CASES ON CONSTITUTIONAL LAW

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CASES ON
CONSTITUTIONAL LAW

Selected Edited and Arranged
By
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INDIANAPOLIS
THE BOBBS-MERRILL COMPANY
PUBLISHERS

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PREFACE

This collection of cases and other materials has been made for well qualified students who are preparing for the practice of law. To afford them broad training while in the law school the historical method has been used as to a few of the important doctrines. This has been done rather elaborately in the topics of judicial review of legislation and of the due process of law clauses as limitations upon the substance of legislation. No more interesting and important examples of the growth of legal concepts can be found.

My principal effort has been to attain variety of treatment. In a few sections a broad treatment, giving the larger aspects and tendencies, is all that has been attempted. In others there is more detail both in the cases selected and in the annotations. In one instance, at the end of Section 2, of Chapter I, there is a reprint of an exhaustive law review note which is not intended to be "learned" by the student but to indicate how much more there is to almost any topic than a law school course includes.

Two chapters have attempted to do what is commonly called taking the law in cross-section. These are the chapter on Taxation and the chapter on Foreign Corporations. Cases in taxation and foreign corporations are kept out of the other chapters when it is possible to dispense with them and are reserved for these special chapters. Yet the logical completeness of showing the operation of every phase of the Constitution on these subjects has not been attempted. The chapter on Foreign Corporations, for example, covers principally the operation of Art. IV, Sec. 2, Cl. 1, the equal protection, due process, and commerce clause, in respect to foreign corporations.

The use of an essay to present the subject matter of Chapter IV is an experiment. Certainly no better essay than that of Professor Frederick Green is available. I shall welcome reports from others as to their experience in trying this experiment. I am still convinced that case study should be the chief mode of studying law. I believe also that law students should acquire ability to read profitably closely reasoned essays. There is no danger of supplanting case study with treatise study so long as there is for a given subject no comprehensive treatise comparable to the better articles in the legal periodicals.

Against my desire I refrain from quoting all that Professor James Bradley Thayer said in the preface to his scholarly collection. He regretted having to compress his material on the topics he selected into two volumes, totaling twenty-four hundred pages, instead of "three or four volumes." In spite of the immense growth of the subject in the subsequent thirty-four years still greater compression has been forced by the crowded curriculum of law schools and the value of time for other purposes. Has time become so valuable for other purposes that no one has time adequately to study so great a subject as constitutional law, even though it is also so fascinating? Constitutional law, said Thayer, is "law in a strict sense, as distinguished from constitutional history, politics or literature, since it deals with the principles and rules which courts apply in deciding litigated cases." "It is an exact and technical subject." (This last sentence is open to doubt but perhaps no more than if it were made about many other branches of law that formerly were considered much more definite than present day masters find them.) Yet "the study of constitutional law is allied not merely with history, but with statecraft, and with the political problems of our great and complex national life." No doubt Thayer meant to include in political problems the relation of government and law to all phases of human conduct and human welfare. The social, the economic, the commercial welfares constitute the purposes of politics, of the science and art of government.

Berkeley, California, D. O. McGovney.
August, 1930.

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[CONSTITUTION

OF THE

UNITED STATES OF AMERICA]

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE. I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. [1.] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2.] No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3.] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.[2] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight,

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[1] The text of the Constitution is reprinted here from American History Leaflet no. 8 published by Simmons-Peckham Co., Inc., New York, under the editorial direction of Professors Albert Bushnell Hart and Edward Channing, who compared it with the original manuscripts (through Amendment XV). It is reprinted with the consent of Professor Hart and the publishers. The paragraph numbers in brackets are not in the original, neither are the bracketed numbers of the first twelve amendments, nor the bracketed title of the document.

[2] See Amendment XIV, § 2.

Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4.] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5.] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. [1.] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof,[3] for six Years; and each Senator shall have one Vote.

[2.] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3.] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4.] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5.] The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6.] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7.] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. [1.] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[2.] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. [1.] Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

[2.] Each House may determine the Rules of its Proceedings, punish its Members for Disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

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[3] See Amendment XVII.

[3.] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4.] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. [1.] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2.] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office.

SECTION. 7. [1.] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2.] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[3.] Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power [1.] To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2.] To borrow Money on the credit of the United States;

[3.] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4.] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5.] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6.] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[7.] To establish Post Offices and post Roads;

[8.] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9.] To constitute Tribunals inferior to the supreme Court;

[10.] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

[11.] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12.] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13.] To provide and maintain a Navy;

[14.] To make Rules for the Government and Regulation of the land and naval Forces;

[15.] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16.] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17.] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings; —And

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[18.] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9. [1.] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Lim.

[2.] The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Lim

[3.] No Bill of Attainder or ex post facto Law shall be passed.

Lim. on fed gov.

[4.] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5.] No Tax or Duty shall be laid on Articles exported from any State.

Lim.

[6.] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another. Lim.

[7.] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8.] No Title of Nobility shall be granted by the u.s. United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent ~~of the Cong~~ress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince; or foreign State. Lim.

SECTION. 10. [1.] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. Lim. on S

[2.] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

[3.] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE. II.

SECTION. 1. [1.] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

[2.] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[3.] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like

Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.[4]

[4.] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[5.] No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[6.] In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7.] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[8.] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION. 2. [1.] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

[2.] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[3.] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

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[4] This paragraph was superseded by Amendment XII.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE. III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION. 2. [1.] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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[2.] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3.] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. [1.] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2.] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE. IV.

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SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

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SECTION. 2. [1.] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2.] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Term on punishment.

[3.] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION. 3. [1.] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2.] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate. 1808

ARTICLE. VI.

[1.] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2.] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[3.] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.[5]

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth **In Witness** whereof We have hereunto subscribed our names.

1787

Go WASHINGTON—
Presidt and deputy from Virginia.

[Note of the draughtsman as to interlineations in the text of the manuscript.]

Attest
William Jackson
Secretary.

Delaware.

Geo: Read
Gunning Bedford jun
John Dickinson
Richard Bassett
Jaco: Broom

Maryland.

James McHenry
Dan of St Thos. Jenifer
Danl Carroll

Virginia.

John Blair—
James Madison Jr.

North Carolina.

Wm. Blount
Richd. Dobbs Spaight
Hu Williamson

South Carolina.

J. Rutledge
Charles Cotesworth Pinckney
Charles Pinckney
Pierce Butler.

Georgia.

William Few
Abr Baldwin

New Hampshire.

John Langdon
Nicholas Gilman

Massachusetts.

Nathaniel Gorham
Rufus King

Connecticut.

Wm: Saml. Johnson
Roger Sherman

New York.

Alexander Hamilton

New Jersey.

Wil: Livingston
David Brearley
Wm: Paterson.
Jona: Dayton

Pennsylvania

B Franklin
Thomas Mifflin
Robt Morris
Geo. Clymer
Thos FitzSimons
Jared Ingersoll
James Wilson.
Gouv Morris

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[5] Conventions of the people in the several states ratified the Constitution on the following dates:

Delaware	December 7, 1787	South Carolina	May 23, 1788
Pennsylvania	December 12, 1787	New Hampshire	June 21, 1788
New Jersey	December 18, 1787	Virginia	June 26, 1788
Georgia	January 2, 1788	New York	July 26, 1788
Connecticut	January 9, 1788	North Carolina	November 21, 1789
Massachusetts	February 6, 1788	**Rhode Island**	**May 29, 1790**
Maryland	April 26, 1788		

ARTICLES in addition to and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.[6]

[ARTICLE I.][7]

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Limit on U.S.

[ARTICLE II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

[ARTICLE III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Limit on U.S. and ~~State~~

[ARTICLE IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Limit on U.S. both

[ARTICLE V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Limit on both

[ARTICLE VI.]

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Limit on both

[ARTICLE VII.]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

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[6] This heading appears only in the joint resolution submitting the first ten amendments.

[7] Amendments I to X, inclusive, were proposed by Congress on September 25, 1789 and became effective December 15, 1791 by ratification by the legislatures of three-fourths of the states.

[ARTICLE VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[ARTICLE IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[ARTICLE X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[ARTICLE XI.][8]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[ARTICLE XII.][9]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

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[8] Proposed by Congress on March 4, 1794 and effectively ratified February 7, 1795. For a brief statement of the details of ratification of this and all the other amendments see the notes to these amendments in the Appendix to Charles K. Burdick, The Law of the American Constitution (1922).

[9] Proposed by Congress on December 8, 1803 and effectively ratified June 15, 1804.

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ARTICLE XIII.[10]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

Lim on States only

ARTICLE XIV.[11]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. ✓

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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ARTICLE XV.[12]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.—

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[10] Proposed by Congress on January 31, 1865 and effectively ratified December 9, 1865.

[11] Proposed by Congress on June 13, 1866 and effectively ratified July 9, 1868.

[12] Proposed by Congress on February 26, 1869 and effectively ratified February 17, 1870.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.—

ARTICLE XVI.[13]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

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[ARTICLE XVII.][14]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

[ARTICLE XVIII.][15]

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

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State)

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

[ARTICLE XIX.][16]

[1.] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

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and

[2.] Congress shall have power to enforce this article by appropriate legislation.

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[13] Proposed by Congress on July 12, 1909 and effectively ratified February 13, 1913.

[14] Proposed by Congress on May 13, 1912 and effectively ratified May 9, 1913.

[15] Proposed by Congress on December 18, 1917 and effectively ratified January 16, 1919.

[16] Proposed by Congress on June 4, 1919 and effectively ratified August 18, 1920.

Cases on Constitutional Law

CHAPTER I.

JUDICIAL FUNCTION OF GIVING EFFECT TO CONSTITUTIONS.

Section 1.—Establishment of the Function.[1]

"Considering the judicial system as the chief pillar upon which our National Government must rest * * *."

—President Washington.[2]

Article III.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * *.

Article VI.

* * * This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

> "The chief purpose of the writer is to show that the Constitution of the United States contains express texts providing for judicial competency to decide questioned legislation to be constitutional or unconstitutional and to hold it valid or void accord-

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[1] On the history of the doctrine of *judicial review* see: Edward S. Corwin, The Doctrine of Judicial Review (1914); Andrew C. McLaughlin, The Courts, the Constitution and Parties (1912); Charles A. Beard, The Supreme Court and the Constitution (1912); Frank E. Melvin, The Judicial Bulwark of the Constitution (1914); Am. Pol. Sci. Rev., vol. VIII, 167; Charles Grove Haines, The American Doctrine of Judicial Supremacy (1914); J. Hampden Dougherty, Power of Federal Judiciary over Legislation (1912); Charles Warren, Congress, the Constitution and the Supreme Court (1925); Brinton Coxe, Judicial Power and Unconstitutional Legislation (1893); U. S. Senate Doc. No. 941, 63 Cong. 3rd Sess.

[2] Letter of September 30, 1789, to the first Associate Justices of the Supreme Court of the United States.

ingly."—Brinton Coxe, Judicial Power and Unconstitutional Legislation, p. 1 (incomplete work published posthumously in 1893).

"I have already indicated my opinion that no clause was inserted in the Constitution for the specific purpose of bestowing this power on the courts, but that the power rests upon certain general principles thought by its framers to have been embodied in the Constitution. * * *

For one thing, it may be asked, if these phrases are necessary to give the federal courts power to pass upon the constitutionality of acts of Congress, what becomes of the similar pretention of state courts with reference to state legislation under the state constitutions, from which these or equivalent phrases are usually absent?"—Edward S. Corwin, The Doctrine of Judicial Review (1914) 10, 16.

CALVIN'S CASE.

1608. 7 Co. Rep. 1a.

The question of this case as to matter in law was, whether Robert Calvin the plaintiff (being born in Scotland since the Crown of England descended to His Majesty) be an alien born, and consequently disabled to bring any real or personal action for any lands within the realm of England. After this case had been argued in the Court of King's Bench, at the Bar, by the counsel learned of either party, the Judges of that Court, upon conference and consideration of the weight and importance thereof, adjourned the same (according to the ancient and ordinary course and order of the law) into the Exchequer Chamber, to be argued openly there; first by the counsel learned of either party, and then by all the Judges of England; * * *

[Coke, then Chief Justice of the Common Pleas, states that he attempts in his report to give the "sum and effect" of the reasoning of all the judges, which "the reporter himself thinketh to be fittest and clearest for the right understanding of the true reasons and courses of the judgment." The gist of these was that allegiance is a personal relation between subject and King, that upon the union of the Crowns of Scotland and of England in the person of James I, his subjects thereafter born in Scotland were born subjects of the King of England, that the King did not have separate personality with respect to each kingdom severally, and had but one body of subjects, and so the decision was that subjects born after the Union, in Scotland, could hold lands in England. The following appears as part of this reasoning.]

The law of nature[3] is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex acterna*, the moral law, called also the law of nature. * * * And certain it is, that before judicial or municipal laws were made, Kings did decide causes according to natural equity, and were not tied to any rule or formality of law, but did *dare jura*. * * *

Now it appeareth by demonstrative reason, that ligeance, faith, and obedience of the subject to the Sovereign, was before any municipal or judicial laws. * * * Seeing then that faith, obedience, and ligeance are due by the law of nature, it followeth that the same can not be changed or taken away; for albeit judicial or municipal laws have inflicted and imposed in several places, or at several times, divers and several punishments and penalties, for breach or not observance of the law of nature, (for that law only consisted in commanding or prohibiting, without any certain punishment or penalty), yet the very law of nature itself never was nor could be altered or changed. * * * By the statute of 25 Ed. 3. cap. 22. a man attainted in a *praemunire*, is by express words out of the King's protection generally; and yet this extendeth only to legal protection, as it appeareth by Littleton, fol. 43. for the Parliament could not take away that protection which the law of nature giveth unto him; and therefore notwithstanding that statute, the King may protect and pardon him.

DR. BONHAM'S CASE.

1610. 8 Co. Rep. 114a.

In April, 1606, Thomas Bonham was summoned to appear before the President and Censors of the Royal College of Physicians, who examined him, and finding that he was deficient in medical science, imposed upon him a fine of a hundred shillings and forbade him under pain of imprisonment to practice physic until he had been admitted by the College. Bonham continued to practice, however, and in October was resummoned. This time he defaulted, and was sentenced in his absence to a fine of ten pounds, and a warrant was issued for his arrest. Early in November he appeared and refused to submit to reëxamination, on the grounds that he was a Doctor of Medicine of the University of Cambridge, and that the Royal College of Physicians had therefore no jurisdiction over him. Thereupon the Censors (without the President) committed him to prison in the Counter of Fleet Street, whither he was conveyed by the servants of the President and Censors. Bonham now brought an action for false imprisonment against the leading members of the Royal College of Physicians.

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[3] On the various meanings and history of "the law of nature," see Bryce, Studies in History and Jurisprudence (1901) Essay XI and Pollock, The History of the Law of Nature (1901) 1 Col. L. Rev. 11-32. The latter states that the reliance upon the law of nature in Calvin's case did not represent a usual habit of mind of English lawyers; yet he calls attention to the statement in St. German, Doctor and Student (1531) ch. 5, that where the canonist or civilian spoke of the law of nature, the common lawyer spoke of reason. See B. F. Wright, Jr., American Interpretations of Natural Law (1926) 20 Am. Pol. Sci. Rev. 524-547; Charles Grove Haines, The Law of Nature in State and Federal Judicial Decisions (1916) 25 Yale L. J. 617-657.

The pleadings of the defendants set forth that letters patent dated 10 Hen. VIII had incorporated them as the Royal College of Physicians, with powers to fine practitioners in London who were not admitted by them, and further general powers to govern all the physicians in London and district with fine and imprisonment—in all cases one-half of the fine was to go to the King, and one-half to the College. This patent was confirmed by the statute 14 & 15 Hen. VIII, c. 5, which in turn was confirmed by the statute 1 Mar. c. 9, with the addition of a general command to all gaolers to keep such persons as the President and College shall commit to them, without bail or mainprise. It was in pursuance of these statutory powers that the College claimed to have committed Dr. Bonham. * * *

After argument in several terms by counsel and long discussion among the justices, the chief justice of the Common Pleas, Sir Edward Coke with whom concurred Warburton and Daniel, J. J., gave judgment for the plaintiff, chiefly for two reasons. In the first place, the College did not possess the powers they claimed over unlicensed (as distinct from incompetent) practitioners; and secondly, even if they did, they had not pursued them aright. One of the five lines of reasoning in support of the first of these conclusions was that the Royal College of Physicians were to receive one-half of all the fines, and are therefore not only judges, but also parties in any case that comes before them, and it is an established maxim of the common law that no man can be judge in his own case.

"And it appears in our books, that in many cases the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void;" [and in support of this proposition several earlier cases were cited.][4]

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[4] Only so much of Dr. Bonham's Case is here digested by the editor as is required to show the setting of the passage quoted. The statement of the case by Professor Plucknett in the essay from which the next fragment is taken has been liberally drawn upon.

"Moreover, Coke was prepared to advance mediaeval precedent for his theory, and in so doing has drawn upon his head the criticisms of later investigators. Just as these criticisms are, from the point of view of modern scholarship, it is only fair to the Chief Justice to insist that his view of history was not ours, and that it is only by the standard of his own day that a true evaluation of his learning and intellectual honesty can be formed. Although it must be confessed that even then he cannot be found altogether faultless, yet it is believed that a sufficient explanation will be found to establish his *bona fides*. His doctrine is certainly based largely upon mediaeval precedents and the extent to which they justify it is an interesting subject for investigation. But if we reach a different estimate from his of the Year Book authority for his dogma, this must not be taken as necessarily involving a severe censure of Coke. He himself has told us that though the fields are old, the corn is new. * * *

"His second instance is the anonymous case printed by Fitzherbert from an inedited Year Book as *Cessavit* 42 [Natura Brevium (1553) clvii d; Fitzherbert, Natura Brevium (Hale's ed. 1755) 209] * * * it is plain that the judgment was in complete accordance with that in an earlier case, Copper v. Gedderings, Y. B. 3 Edw. II, 105, * * *. Here then is no mere caprice of one particular judge but a *catena* of authorities extending from the middle of the fourteenth century down to Coke's own day. The statement of Sir Frederick Pollock that 'no case is known, in fact, in which an English court of justice has openly taken on itself to overrule or disregard the plain meaning of an Act of Parliament' must be taken subject to this exception (and others will appear later), which the publication of the Selden Society's Year Books has brought to light. The courts in these cases did undoubtedly 'disregard the plain meaning of an Act of Parliament'; but in telling the story Lord Coke has made the important addition of the words 'because it would be against common right and reason, the common law adjudges the said act of parliament as to that point void.' There is no such judgment as this in the report; the statute is not held void; it is just ignored. To this fact Coke has ~~really added an explanation and a theory~~ all his own—an addition that was to be of immense importance in subsequent history. * * * A few more instances are extant of this strange habit of quietly ignoring a statute without assigning any constitutional grounds for doing so, or specifying what powers the court claimed to possess in that behalf, and they have already been discussed elsewhere."[5]—T. F. T. Plucknett. Bonham's Case and Judicial Review (1926) 40 Harv. L. Rev. 30, 31, 35, 36.

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[5] Plucknett, Statutes and their Interpretation in the 14th Century (1922) 60, 66-71.

DAY v. SAVADGE.

1614. Hobart, 85.

[Matthew Day brought an action of trespass against John Savadge for taking away a bag of nutmegs. The defendant justified as collector of wharfage and that the nutmegs were taken in distraint for non-payment of wharfage all in accordance with a custom of the City of London, confirmed by Parliament, and prayed the King's writ to the mayor and aldermen to certify to the existence of the custom. And the plaintiff said that the existence of the custom ought to be tried by jury, whereupon the defendant demurred.]

After some arguments at the Bar pro & contra, wherein nothing was questioned, but whether the custom in this special case were good, that the mayor and aldermen should certifie a custom which concerned the interest of the corporation whereof they were a part. The Court now being agreed determined to give judgment, and intreated me [Sir Henry Hobart, Lord Chief Justice of the Common Pleas,] to pronounce it for them all, and so we gave judgment, that this custom was not to be tryed by certificate, but by the jury, whereof I gave three reasons. * * * Thirdly, it was against right and justice, and against natural equity to allow them their certificate, wherein they are to try and judge their own cause. * * *

By that which hath been said it appears, that though in pleading it were confessed, that the custom of certificate of the customs of London is confirmed by Parliament, yet it made no change in this case, both because it is none of the customs intended, and because even an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in itself, for *jura naturae sunt immutabilia,* and they are *leges legum.*

THE CITY OF LONDON v. WOOD.

1701. 12 Mod. 669, 678, 687-688.

[A by-law enacted by the Common Council of the City of London provided that any freeman elected sheriff should not be excused from serving unless he took oath that he was not worth £10,000 and verified the oath by six compurgators, and that any person who refused without good excuse satisfactory to the Mayor and Court of Aldermen should forfeit £400, one hundred to the next sheriff and three hundred to the use of the Mayor and commonalty, to be recovered in the Court of Record held before the mayor and aldermen. In an action in the Court of Record against Wood for the penalty judgment went against him. On writ of error this judgment was reversed.]

Holt, Chief Justice. * * * So in this case it is plain he is guilty of a wrong in not obeying the Act of Common Council, for it is a law in London; and every by-law is a law, and as obligatory to all persons bound by it, that is, within its jurisdiction, as any Act of Parliament, only with this difference, that a by-law is liable to have its validity brought in question, but an Act of Parliament is not; but when a by-law is once adjudged to be a good and reasonable by-law, it is to all intents as binding to those that it extends to as an Act of Parliament can be. * * * But the true great point is, that the Court is held before the mayor and aldermen, and the action brought in the names of the mayor and commonalty; and that very man, who is head of the city, and without whom the city has no ability or capacity to sue, is the very person before whom the action is brought; and this cannot be by the rules of any law whatever, for it is against all laws that the same person should be party and Judge in the same cause. * * * And what my Lord Coke says in *Dr. Bonham's case* in his 8 Co. is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party, for the Judge is to determine between party and party, or between the Government and the party; and an Act of Parliament can do no wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the Government he lives under, and restore him to the state of nature; but it cannot make one that lives under a Government Judge and party. An Act of Parliament may not make adultery lawful, that is, it cannot make it lawful for A. to lie with the wife of B. but it may make the wife of A. to be the wife of B. and dissolve her marriage with A.[6]

Willes, J., in Lee v. Bude & Torrington Junction Railway Co. (1871) L. R. 6 C. P. 576, 582: It is further urged that the company was a mere nonentity, and there never were any shares or shareholders. That resolves itself into this, that parliament was induced by fraudulent recitals (introduced, it is said, by the plaintiffs,) to pass the Act which formed the company. I would observe, as to these Acts of Parliament, that they are the law of this land; and we do not sit here as a court of appeal from parliament. It was once said,—I think in Hobart,[7]—that, if an Act of Parliament were to create a man judge in his own case, the Court might disregard it. That *dictum*, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords, and commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but, so long as it exists as law, the Courts are bound to obey it.

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[6] In King v. Earl of Banbury (1694) Skinner, 517, involving inheritance of a peerage the jurisdiction of the court was questioned. Holt, C. J., said that the judges "adjudge things of as high a nature every day; for they construe and expound Acts of Parliament, and adjudge them to be void."

GIDDINGS v. BROWNE.[8]

1657. Magistrate's Court. Ipswich, Massachusetts Bay Colony.
2 Hutchinson Papers 1.

[A general town-meeting of Ipswich voted a tax of £100 toward building or buying a house for Mr. Cobbet, minister of the gospel, to be his in personal right and not merely as a manse to be occupied by a minister during his incumbency. Giddings and others refused to pay the tax. The selectmen of the town ordered the town marshall, Browne, to distrain the goods of those who had refused. To recover damages incurred by such a distraint this action was brought against Browne.]

MAGISTRATE SYMONDS.[9] In an action of trespass upon the case for entering his house and severing his pewter dishes or platters and marking of them.

I find in this case for the plaintiff,
Damage 0—1—0
Costs 0—5—8

And the case being of very weighty concernment in the countrey (I conceive) I shall expresse the groundes of my judgment.

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[7] A footnote in the report indicates that this reference is to Day v. Savage, ante p. 6.

[8] The above report is abbreviated from that in 2 Hutchinson Papers, pp. 1-25 (Publications of the Prince Society, 1865) and is made up from the brief opinion written by Magistrate Symonds at the close of the trial and from his longer, supplemental opinion apparently written on account of the appeal. The defendant appealed to the county court at Salem which certified a question of law to the General Court at Boston (the legislature of the colony which was possessed of both legislative and judicial powers, see 2 Mass. Law Quart. 85-86), namely, whether a tax voted by a town-meeting for such a purpose bound those who dissented. The General Court voted in the affirmative.

[9] Mr. Symonds the Justice who tried this cause was descended from an ancient and honorable family in Yuldham in Essex, where he had a good Estate. The proceedings are somewhat singular and the arguments give us some idea of the notions of government prevailing in that day. [Hutchinson.]

Samuel Symonds was son of Richard, and born at Great Yeldham in 1595. He came to Ipswich in 1637, and was constantly and prominently employed in

I understand this to be about a fundamentall law, and that a fundamentall law properly so called. It is such a law as that God and nature have given to a people. So that it is in the trust of their governors in highest place and others, to preserve, but not in their power to take away from them.

Of which sort are these, viz. * * *

2. That every subject shall and may enjoy what he hath a civell right or title unto, soe as it cannot be taken from him, by way of gift or loan, to the use or to be made the right or property of another man, without his owne free consent. * * *

First, This may be given as a reason, that it is against a fundamentall law in nature to be compelled to pay that which others doe give. For them no man hath any certaynty or right to what he hath, if it be in the power of others (by pretence of authority or without) to give it away (when in their prudence they conceive it to be for the benefit of the owner soe to doe) without his owne consent. * * * I dare say, if search be made into histories, lawyers bookes of reports, records, &c. it cannot be made to appeare that in the most exorbitant times any man hath had his estate taken from him as by the guift of others, under colour of lawe, or countenance of authority. * * *

This I say further, and I doe argue it from the greater to the lesse. That if noe kinge or parliament can justly enact and cause that one mans estate, in whole or in part, may be taken from him and given to another without his owne consent, then surely the major part of a towne or other inferior powers cannot doe it. But shew us any man that can produce any footstep for such a way, either directly or indirectly.

But to the contrary it appeareth unto me. See Dalton, page 401, where it is to this effect. That the kinge cannot release a man out of prison (being in at a private mans suit) to his damage, without his owne consent. Also to the same purpose see Sir Henry Finch, recorder of London, in his first booke of lawe, page 74, having ended his rules about native or fundamentall lawes, he saith in the next page, Therefore lawes positive doe lose their force and are noe lawes at all, which are directly contrary to the former, viz. native or fundamentall.

The parliament may tax (and that justly) the whole country to give a guift or reward to one man for some service; for they are betrusted soe to doe. The reason is, it is levied upon the whole country, with their consent, and for the immediate benefitt of the whole.

But if they should doe it between persons (though they should soe doe by power, and the person wronged hath noe remedy in

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public duties till his death in 1678. He was Deputy Governor from 1673. A. [Note by the editor of the Hutchinson Papers.]

this world) yet it would be accounted tyranny. Is it not to take from Peter and give it to Paul?[10]

If one man, for such or such a turne or good end, may justly be deprived of a fundamentall right or liberty, then an other and an other, and so every man. In England there is but one sort of men that might be deprived of their goods; which kinde are usually called slaves but there they are called villeynes to the lord of the mannor.

Thus much touching fundamentall lawe, in reference to mine and thine, not to be given or taken away without his owne consent.

But now to answer some objections that may be made to the case in hande.

Objection. Suppose it be true what is expressed, and granted that he were a strange man that should deny the same in the generall: Yet, notwithstanding, it hindereth not but that a towne (when and as often as they thinke good, in their prudence) may doe it for good ends, and soe (in speciall cases) it may lawfully be done in the particular, upon the lawe made page the 9th, *that every inhabitant shall contribute to all charges in church and commonwealth (whereof he doth or may receive a benefit) else he shall be strayned.*

Answer. I conceive that it is an extreame dishonour cast upon the generall court, to make such a construction of their positive laws as doth infringe the fundamentall law of mine and thine; for it must needs be voyd, if it should indeed be necessarily construed against the right or liberty of the subject. But the law in its true sense is good.

Before this recited law was made, though some churches, or townes rather, did agree how much yearely maintenance the minister should have, yet it was not rated, at least in any compellable way, by the towne, but men did pay their proportion in a way of voluntary contribution. But some (especially non members) some of them did grow slacke; and so the burthen grew too hevy upon church members, &c. And upon consideration it was found lawfull to make a law to compell every one to beare his owne share; forasmuch as by hearing the word and publique prayer, &c. he did or might receive a benefitt and (in a way of God) be received as a member with the rest. * * *

But it is not understood that any law doth provide that every towne shall buy or build a house for the minister as often as there is a removall by death or otherwise, I mean to be his in propriety.

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[10] "Certainly no one would claim that funds may be raised by taxation to aid a private person in constructing a private building on his own lot, although, incidentally, it will enhance the value of all the lots in the city or village." Gilfillan, C. J. in Coates v. Campbell (1887) 37 Minn. 498, 500, 35 N. W. 366.

Let us a little examine the poynt of *benefitt* that a man doth or may receive, as a motive to such a gift.

First, suppose or admitt the giver (compelled by the act of others against his will) should gaine twenty fold thereby, viz. by the use of such a smith, or person obtained into towne, yet that doth nothing at all warrant the act. * * *

Now a little about interpretation of lawes and of rules to be attended therein.

Let us not (here in New-England) despise the rules of the learned in the lawes of England, who have both great helps and long experience.

1. First rule is, that where a law is such as that, by wresting, a man may give such an interpretation as will overthrow it, when it might be construed to be good; this is a corrupt interpretation. So holy scripture may be wrested.

If repugnant to fundamentall law, it's voyd; as if it gives power to take away an estate from one man and give it to another.[11]

It is then consonant, if it be to compell men to pay necessary duties in church and common wealthe, as yearely maintenance. * * *

Quest. If it be demanded whether there be any difference betweene disposing mens estates by way of guift (under colour of lawe and countenance of authority) unto other men against or without the consent of the owners and the doctrine of levellisme.

Ans. It may be answered (I conceive) to this effect, viz. That of the levellers, though wicked and absurd, yet it is as yet but doctrinall (I thinke) but this kinde of transposeing mens estates is both doctrinall and practicall alsoe, and soe leadeth more directly to tiranny as it seemeth.

Secondly, Levellisme (I take it) reacheth but to the estate, &c. But this (if accounted legall) men may for a debt soe obtained (as in other cases) upon execution for a debt inforce the person to prison. * * *.[12]

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[11] For this paragraph the magistrate cited in the margin, "Finch p. 33 in his booke of law."

[12] A similar decision is Loan Association v. Topeka (1874) 20 Wall. (U. S.) 655, 22 L. ed. 455. The United States Supreme Court held that a Kansas statute which purported to authorize any city in Kansas to appropriate tax-raised money to private persons as a bounty to induce them to locate manufactories in the city was unconstitutional and void, without specifying what provision of any constitution was violated. It was said that taxation must be for public purposes only, that the statute was an "unauthorized invasion of private right. It must be conceded that there are such rights in every free government [state?] beyond the control of the state [the government?]. * * * There are limitations on such [governmental?] power which grow out of the essential nature of all free governments [states?]. Implied reservations of individual rights, without which the social compact could not exist * * *. No court, for instance would hesitate to declare void a statute which enacted * * * that the homestead now owned by A should no longer be his, but should henceforth be the property of B"—per Miller, J. pp. 662-663. Justice Clifford, dissenting, said: "Errors of indiscre-

PAXTON'S CASE OF THE WRIT OF ASSISTANCE.

1761. Quincy's Rep. 51.

Charles Paxton, "Surveyor and Searcher" of customs duties in Boston applied in 1761 to the Superior Court of Judicature of the Colony of Massachusetts "for the Writ of Assistants as by Act of Parliament to be granted to him," which was a general warrant to search "any house, shop, cellar, warehouse or room or other place and in case of resistance to break open doors, chests, trunks, etc." for "prohibited and uncustomed" goods or merchandise. Against the application, James Otis argued:

"As to Acts of Parliament an Act against the Constitution is void: an Act against natural Equity is void: and if an Act of Parliament should be made, in the very Words of this Petition, it would be void. The Executive Courts[13] must pass such Acts into disuse—8 Rep. 118. from Viner.—Reason of the common law to control an Act of Parliament."

The court granted the writ relying upon precedent both in England and in the Province.—Digest by the editor.[14]

ROBIN ET AL. v. HARDAWAY ET AL.

1772. General Court of Virginia. Jefferson, 109.

In several actions of trespass to try the right to freedom of several Indians held as slaves, the main reliance of the defendants

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tion which the legislature may commit in the exercise of the power it possesses can not be corrected by the courts, for the reason that the courts cannot adjudge an act of the legislature void unless it is in violation of the federal or state constitution. * * * Courts can not nullify an act of the state legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism. Subject to the federal constitution the legislature of the state possesses the whole legislative power of the people, except so far as the power is limited by the state constitution." Pages 668, 669.

Another similar decision partly rested on the same vague grounds is Michigan Sugar Co. v. Auditor General (1900) 124 Mich. 674, 83 N. W. 625, 56 L. R. A. 329.

The student may also find interest in reverting to Giddings v. Brown when later studying the liability of the officer in such circumstances, and also when studying cases on "due process of law."

[13] The term "executive courts" was commonly applied to Courts of Justice, as distinguished from the Legislative or "General Court."—Horace Gray.

[14] See Horace Gray's full and learned notes on Paxton's case and writs of assistance in an Appendix to Quincy's Massachusetts Reports, pp. 395-540. The argument of Otis printed above is from the memorandum of John Adams, 2 John Adams's Works 521-523; republished in Quincy's Reports, 474.

was an act of the Assembly, of 1682 which declared certain classes of Indians to be slaves. Mason, for the plaintiffs, argued:

"Now all acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God; whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to him from whose punishments they cannot protect us. All human constitutions which contradict his laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of justice. And cited 8 Co. 118. a. Bonham's case. Hob. 87; 7 Co. 14. a. Calvin's case."

The court held that the act of 1682 had been repealed by an act of 1705.—Digest by the editor.

HAM QUI TAM V. M'CLAWS AND WIFE.

1789. Superior Court of South Carolina. 1 Bay 93.

[An act of Mar. 28, 1787 prohibited the importation of slaves except slaves brought in by persons coming to settle within the state. An act of Nov. 4, 1788 prohibiting importation omitted this exception. While the former act was in force, Mrs. M'Claws and her children with slaves belonging to the latter sailed from British Honduras to settle in South Carolina and arrived a few days after the latter statute was enacted and took effect. In proceedings to forfeit the slaves in accordance with the statute, it was argued by counsel for the claimants (the owners) that "there were certain fixed and established rules, founded on the reason and fitness of things, which were paramount to all statutes; and if laws are made against those principles, they are null and void. For instance, statutes made against common right and reason, are void. 8 Rep. 118. So statutes made against natural equity are void; and so also are statutes made against Magna Charta. Ibid. 118."]

The Court. It is clear, that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as *far as they are calculated to operate against those principles.* In the present instance, we have an act before us, which, were the strict letter of it applied to the case of the present claimants, would be *evidently* against *common reason.* But we would not do the legislature who passed this act, so much injustice, as to sit here and say that it was their intention to make a forfeiture of property brought in here as this was. We are, therefore bound to give such a construction to this enacting clause of the act of 1788, as will be consistent with justice, and the dictates of natural reason, though contrary to the strict letter of the law; and this construction is, that the legislature never had it in their contemplation to make a forfeiture of the negroes in question, and subject the parties to so heavy a penalty for bringing slaves into the state, under the circumstances and for the purposes, the claimants have proved.

BOWMAN ET AL. v. MIDDLETON.

1792. Superior Court of South Carolina. 1 Bay 252.

[An act of the colonial assembly in 1677 granted a tract of land to Nicholls. By an act of 1701 a grant was made to John Cattel which included 146 acres of the former grant. In 1712 by another act the second grant was confirmed in William Cattel, the second son of John, though the latter died intestate. The only important point of law was whether this legislation was void which attempted (1) to divest Nicholls' title and (2) to deprive the eldest son of John Cattel of his inheritance.]

The Court, (present, GRIMKE and BAY, Justices,) who, after a full consideration on the subject, were clearly of opinion, that the plaintiffs could claim no title under the act in question, as it was against common right, as well as against *magna charta,* to take away the freehold of one man and vest it in another, and that, too, to the prejudice of third persons, without any compensation, or even a trial by the jury of the country, to determine the right in question. That the act was, therefore, *ipso facto,* void. That no length of time could give it validity, being originally founded on erroneous principles. That the parties, however, might, if they chose, rely upon a possessory right, if they could establish it.[15]

> "But the existence of the principle of fundamental law does not necessarily mean that the court has the right to declare an act unconstitutional. This is true; I maintain, however, that, if all men and all officers are thoroughly imbued with this doctrine and recognize it as the controlling principle of the state, nothing can be left for the judges in their judicial capacity except to recognize the fact and the principle. Acting in their independent position, the judges will announce that a law contravening these fundamentals does not bind them or the litigants. Whether the courts *will* or logically *must,* in American

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[15] See Symsbury's Case (1785) Kirby (Conn.) 444 where on similar facts it was held, without assigning a reason, that the second statute "could not legally operate to curtail the land before granted."

history they *did*; and they did so because of the commonly accepted and active principle of American jurisprudence. I do not mean to assert that the courts actually did adopt the practice of declaring laws void because contrary to the fundamental law as long as that law was unwritten and not formally announced in constitutions; my contention is that the continuous declaration that there was a fundamental law necessarily made impression and established a principle and that when the written constitutions were formed and new governments founded, the courts were prepared to put into actual operation the principle of fundamental law.[16]

"In this country this principle of the existence of fundamental law was first clearly stated in one of the most popular and influential pamphlets of the early Revolutionary days—Otis' *The Rights of the British Colonies Asserted and Proved* (1764). Otis says among other things, 'The supreme legislature cannot justly assume power of ruling by *extempore* arbitrary decrees, but is bound to dispense justice by known settled rules, and by duly authorized independent judges (p. 55). * * * These are their bounds, which by God and nature are fixed, hitherto have they a right to come, and no further. * * * These are the first principles of law and justice, and the great barriers of a free state, and of the British constitution in particular. To say the parliament is absolute and arbitrary, is a contradiction. The Parliament cannot make 2 and 2, 5: Omnipotency cannot do it. The supreme power in a state, is *jus dicere* only:—*jus dare,* strictly speaking, belongs alone to God' (p. 70). It is, however, unnecessary to multiply quotations, although it is only by reading these contemporary documents that one can get anything like a comprehensive impression as to the extent to which men appealed to this principle.

"No one who knows anything of the Revolution can doubt the immense influence of James Otis and his writings in forming opinion and the basis for argument and theory. I am inclined to think that Otis was in large measure responsible for the main drift of the documents put forward by Massachusetts in 1768, which were doubtless known to the reading public in America. One of these documents, the Circular Letter, was, of course, widely distributed, and probably every lawyer and politician, from one end of the land to the other, knew its contents and was familiar with its principles. The Circular Letter contains the central element of the American argument in the Revolution. This letter declares 'That in all free States the Constitution is fixed; and as the supreme Legislative derives its Power and Authority from the Constitution, it cannot overleap the Bounds of it without destroying its own foundation: That the Constitution ascertains and limits both Sovereignty and allegiance, and therefore, his Majestys American Subjects who acknowledge themselves bound by the Ties of Allegiance, have an equitable Claim to the full enjoyment of the fundamental Rules of the British Constitution. That it is an essential, unalterable Right in nature, ingrafted into the British Constitution, 'as a fundamental Law * * * that what a man has honestly acquired is absolutely his own * * *.'[17]

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[16] As I point out later, it was a mooted question whether the courts would actually exercise the power of declaring a law void because it violated fundamental principles of justice. But whether they did so or not, the way for the simpler doctrine, the power and duty of the court to declare a law void because contrary to the fundamental law embodied in a written constitution, was prepared by the old assertions of fundamental law, the assertions which played so prominent a part in the whole Revolutionary argument.—McLaughlin.

"The other letters of which I have spoken reiterate this doctrine of fundamental law. 'The supreme legislative, in every free state, derives its power from the constitution; by the fundamental rules of which, it is bounded and circumscribed' (ibid., 134). 'There are, my Lord, fundamental rules of the constitution, which, it is humbly presumed, neither the supreme legislative nor the supreme executive can alter. In all free states, the constitution is fixed; it is from thence, that the legislative derives its authority; therefore it cannot change the constitution without destroying its own foundation' (ibid., 156). 'But, in all free states, the constitution is fixed; it is from thence, that the supreme legislative, as well as the supreme executive derives its authority. Neither, then, can break through the fundamental rules of the constitution, without destroying their own foundation' (ibid., 170).[18]

"Perhaps these citations are alone sufficient to establish my assertion that a central cardinal element of American contention against Great Britain was that the legislature could not overstep its authority and that such principles were firmly fixed in the English system. It was characteristic of the American Revolution that, as in other English revolutions, men contended that they already possessed rights and privileges, which in reality they were seeking to establish.

"The Circular Letter and the other letters or documents of 1768, which have just been quoted, were probably drafted by Samuel Adams, but, as I have said, the line of argument was probably furnished by Otis. Once again we are led back to Otis' widely read pamphlet, and there we find the source of his statement.[19] He gives an excerpt from Vattel's *Law of Nature and of Nations.* Speaking of the legislative power Vattel says: 'It is here demanded whether, if their power extends so far as to the fundamental laws, they may change the constitution of the state? The principles we have laid down lead us to decide this point with certainty, that the authority of these legislators does not extend so far, and that they ought to consider the fundamental laws as sacred, if the nation has not in very express terms given them the power to change them. For the constitution of the state ought to be fixed; and since that was first established by the nation, which afterwards trusted certain persons with the legislative power, the fundamental laws are excepted from their commission.' In another portion of the paragraph from which Otis quoted these words—in fact in the very next sentence—Vattel says, 'In short, it is from the constitution that those legislators derive their power: how then can they change it without destroying the foundation of their own authority?'

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[17] *Writings of Samuel Adams*, I, 185.

[18] Similar expression found *ibid.*, pp. 174, 175, 180, 190, 196. See for fundamental principles, "Rights of the Colonists," *ibid.*, II, 350 ff. See also *ibid.*, 452 where the House of Representatives in Massachusetts is engaged in this famous argument with Hutchinson: "Your Excellency has not thought proper, to attempt to confute the reasoning of a learned writer on the laws of nature and of nations, quoted by us on this occasion, to shew that the authority of the legislature does not extend so far as the fundamentals of the constitution. * * *", etc. See also *ibid.*, 325 (1772), with references to Vattel and Locke.—McLaughlin.

[19] Otis, *Rights of the Colonists*, 109. The words quoted appear in Otis' pamphlet, in a footnote to a memorial transmitted by the Massachusetts House to their agent in England.—McLaughlin.

"Naturally these assertions and this idea were taken up and expressed by the courts, and the source is evident. Whether they gathered the statement of the principle first from the Circular Letter or from Otis' pamphlet is immaterial. In the case of Bayard vs. Singleton[20] and in Varnum's argument in Trevett vs. Weeden, two of the cases already referred to among the state decisions between 1776 and 1787, we find the assertion that the legislature can not violate the constitution without destroying its own foundation. Varnum quoted at length from Vattel." —Andrew C. McLaughlin, The Courts, the Constitution and Parties (1912), pp. 67-74.

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[20] James Iredell of North Carolina, who became a federal judge after the founding of the federal government, was strongly of the opinion that a court had the power and the duty to declare a law void. He was much interested in the case of Bayard v. Singleton [*infra*, p. 28] and his letters at that time (1786-87), one a public letter printed in the press, fully discloses the line of thought. It was consonant in most respects with that of Otis on the fundamental law. Judging from Iredell's expression, one would believe he had read Vattel. See especially McKee, *Life and Corr. of Iredell*, II, 173. His letter discloses the intimate connection between this argument in defense of the court's right and the experiences of the Revolution: "We were not ignorant of the theory of the necessity of the legislature being absolute in all cases, because it was the great ground of the British pretenses" (*ibid.*, 146). "Without an express Constitution the powers of the legislature would undoubtedly have been absolute (as the Parliament of Great Britain is held to be), and any act passed, *not inconsistent with natural justice* (for that curb is avowed by the judges even in England), would have been binding on the people. The experience of the evils which the American war fully disclosed, attending an absolute power in a legislative body, suggested the propriety of a real, original contract between the people and this future government, such, perhaps, as there has been no instance of in the world but in America" (*ibid.*, 172). The whole of these letters should be carefully read, for Iredell had as much influence probably as anyone, possibly more than anyone, in maintaining the doctrine of judicial power. His words show, as I have said, that the power of the court was a product of Revolutionary experiences and of Revolutionary argument. —McLaughlin.

COMMONWEALTH v. CATON ET AL.

1782. Court of Appeals of Virginia. 4 Call 5.

This case came before the court[21] by adjournment from the general court; and was as follows: 3

John Caton, Joshua Hopkins and *John Lamb* were condemned for treason, by the general court, under the act of assembly concerning that offence, passed in 1776, which takes from the executive, the power of granting pardon in such cases.[22] The house of delegates by resolution of the 18th of June, 1782, granted them a pardon, and sent it to the senate for concurrence; which they refused. The men, however, were not executed, but continued in jail under the sentence; and, in October 1782, the *attorney general*, moved in the general court, that execution of the judgment might be awarded. The prisoners pleaded the pardon granted by the house of delegates: The *attorney general* denied the validity of the pardon, as the senate had not concurred in it: and the general court adjourned the case, for novelty and difficulty, to the court of appeals. * * *

The *attorney general*, in reply, insisted, that compassion for the prisoners could not enter into the case; and that the act of assembly pursued the spirit of the constitution. But that, whether it did or not, the court were not authorized to declare it void.

Cur. adv. vult.

WYTHE, Judge. Among all the advantages, which have arisen to mankind, from the study of letters, and the universal diffusion of knowledge, there is none of more importance, than the tendency they have had to produce discussions upon the respective rights of the sovereign and the subject; and, upon the powers which the different branches of government may exercise. For, by this means, tyranny has been sapped, the departments kept within their own spheres, the citizens protected, and general liberty promoted. But this beneficial result attains to higher perfection, when those, who hold the purse and the sword, differing as to the powers which each may exercise, the tribunals, who hold neither, are called upon to declare the law impartially between them. For thus the pretensions of each party are fairly examined, their respective powers ascertained, and the boundaries of authority peaceably established. Under these impressions, I approach the question which has been submitted to us: and, although, it was said the other day, by one of the judges, that, imitating that great and good man lord *Hale,* he would sooner quit the bench than determine it, I feel no alarm; but will meet the crisis as I ought; and, in the language of my oath of office, will decide it, according to the best of my skill and judgment.

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[21] Which at that time consisted of the judges of the High Court of Chancery; those of the General Court; and those of the admiralty assembled together. *Chancery Rev.* 102. And the sitting members, upon the present occasion, were *Edmund Pendleton, George Wythe* and *John Blair*, judges of the High Court of Chancery: *Paul Carrington, Batholomew Dandridge, Peter Lyons* and *James Mercer*, judges of the General Court: and *Richard Cary*, one of the judges of the Court of Admiralty.—Call.

[22] The words of the act are, "The governor, or in case of his death, inability, or necessary absence, the councillor who acts as president, shall in no wise have or exercise a right of granting pardon to any person or persons convicted in manner aforesaid, but may suspend the execution until the meeting of the general assembly, who shall determine whether such person or persons are proper objects of mercy or not, and order accordingly." *Chancery Rev.* 40.—Call.

I have heard of an English chancellor who said, and it was nobly said, that it was his duty to protect the rights of the subject, against the encroachments of the crown; and that he would do it, at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely, it is equally mine, to protect one branch of the legislature, and, consequently, the whole community, against the usurpations of the other: and, whenever the proper occasion occurs, I shall feel the duty; and, fearlessly, perform it. Whenever traitors shall be fairly convicted, by the verdict of their peers, before the competent tribunal, if one branch of the legislature, without the concurrence of the other, shall attempt to rescue the offenders from the sentence of the law, I shall not hesitate, sitting in this place, to say, to the general court, *Fiat justitia, ruat coelum*; and, to the usurping branch of the legislature, you attempt worse than a vain thing; for, although, you cannot succeed, you set an example, which may convulse society to its centre. Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds, prescribed to them by the people, I in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further.

Waiving, however, longer discussion upon those subjects, and proceeding to the question, immediately, before us, the case presented is, that three men, convicted of treason against the state, and condemned by the general court, have pleaded a pardon, by the house of delegates, upon which that house insists, although the senate refuses to concur; and the opinion of the court is asked, whether the general court should award execution of the judgment, contrary to the allegation of the prisoners, that the house of delegates, alone, have the power to pardon them, under that article of the constitution, which says, "But he (the governour) shall, with the advice of the council of state, have the power of granting reprieves or pardons, except where the prosecution shall have been carried on by the house of delegates, or the law shall otherwise

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particularly direct; in which *cases,* no reprieve, or pardon, shall be granted, but by resolve of the house of delegates."

Two questions are made,

1. Whether, this court has jurisdiction in the case?
2. Whether the pardon is valid?

The first appears, to me, to admit of no doubt; for the act constituting this court is express, that the court shall have jurisdiction "In such cases as shall be removed, before them, by adjournment from the other courts before mentioned, when questions, in their opinion, new and difficult, occur." *Chan. Rev.* 102: which emphatically embraces the case under consideration.

The sole enquiry therefore is, whether the pardon be valid?

If we consider the genius of our institutions, it is clear, that the pretensions of the house of delegates cannot be sustained. For, throughout the whole structure of the government, concurrence of the several branches of each department is required to give effect to its operation. * * *

This view of the subject confines the object of the provision of the constitution, now under consideration, to cases where the prosecution is carried on by the house of delegates; and justifies the first interpretation contended for by the attorney general, of reading the words "*Or the law shall otherwise particularly direct,*" in parenthesis: so as to limit the power of pardoning, by the house of delegates, to cases of impeachment prosecuted, by them, under the sixteenth and seventeenth sections of the constitution. Which is, manifestly, the intention of the clause. * * *

The word *cases,* in the plural number, makes no difference, 1. Because it was probable there would be more than one case of a prosecution by the house of delegates; and therefore the plural number was properly used, with a view to that possibility. * * *

This mode of considering the subject, obviates the objection made by the prisoners' counsel, relative to the constitutionality of the law concerning treason; for, according to the interpretation just discussed, there is nothing unconstitutional in it.

I am, therefore, of opinion, that the pardon pleaded by the prisoners is not valid; and that it ought to be so certified, to the general court.

Pendleton, President. * * * I shall pass to the two great points into which the question has been divided, whether, if the constitution of government and the act declaring what shall be treason are at variance on this subject, which shall prevail and be the rule of judgment? And then, whether they do contravene each other? The constitution of other governments in Europe or elsewhere, seem to throw little light upon this question, since we have a written record of that which the citizens of this state have adopted as their social compact; and beyond which we need not extend our researches. It has been very properly said, on all sides, that this act, declaring the rights of the citizens, and forming their government, divided it into three great branches, the legislative, executive, and judiciary, assigning to each its proper powers, and directing that each shall be kept separate and distinct, must be considered as a rule obligatory upon every department, not to be departed from on any occasion. But how far this court, in whom the judiciary powers may in some sort be said to be concentrated, shall have power to declare the nullity of a law passed in its forms by the legislative power, without exercising the power of that branch, contrary to the plain terms of that constitution, is indeed a deep, important, and I will add, a tremendous question, the decision of which might involve consequences to which gentlemen may not have extended their ideas. I am happy in being of opinion there is no occasion to consider it upon this occasion; and still more happy in the hope that the wisdom and prudence of the legislature will prevent the disagreeable necessity of ever deciding it, by suggesting the propriety of making the principles of the constitution the great rule to direct the spirit of their laws. * * *

The language of the clause is inaccurate, and admits of both the constructions mentioned by the *attorney general,* that is to say, 1. By throwing the words, "or the law shall otherwise particularly direct," into a parenthesis, to confine the power of pardoning, by resolution of the house of delegates alone, to cases of impeachment only: and to leave those which the general assembly might take from the executive, to the direction of the laws made for the purpose. 2. By taking the clause altogether, to make the representatives of the people the source of mercy, provided the consent of the senate was obtained. Either view of the subject satisfies the present enquiry; but I prefer the first, as most congenial to the spirit, and not inconsistent with the letter, of the constitution.

The treason law appears to have been framed upon this idea; and, in passing it, the legislature have, in my opinion, pursued, and not violated, the constitution. Indeed the house of delegates appear to have understood it so themselves, as they sent the resolution to the senate for their concurrence, which not having been obtained, the resolution is of no force, and the pardon falls to the ground.

Chancellor BLAIR and the rest of the judges, were of opinion, that the court had power to declare any resolution or act of the legislature, or of either branch of it, to be unconstitutional and void; and, that the resolution of the house of delegates, in this case, was inoperative, as the senate had not concurred in it. That this would be the consequence clearly, if the words, "or the law shall otherwise particularly direct," were read in a parenthesis; for then the power of pardoning by the house of delegates, would be expressly confined to cases of impeachment by that house; and, if read without the parenthesis, then the only difference would be, that the assent of the two houses would be necessary; for it would be absurd to suppose that it was intended, by the constitution, that the act of the whole legislature should be repealed by the resolution of one branch of it, against the consent of the other.

The certificate to the general court was as follows:

"The court proceeded, pursuant to an order of the court of Thursday last, to render their judgment on the adjourned question, from the general court, in the case of *John Caton, Joshua Hopkins* and *James Lamb*; whereupon it is ordered to be certified, to the said general court, as the opinion of this court, that the pardon, by resolution of the house of delegates, severally pleaded and produced in the said court, by the said *John Caton, Joshua Hopkins* and *James Lamb,* as by the record of their case appears, is invalid."[23]

TREVETT v. WEEDEN.[24]

1786. Superior Court of Judicature of Rhode Island.

Upon the last Monday of September, in the eleventh year of the Independence of the United States, in the city of Newport, and State of Rhode Island, &c., was heard, before the Superior Court of Judicature, Court of Assize, and General Jail-Delivery, a certain information, John Trevett against John Weeden, for refusing to receive the paper bills of this State, in payment for meat sold in market, equivalent to silver or gold; and upon the day following, the court delivered the unanimous opinion of the judges, that the information was not cognizable before them. [Coxe (Jud. Power and Unconst. Legis. 245) adds this: "The following constitutes the whole of the brief extant report of what was said by them:[25] 'The court adjourned to next morning, upon opening of which, Judge Howell, in a firm, sensible, and judicious speech, assigned the reasons which induced him to be of the opinion that the information was not cognizable by the court—declared himself independent as a judge—the penal law to be repugnant[26] and unconstitutional—and therefore gave it as his opinion that the court could not take cognizance of the information! Judge Devol was of the same opinion. Judge Tillinghast took notice of the striking repugnancy of the expressions of the act—Without trial by jury, according to the laws of the land—and on that ground gave his judgment the same way. Judge Hazard voted against taking cognizance. The Chief Justice declared the judgment of the court without giving his own opinion.'"]

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[23] Wythe, J., Blair, J., and Edmund Randolph, Attorney General, were subsequently members of the convention of 1787 that drafted the Constitution of the United States, and Pendleton was president of the convention in Virginia that voted in 1788 to ratify the Constitution. In the latter convention John Marshall said, without contradiction, "Has the government of the United States power to make laws on every subject? * * * Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void." 3 Elliot's Debates, (ed. of 1866) 553.

[24] Pamphlet, by James M. Varnum. Providence: John Carter. 1787. An account of the case is given in 2 Chandler's Crim. Tr. 269.—Thayer. [This case is reprinted here by permission as abbreviated in James Bradley Thayer's scholarly collection of Cases on Constitutional Law (1895) vol. 1, pp. 73-78.—Ed.]

That this important decision may be fully comprehended, it will be necessary to recur to the Acts of the General Assembly, which superinduced the trial. At the last May session, an Act was made for emitting the sum of one hundred thousand pounds, lawful money, in bills, upon land security, which should pass in all kinds of business and payments of former contracts, upon par with silver and gold, estimating an ounce of coined silver at six shillings and eightpence. Another Act was passed in the June following, subjecting every person who should refuse the bills in payment for articles offered for sale, or should make a distinction in value between them and silver and gold, or who should in any manner attempt to depreciate them, to a penalty of one hundred pounds, lawful money; one moiety to the State, and the other moiety to the informer; to be recovered before either of the Courts of General Sessions of the Peace, or the Superior Court of Judicature, &c.

Experience soon evinced the inadequacy of this measure to the objects of the administration: and at a session of the General Assembly, specially convened by his Excellency the Governor, upon the third Monday of the following August, another Act was passed, in addition to and amendment of that last mentioned, wherein it is provided, that the fine of one hundred pounds be varied; and that for the future the fine should not be less than six, nor exceed thirty pounds, for the first offence. The mode of prosecution and trial was also changed, agreeably to the following clauses: "That the complainant shall apply to either of the judges of the Superior Court of Judicature, &c., within this State, or to either of the judges of the Inferior Court of Common Pleas within the county where such offence shall be committed, and lodge his certain information, which shall be issued by the judge in the following form," &c. It is then provided, that the person complained of come before a court to be specially convened by the judge, in three days; "that the said court, when so convened, shall proceed to the trial of said offender, and they are hereby authorized so to do, without any jury, by a majority of the judges present, according to the laws of the land, and to make adjudication and determination, and that three members be sufficient to constitute a court, and that the judgment of the court, if against the offender so complained of, be forthwith complied with, or that he stand committed to the county jail, where the said court may be sitting, till sentence be performed, and that the said judgment of said court shall be final and conclusive, and from which there shall be no appeal; and in said process no essoin, protection, privilege, or injunction shall be in anywise prayed, granted, or allowed."

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[25] Providence "Gazette," Oct. 7, 1786: compare American Museum, vol. 5, p. 36.—Coxe.

[26] "Unjust," in the Museum's text.—Coxe.

In consequence of a supposed violation of this Act, John Trevett exhibited his complaint to the Hon. Paul Mumford, Esq., Chief Justice of the Superior Court, at his chamber, who caused a special court to be convened; but as the information was given during the term of the court, it was referred into the term for consideration and final determination.

John Weeden, being demanded and present in court, made the following answer; "That it appears by the Act of the General Assembly, whereon said information is founded, that the said Act hath expired, and hath no force: also, for that by the said Act the matters of complaint are made triable before special courts, uncontrollable by the Supreme Judiciary Court of the State; and also for that the court is not, by said Act, authorized and empowered to impanel a jury to try the facts charged in the information; and so the same is unconstitutional and void." * * * [Omitting only the verbatim report of the writer's argument, the report continues at page 37 as follows]:—

The consequences of the foregoing determination were immediately felt. The shops and stores were generally opened, and business assumed a cheerful aspect. Few were the exceptions to a general congratulation, and lavish indeed were the praises bestowed upon the court. The dread and the idea of informations were banished together, while a most perfect confidence was placed in judicial security. The paper currency obtained a more extensive circulation, as every one found himself at liberty to receive or refuse it. The markets, which had been illy supplied, were now amply furnished, and the spirit of industry was generally diffused. Every prospect teemed with returning happiness, and nothing appeared wanting to restore union and harmony among the contending parties.

The demon however of discord was not entirely subdued; for upon the next succeeding week a summons was issued from both Houses of Assembly, requiring an immediate attendance of the judges, "to render their reasons for adjudging an Act of the General Assembly unconstitutional, and so void." Three of the judges attended, the other two being unwell. This circumstance induced the Assembly to dismiss them at that time, but they were directed to appear at the October session next following.

Accordingly three of the judges attended, and gave notice in writing to both Houses, "that they waited their pleasure." They were informed that the Assembly was ready to hear them, and would proceed immediately upon the business for which they were in attendance.

Certain ceremonies being adjusted, and the records of the court produced, the Honorable Mr. Howell, the youngest justice, addressed himself to the Assembly in a very learned, sensible, and elaborate discourse, in which he was upwards of six hours upon the floor.

He observed, that the order by which the judges were before the House might be considered as calling upon them to assist in matters of legislation, or to render the reasons of their judicial determination, as being accountable to the legislature for their judgment.

That in the former point of view, the court was ever ready, as constituting the legal counsellors of the State, to render every kind of assistance to the legislative, in framing new or repealing former laws: but that for the reasons of their judgment upon any question judicially before them, they were accountable only to God and their own consciences.

Under the first head, the honorable gentleman pointed out the objectionable parts of the Act upon which the information was founded, and most clearly demonstrated, by a variety of conclusive arguments, that it was unconstitutional, had not the force of a law, and could not be executed. His arguments were enforced by many authorities of the first eminence, in addition to those produced upon the trial. But as this part of the subject hath in a great measure been anticipated, we shall not enter into a further detail, concluding that the legal defence of the court, in showing "that they were not accountable to the legislature for the reasons of their judgment," will be more interesting to the public.

Here it was observed, that the legislature had assumed a fact, in their summons to the judges, which was not justified or warranted by the records. The plea of the defendant, in a matter of mere surplusage, mentions the Act of the General Assembly as "unconstitutional, and so void;" but the judgment of the court simply is, "that the information is not cognizable before them." Hence it appears that the plea hath been mistaken for the judgment.

Whatever might have been the opinion of the judges, they spoke by their records, which admitted of no addition or diminution. They might have been influenced respectively by different reasons, as the whole Act was judicially before them, of which, it being general, they could judge by inspection, without confining themselves to the particular points stated in the plea. It would be out of the power, therefore, of the General Assembly to determine upon the propriety of the court's judgment, without a particular explanation. If this could be required in one instance, it might in all; and so the legislative would become the Supreme Judiciary. A perversion of power totally subversive of civil liberty!

If it be conceded, that the equal distribution of justice is as requisite to answer the purposes of government as the enacting of salutary laws, it is evident that the judiciary power should be as independent as the legislative. And consequently the judges can not be answerable for their opinion, unless charged with criminality. * * *

Judge Tillinghast observed, that nothing could have induced the gentlemen of the court to accept the office to which they were appointed, but a regard to the public good; that their perquisites were trifling, and their salaries not worth mentioning. The only recompense they expected, or could receive, was a consciousness of rectitude, which had supported them, and he was confident would support them, through every change of circumstances; that melancholy indeed would be the condition of the citizens, if the Supreme Judiciary of the State was liable to reprehension, whenever the caprice or the resentment of a few leading men should direct a public inquiry!

That, as one member of the court, he felt himself perfectly independent, while moving in the circle of his duty; and however he might be affected for the honor of the State, he was wholly indifferent about any consequences that might possibly respect himself.

That the opinion he had given resulted from mature reflection and the clearest conviction; that his conscience testified to the purity of his intentions, and he was happy in the persuasion, that his conduct met the approbation of his God!

Judge Hazard. My brethren have so fully declared my sentiments upon this occasion, that I have nothing to add by way of argument. It gives me pain that the conduct of the court seems to have met the displeasure of the administration. But their obligations were of too sacred a nature for them to aim at pleasing but in the line of their duty.

It is well known that my sentiments have fully accorded with the general system of the legislature in emitting the paper currency; but I never did, I never will, depart from the character of an honest man, to support any measures, however agreeable in themselves. If there could have been a prepossession in my mind, it must have been in favor of the Act of the General Assembly; but it was not possible to resist the force of conviction. The opinion I gave upon the trial was dictated by the energy of truth: I thought it right—I still think so. Be it as it may, we derived our understanding from the Almighty, and to Him only are we accountable for our judgment.

To the observations of the judges, succeeded a very serious and interesting debate among the members, wherein many arguments and observations were adduced on both sides. At length a question was taken, "whether the Assembly was satisfied with the reasons given by the judges in support of their judgment?" It was determined in the negative.

A motion was then made, and seconded, "for dismissing the judges from ~~their office." * * *~~ [A memorial and protest from the judges, dated Nov. 4, 1786, was here presented to the Assembly, and Mr. Varnum was allowed to address the House in support of it.]

The claim and demand of the judges, as stated in their memorial, and enforced by their counsel, were followed by a concise, but rational debate, in which the fury of passion, excepting in one or two instances, surrendered to cool reflection, and prepared the way for vindicating the honor of the law, and the dignity of the State. In vain did any endeavor to recall the mind to a predetermined resolution! Truth, "which is lodged in a secret corner of the heart," exerted her gentle influence, while prejudice and malice retired abashed!

A motion was made by an honorable member, seconded, and agreed to, that the opinion of the Attorney-General be taken, and the sentiments of the other professional gentlemen requested, whether constitutionally, and agreeably to law, the General Assembly can suspend, or remove from office, the judges of the Supreme Judiciary Court, without a previous charge and statement of criminality, due process, trial, and conviction thereon? * * * [Addresses were then made by "Mr. Channing, the Attorney-General," and three others, to the effect that the judges could only be removed by impeachment or other regular process.] The two professional gentlemen in the House, the Honorable Mr. Marchant and Mr. Bourne, confirmed the sentiments of their brethren, in the leading points, by a masterly display of legal talents.

The only question remaining was, whether the judges should be discharged from any further attendance upon the General Assembly, as no accusation appeared against them? The question was put, and decided by a very great majority, "that as the judges are not charged with any criminality in rendering the judgment, upon the information, Trevett against Weeden, they are therefore discharged from any further attendance upon this Assembly, on that account."[27]

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[27] Coxe, Jud. Power and Unconst. Legis. (1893) 237, 238 (and so *passim*), treats this case as one arising under an unwritten constitution. This view seems to be inadmissible. Before the Revolution, the charter of Rhode Island, so far

DEN D. BAYARD v. SINGLETON.

1787. Superior Court[28] of North Carolina. 1 Martin 48.

EJECTMENT. This action was brought for the recovery of a valuable house and lot, with a wharf and other appurtenances, situate in the town of *Newbern.*

The defendant pleaded *not guilty,* under the common rule.

He held under a title derived from the state, by a deed, from a Superintendent Commissioner of confiscated estates.

At May Term 1786, *Nash,* for the defendant, moved that the suit be dismissed, according to an act of the last session, entitled, an act, to secure and quiet in their possession all such persons, their heirs and assigns, who have purchased or may hereafter purchase lands and tenements, goods and chattels, which have been sold or may hereafter be sold by commissioners of forfeited estates, legally appointed for that purpose, 1785, 7, 553.

The act requires the Courts, in all cases where the defendant makes affidavit that he holds the disputed property under a sale from a commissioner of forfeited estates, to dismiss the suit on motion.

The defendant had filed an affidavit, setting forth that the property in dispute had been confiscated and sold by the Commissioner of the district.

This brought on long arguments from the counsel on each side, on constitutional points. * * *

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as it went, was a written constitution. It continued to have the same character throughout.—Thayer.

Holmes v. Walton, decided by the Supreme Court of New Jersey in 1780, seems to be the first instance of a court holding a State statute inoperative because in conflict with the constitution of the State. The statute prescribed a jury of six men in a particular type of cases and it seems probable that the court regarded the guaranty of jury trial expressed in the constitution as requiring a jury of twelve. The case is summarized in the opinion in State v. Parkhurst (1804) 9 N. J. L. 427, 444. That it was known outside of New Jersey is evidenced by the statement of Gouverneur Morris in an address in 1785 to the legislature of Pennsylvania: "A law was once passed in New Jersey, which the judges pronounced unconstitutional, and therefore void. * * * Such power in judges is dangerous; but unless it somewhere exists, the time employed in framing a bill of rights and form of government was merely thrown away." Among the New Jersey delegates to the Federal Convention of 1787 that drafted the present Constitution of the United States were David Brearly, chief justice at the time of the decision, William Livingston, and James Patterson, governor and attorney-general respectively at that time. It seems that both the governor and the legislature accepted the decision as shown by his recommendation and their enactment of legislation to cure the defect in the statute in question. The opinion of the court was probably oral, at least there seems to be no extant published opinion. See Dr. Austin Scott, Holmes v. Walton: The New Jersey Precedent, 4 Amer. Hist. Rev. 456-469.

[28] Though called "Superior Court" it had supreme jurisdiction; in fact the three judges who composed it constituted the entire judiciary of the state, *nisi prius* and appellate. See 103 N. Car. 467, 469.—Ed.

At May term, 1787, *Nash's* motion was resumed, and produced a very lengthy debate from the Bar.

Whereupon the COURT recommended to the parties to consent to a fair decision of the property in question, by a jury according to the common law of the land, and pointed out to the defendant, the uncertainty, that would always attend his title, if this cause should be dismissed without a trial; as upon a repeal of the present act (which would probably happen sooner or later) suit might be again commenced against him for the same property, at the time when evidences, which at present were easy to be had, might be wanting. But this recommendation was without effect.

Another mode was proposed for putting the matter in controversy on a more constitutional footing for a decision, than that of the motion under the aforesaid act. The court then, after every reasonable endeavor had been used in vain for avoiding a disagreeable difference between the Legislature and the judicial powers of the state, at length with much apparent reluctance, but with great deliberation and firmness, gave their opinion separately, but unanimously for overruling the aforementioned motion for the dismission of the said suits.

In the course of which the Judges observed, that the obligation of their oaths, and the duty of their office required them, in that situation, to give their opinion on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the state, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.

That they therefore were bound to declare that they considered, that whatever disabilities the persons under whom the plaintiffs were said to derive their titles, might justly have incurred, against their maintaining or prosecuting any suits in the Courts of this state; yet that such disabilities in their nature were merely personal, and not by any means capable of being transferred to the present plaintiffs, either by descent or purchase; and that these plaintiffs being citizens of one of the United States, are citizens of this state, by the confederation of all the states; which is to be taken as a part of the law of the land, unrepealable by any act of the General Assembly.

That by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all: that if the members of the General Assembly could do this, they might with equal authority, not only render themselves the Legislators of the state for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

But that it was clear, that no act they could pass, could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently the constitution (which the judicial power was bound to take notice of as much as of any other law whatever,) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect.

Nash's motion was overruled.

And at this term the cause was tried. * * *[29]

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[29] James Iredell and William R. Davie were counsel for the plaintiffs. The latter was attending the Convention at Philadelphia that drafted the present Constitution of the United States as a member at the time of the decision. He must have known the argument that Iredell proposed to make for it is highly probable that this followed the thought of Iredell's public letter published at Newbern, Aug. 17, 1786. It is not improbable that Davie participated in the argument at the first hearing at the May term, 1786. In part, Iredell's letter read: "in forming the constitution [of North Carolina] * * * which we considered as the fundamental basis of our government, unalterable, but by the same high power which established it * * *. It was, of course, to be considered how to impose restrictions on the legislature, that might still leave it free to all useful purposes, but at the same time guard against the abuse of unlimited power, * * *. Theories were nothing to us, opposed to our own severe experience. We were not ignorant of the theory of *the necessity of the legislature being absolute in all cases,* because it was the great ground of the British pretensions. But this was a mere speculative principle, which men at ease and leisure thought proper to assume. When we were at liberty to form a government as we thought best, without regard to that or any theoretical principle we did not approve of, we decisively gave our sentiments against it, * * *. I have therefore no doubt, but that the power of the Assembly is limited and defined by the constitution. It is a *creature* of the constitution. * * *. The great argument is, that though the Assembly have not a *right* to violate the constitution, yet if they *in fact* do so, the only remedy is, either by a humble petition that the law may be repealed, or a universal resistance of the people. But that in the meantime, their act, whatever it is, is to be obeyed as a law; for the judicial power is not to presume to question the power of an act of Assembly.

"To these positions, not unconfidently urged, I answer:—

"1. That the remedy by petition implies a supposition, that the electors hold their rights by the *favour of their representatives.* * * *

"But 2. The whole people may resist. A dreadful expedient indeed. * * *

"These two remedies then being rejected, it remains to be inquired whether the judicial power hath any authority to interfere in such a case. The duty of that power, I conceive, in all cases, is to decide according to the *laws of the State.* It will not be denied, I suppose, that the constitution is a *law of the State,* as well as an act of Assembly, with this difference only, that it is the *fundamental* law, and unalterable by the legislature, which derives all its power from it. One act of Assembly may repeal another act of Assembly. For this reason, the latter act is to be obeyed, and not the former. An act of Assembly cannot repeal the constitution, or any part of it. For that reason, an act of Assembly, inconsistent

"That the members of the Convention of 1787 thought the Constitution secured to courts in the United States the right to pass on the validity of acts of Congress under it cannot be reasonably doubted. Confining ourselves simply to the available evidence that is strictly contemporaneous with the framing and ratifying of the Constitution, as I think it only proper to do, we find the following members of the Convention that framed the Constitution definitely asserting that this would be the case: Gerry and King of Massachusetts, Wilson and Gouverneur Morris of Pennsylvania, Martin of Maryland, Randolph, Madison, and Mason of Virginia, Dickinson of Delaware, Yates and Hamilton of New York, Rutledge and Charles Pinckney of South Carolina, Davie and Williamson of North Carolina, Sherman and Ellsworth of Connecticut.[30] True these are only seventeen names out of a possible fifty-five, but let it be considered whose names they are. They designate fully three-fourths of the leaders of the Convention, four of the five members of the Committee of Detail which drafted the Constitution,[31] and four of the five members of the Committee of Style which gave the Constitution final form.[32]

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with the constitution, is *void*, and cannot be obeyed, without disobeying the superior law to which we were previously and irrevocably bound. The judges, therefore, must take care at their peril, that every act of Assembly they presume to enforce is warranted by the constitution, since if it is not, they act without lawful authority. This is not a usurped or a discretionary power, but one inevitably resulting from the constitution of their office, they being judges *for the benefit of the whole people*, not *mere servants of the Assembly*. * * * But it is said, if the judges have this power, so have the county courts. I admit it. The county courts, in the exercise of equal judicial power, must have equal authority. * * * The objection, however, urged by some persons, that sheriffs and other *ministerial* officers must exercise their judgment too, does not apply. For *if the power of judging rests with the courts*, their decision is final as to the subject matter."

Spaight then also attending the convention as a member from North Carolina wrote Iredell criticizing the decision. The latter replied in defense of it. For Iredell's two letters, see Coxe, Judicial Power and Unconstitutional Legislation (1893), pp. 253-263, also see p. 266; for Spaight's letter see, *ibid.* p. 385. In the North Carolina convention of 1788, Davie expressed his understanding that the proposed federal constitution gave power to the federal judiciary to enforce the restrictions imposed upon the states. 4 Elliot's Debates (ed. of 1866) pp. 156-158.

[30] Max Farrand, Records of the Federal Convention (Yale Univ. Press, 1913); I, 97 (Gerry), 109 (King); II, 73 (Wilson), 76 (Martin), 78 (Mason), 299 (Dickinson and Morris), 428 (Rutledge), 248 (Pinckney), 376 (Williamson), 28 (Sherman), 93 (Madison); III, 220 (Martin, in "Genuine Information"). The Federalist: Nos. 39 and 44 (Madison), No. 78 (Hamilton). Elliot's Debates (ed. of 1836); II, 1898-9 (Ellsworth), 417 and 454 (Wilson), 336-7 (Hamilton); III, 197, 208, 431 (Randolph), 441 (Mason), 484-5 (Madison); IV, 165 (Davie). P. L. Ford, Pamphlets on the Constitution, 184 (Dickinson, in "Letters of Fabius"); Ford, Essays on the Constitution, 295 (Yates, writing as "Brutus"). Pinckney later, in 1799, denounced the idea of judicial review, thus: "On no subject am I more convinced than that it is an unsafe and dangerous doctrine in a republic ever to suppose that a judge ought to possess the right of questioning or deciding upon the constitutionality of treaties, laws, or any act of the legislature. It is placing the opinion of an individual, or two, or three, above that of both branches of Congress, a doctrine which is not warranted by the Constitution, and will not, I hope, long have any advocates in this country"; quoted from Wharton's State Trials, 412, by Mr. Horace A. Davis in Am. Polit. Sc. Rev., 551. Madison's later views are considered *infra*.

[31] Gorham, Rutledge, Randolph, Ellsworth, and Wilson. The argument is from Professor Beard's Supreme Court, etc.

[32] Johnson, Hamilton, Morris, Madison, and King.

The entries under these names, in the Index to Farrand's Records occupy fully thirty columns, as compared with fewer than half as many columns under the names of the remaining members. We have in this list, in other words, the names of men who expressed themselves on the subject of judicial review because they also expressed themselves on all other subjects before the Convention. They were the leaders of that body and its articulate members. And against them are to be pitted, in reference to the question under discussion, only Mercer of Maryland, Bedford of Delaware, and Spaight of North Carolina, the record in each of whose cases turns out to be upon inspection of doubtful implication. For while Spaight, for instance, undoubtedly expressed himself, during the period of the Convention, as strongly adverse to the theory of judicial review,[33] yet he later heard the idea expounded both on the floor of the Philadelphia Convention and the North Carolina convention without protest. The words of Bedford which are relied upon in this connection are his declaration that he was "opposed to every check on the legislature." But these words were spoken with reference, not to judicial review, but to the proposition to establish a council of legislative revision.[34] Mercer of Maryland did not sign the Constitution and opposed its adoption. It is by no means impossible that one of the grounds of his opposition was recognition of the fact that the Constitution established judicial review.[35] Although it seems a warrantable assertion that on no other feature of the Constitution with reference to which there has been any considerable debate is the view of the Convention itself better attested."—Edward S. Corwin, The Doctrine of Judicial Review (1914) pp. 10-13.

"Judicial Review in the State Ratifying Conventions: The power that the courts would have with reference to unconstitutional acts of Congress was expounded at length in the Pa. convention by Wilson: Elliot, Debates, II, 417, 454 (Ed. of 1836); also by Ellsworth in the Conn. convention, *ib.* 198-9. It was referred to directly by Hamilton in the N. Y. convention, *ib.* 336-7. Several references occur to it in the N. C. convention that failed to ratify; *loc. cit.* IV, 87, 93-4, 152, 165, 167, 192. The report of the debate in the Mass. Convention on the judiciary appears in only very abbreviated form on account of the illness of the reporter at this stage of the proceedings. But Samuel Adams made a direct allusion to the power of judicial review affecting acts of Congress; *loc. cit.* II, 142, and other speakers used language showing their recognition of some such power in courts; see *ib.* 97-8, 100-6, 110-11, 138, 154, 167, 171-4. In the Va. convention, judicial review was referred to, either as touching acts of Congress or in more general terms no fewer than twelve times: *loc. cit.* III, 182 and 309 (Henry); 197, 208, and 431 (Randolph); 287 and 498 (Pendleton); 409 (Nicholas); 441 (Mason); 484-5 (Madison);

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[33] See McRee, Life and Correspondence of James Iredell, II, 169-76.
[34] Farrand, I, 100, 106.
[35] *Ib.* II, 298.

503 (Marshall); 514 (Granger). Much of this and further evidence is presented by Mr. Horace Davis in his article in the Am. Pol. Sc. Rev. Mr. Davis himself, however, endeavors to reject the obvious verdict of this evidence. The explanation of his attitude is that he confuses the question of whether judicial review of acts of Congress was believed to be a feature of the new system with the question whether it was expected to prove an effective limitation upon Congress. The absence of a Bill of Rights and the presence of the 'general welfare' and 'necessary and proper' clauses caused opponents of the Constitution to charge that the judges would never be able to stamp any act of Congress as invalid, that Congress' power was practically unlimited to begin with. See Elliot, I, 545; II, 314-15, 318, 321-2; IV, 175; also, McMaster and Stone, Pennsylvania and the Federal Constitution, 467, 611; also, Ford, Pamphlets, 312; also and especially, Federalist No. 33. Said Whitehill in the Pa. convention: 'Laws may be made in *pursuance* of the Constitution, though not *agreeably* to it; the laws may be unconstitutional': McMaster and Stone, *loc. cit.* 780."—Edward S. Corwin, The Doctrine of Judicial Review (1914), pp. 65-66.

Other cases prior to Marbury v. Madison (1803) in which state courts asserted a right to refuse effect to state statutes violative of state constitutions are: Gilman v. McClary (1791) manuscript record, Superior Court for the County of Rockingham, N. H; Kamper v. Hawkins (1793) 1 Virginia Cases, 22; Austin v. Trustees of the University of Pennsylvania (1793) 1 Yeates (Penn.) 260, cf. the comment on this case by Gibson, J. in 12 S. & R. p. 355; Taylor v. Reading, Supreme Court of New Jersey, (1795 or 1796), see reference to this case in 4 Halstead 444; Lindsay et al. v. The Commissioners, Court of Appeals of South Carolina, (1796) 2 Bay 38 (The four judges divided equally on whether the statute conflicted with the constitution, two asserted power to hold unconstitutional statutes inoperative and the others did not disclaim it); Stidger v. Rogers, Court of Appeals of Kentucky (1801) 2 Ky. 52; Whittington v. Polk, General Court of Maryland (1802) H. & J. 236; Ogden v. Witherspoon (1802) U. S. Cir. Ct. 2 Hayw. (N. Car.) 227, Fed. Cas. No. 10, 461, holding a state law inoperative because of conflict with the state constitution, is sometimes cited as a case of this class but query, unless the requirement of Sec. 34 of the Judiciary Act of 1789 that state laws should be the rules of decision where they and not federal law apply leads to the result that such a decision of a federal court is based on a tacit decision that a state court would have that power in a like case. Of course, such a holding would not preclude a decision by the state court that the state constitution did not give it the power. For a like case in 1795 see infra p. 35, note 42.—Ed.

"In June, 1792, Chief Justice Jay, Judge Cushing, and District Judge Henry Marchant, sitting in the Circuit Court for the District of Rhode Island, held a law of that State to be unconstitutional as impairing the obligation of contract, in the case of Alexander Champion and Thomas Dickason v. Silas Casey.[36] The statute involved was an Act of the Rhode Island General Assembly passed in February, 1791, in response to a petition of a debtor for an extension of three years' time in which to settle his accounts with his creditors and for an exemption from all arrests and attachments for such term of three years. The decision was as follows: 'The Court also determined in the case of Champion and Dickason against Silas Casey that the Legislature of a State have no right to make a law to exempt an individual from arrests and his estate from attachments for his private debts, for any term of time, it being clearly a law impairing the obligation of contracts, and therefore contrary to the Constitution of the United States.' Another newspaper stated that: 'The defendant's counsel pleaded a resolution of the State in bar of the action, by which he was allowed three years to pay his debts and during which he was to be free from arrests on that account. The Judges were unanimously of opinion that, as by the Constitution of the United States, the individual States are prohibited from making laws which shall impair the obligation of contracts, and as the resolution in question, if operative, would impair the obligation of the contract in question, therefore it could not be admitted to bar the action.'[37] Though this decision was given great publicity in newspapers throughout the States, it seems to have aroused no opposition to the Federal Courts; and though, thirty years later, the right of these Courts to declare a State statute to be invalid was hotly attacked by many States, the exercise of this right in 1792 was accepted without protest by the very State which, five years before, had sought to impeach its State Judges for holding a State law invalid;[38] and its acquiescence was expressed formally (as described by contemporary papers) as follows: 'In conformity to a decision of the Circuit Court, the Lower House of Assembly voted on Wednesday that they would not grant to any individual an exemption from arrests and attachments for his private debts, for any term of time.'[39] Following this decision in Champion v. Dickason [Casey] holding a Rhode Island State law unconstitutional, the Federal Circuit Courts proceeded to exercise this judicial power in a series of cases involving statutes of other states;[40] in 1793, the validity of a Connecticut statute was involved in a case;[41] in 1795, a statute of Pennsylvania was held invalid by Judge Paterson in VanHorne's Lessee v. Dorrance, 2 Dallas, 304;[42] in 1799, a statute of Vermont was held invalid as violating the impairment of obligation of contract clause of the Federal Constitution.[43] So far as can be ascertained from the comments in the press and from other contemporary documents, the action of the Federal Courts in these cases met with no opposition, and no claim was ever then advanced that their action was without constitutional authority.[44]

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[36] This case has hitherto escaped the notice of legal historians; the original records are now on file in the United States District Court for the District of Rhode Island.—Warren.

[37] For these reports of the decision, see *Columbian Centinel*, June 20, 1792; *Providence Gazette*, June 16, 1792; *United States Chronicle* (Prov.), June 14, 1792; *Salem Gazette* (Mass.), June 26, 1792; *New York Daily Advertiser*, June 22, 1792; *Connecticut Journal*, June 22, 1792, and many other newspapers.

One month before this decision, the Federal Circuit Court sitting in Pennsylvania (Judges Wilson, Blair, and District Judge Peters) had decided a case involving the validity of a statute of that State; but had held it not violative of the Federal Constitution. See Collet v. Collet (1792), 2 Dall. (U. S.) 294; Fed. Cas. No. 3001; *Gazette of the United States*, May 2, 1792; *New York Daily Advertiser*, May 2, 1792.—Warren.

[38] [The reference is to Trevett v. Weeden, ante p. 22.—Ed.]

[39] *Providence Gazette*, June 23, 1792.—Warren.

"Even more notable, however, in the history of American law was the very early exercise of another form of judicial power by the Federal Circuit Courts, when, three years from their establishment, they rendered a decision for the first time holding an Act of Congress to be in violation of the Constitution. By the

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[40] [The student should consider whether the power of the inferior federal courts to refuse effect to state statutes in conflict with the federal Constitution, laws or treaties is granted in any different words or manner than is their power with reference to unconstitutional Acts of Congress. He should consider also the power exercised by the Circuit Court, Marshall, C. J. and Potter, Dist. J., in holding a state statute void for conflict with the state constitution. Ogden v. Witherspoon (1802) 3 (N. Car.) 227, Fed. Cas. No. 10, 461. See note 42, *infra* for another instance.—Ed.]

[41] *Connecticut Courant*, Oct. 7, 1793. "The cause, which involves the question whether a protection granted by the legislature of the State * * * (which protection was to continue no longer than during the session) was valid and sufficient to protect his person from an arrest by process or execution from the Courts of the United States, was fully debated upon demurrer, but is continued * * *. This cause involves consequences of immense magnitude, and we trust will not be decided without full deliberation." This case has not hitherto been noted.—Warren.

[42] [The Federal Circuit Court in this case, involving title under grants of two states, held a state statute inoperative because in conflict with the State constitution.—Ed.] This case has always been cited hitherto by legal historians (though erroneously) as the first instance of a decision by a Federal Court on the validity of a State statute. See *Aurora*, May 15, 1795, *New York Daily Advertiser*, May 16, 1795, *Connecticut Journal*, May 27, 1795, for interesting facts concerning the case; see also a pamphlet published in Lancaster, Pa., in 1801, by William Hamilton, entitled *Connecticut Claim* (Pickering Papers MSS, L, LVII). A writ of error was taken from this decision of the Circuit Court to the United States Supreme Court, but five years later, it was dismissed for failure to prosecute.—Warren.

[43] This case, hitherto unnoted by legal historians, is described in *Farmer's Weekly Museum*, April 20, 1799, as one which "was lately brought to trial before the Circuit Court of the United States at Rutland, Vermont, the Church Land Cause, brought by the selectmen of Manchester, by virtue of a statute of that state authorizing the selectmen of each town to take possession of all church lands, and to appropriate the avails to other purposes than originally intended. The Court, after a fair, impartial examination of the merits of the cause, adjudged the statutes to be *unconstitutional* and that the Church should hold their lands.—Warren.

[44] The only criticism of any of the decisions was that voiced by certain Federalists against Judge Paterson (himself a Federalist) owing to his decision in Van Horne v. Dorrance, [2 Dall. (U. S.) 304, 1 L. ed. 391, Fed. Cas. No. 16857;] it was based purely on political and personal grounds, and arose out of the fact that the decision had resulted in damage to large numbers of Connecticut Federalist settlers on lands in Pennsylvania; see *Georgia Republican*, Feb. 14, 1803. In *Aurora*, Sept. 20, 28, 1803, it is said that Judge Paterson's decision lost him the appointment as Chief Justice in 1801, owing to opposition by certain prominent Federalists.—Warren.

Act of March 23, 1792, it was provided that the Circuit Courts should pass upon certain claims of invalid pensioners, subject to revision by the Secretary of War and by Congress. When the first case under this Act arose in the Federal Circuit Court sitting in New York, April 5, 1792, Chief Justice Jay and Judge Cushing, after stating that, under the Constitution, the Government was divided into three 'distinct and independent branches, and that it is the duty of each to abstain from and to oppose encroachment on either, that neither the Legislative nor the Executive branch can constitutionally assign to the Judicial any duties but such as are properly judicial, and to be performed in a judicial manner', decided to construe the Act as appointing the Judges as Commissioners to perform nonjudicial duties, with power to accept or decline the office; and, out of desire to show high respect for Congress, they professed willingness to act as such Commissioners.[45] These views the Judges communicated to Congress by means of a letter addressed to the President, April 10, 1792. Judge Iredell, sitting in the Southern Circuit, also wrote to President Washington that in his view the Act was unconstitutional, and he expressed a doubt as to whether he would be justified in acting even as a Commissioner. Judges Wilson and Blair, however, sitting in the Circuit Court in Pennsylvania, met the question boldly, and (without filing any further written opinion) entered an order in the case of an invalid claimant named Hayburn that: 'it is considered by the Court that the same be not proceeded upon.'[46] Following the decision, they addressed a letter to the President, setting forth 'the sentiments which, on a late painful occasion, governed us with regard to an Act passed by the Legislature of the Union.' They stated that 'it is a principle important to freedom that, in government, the Judicial should be distinct from, and independent of, the Legislative department', and they held that the business directed by the Act was not of a judicial nature. 'These, Sir, are the reasons of our conduct. Be assured that, though it became necessary, it was far from being pleasant. To be obliged to act contrary, either to the obvious direction of Congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, which we hope never to experience again.'[47] This action of the Federal Judges, holding for the first time an Act of Congress to be in conflict with the Constitution, at once became the subject of consideration in Congress. On a memorial presented by Hayburn, April 13, 1792, asking for relief, the following statement was made in the House of Representatives, setting forth more in detail the view of the Judges:[48]

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[45] That the subject matter of the statute was such as to enlist popular sympathy, and therefore to bring possible odium on the Judges for failing to act under the statute, may be seen from an editorial in the *National Gazette*, April 12, 1792: "Our poor, starving invalids have at length some provision made for them by Congress; and as the distresses of many of them are urgent in the extreme, it is to be hoped that not a moment's delay will be made by the public officers who are directed to settle their accounts; for although men who are accustomed to plentiful tables do not perhaps know it, it is nevertheless a melancholy truth that a few days fasting would kill not only a feeble, war-worn veteran, but even a hearty well-fed member of Congress or head of a department. If through unavoidable delay any of those unfortunate men should starve before their pittance is paid, then it is to be hoped their widows and orphans will on the very first application receive it, that they may at least have something to purchase coffins for the deceased."—Warren.

[46] See the *First Hayburn Case*, by Max Farrand, *Amer. Hist. Rev.* (1907), XIII. Judge Peters, who also sat in this case, wrote, June 23, 1818, to Charles J. Ingersoll relative to a later pension act: "Having been among the first Judges who resisted the danger of Executive control over the judgments of Courts when the first Invalid Law gave power to the Secretary of War to review such judgments, I am confirmed in the opinions I then held by the circumstances now occurring; tho' I do not now act as a Judge *in a Court*." *Peters Papers* MSS. —Warren.

"'It appeared that the Court thought the examination of invalids a very extraordinary duty to be imposed on the Judges—and looked on the law which imposed that duty as an unconstitutional one; inasmuch as it directs the Secretary of War to state the mistakes of the Judge to Congress for their revision; they could not, therefore, accede to a regulation tending to render the Judiciary subject to the Legislative and Executive powers, which, from a regard for liberty and the Constitution, ought to be kept carefully distinct, it being a primary principle of the utmost importance that no decision of the Judiciary Department should under any pretext be brought in revision before either the Legislative or Executive Departments of the government, neither of which have, in any instance, a revisionary authority over the judicial proceedings of the Courts of Justice. * * * This being the first instance in which a Court of Justice had declared a law of Congress to be unconstitutional, the novelty of the case produced a variety of opinions with respect to the measures to be taken on the occasion. At length a Committee of five were appointed to enquire into the facts contained in the Memorial and to report thereon.'

* * * "The decision evidently caused considerable excitement not only in Congress but in the community; and while, fifteen years later, it was the Anti-Federalists who assailed this form of exercise of judicial power, the curious fact should be noted that, at this time, the Federalists were apparently the opponents and the Anti-Federalists the upholders of the Judiciary." —1 Charles Warren, The Supreme Court in United States History (1922) pp. 66-72.

Sec. 25. *And be it further enacted*, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.—The Judiciary Act, enacted by Congress, Sept. 24, 1789.

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[47] For this letter of April 18, 1792, and that of Judge Iredell of June 8, 1792, see [Hayburn's Case (1792)] 2 Dall. [(U. S.) 409,] 410, [1 L. ed. 8,] note; Amer. State Papers, Misc., No. 31.—Warren.

[48] See report in *American Daily Advertiser*, April 16, 1792; see also *2d Cong., 1st Sess.*, 556-557.—Warren.

MARBURY v. MADISON.

1803. Supreme Court of the United States. 1 Cranch. 137.

At the last term, viz. December term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, Charles Lee, Esq. late attorney general of the United States, severally moved the court for a rule to James Madison, secretary of state of the United States, to shew cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the District of Columbia. This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state;

that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that enquiry, either by the secretary of state or any officer in the department of state; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was laid to shew cause on the fourth day of this term. * * *

Afterwards, on the 24th of February the following opinion of the court was delivered by the chief justice.

OPINION OF THE COURT.

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to shew cause why a mandamus should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shewn, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court, is founded. * * *

2dly. The power of this court.

1st. The nature of the writ. * * *

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be enquired,

Whether it can issue from this court. * * *

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole

American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavours to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the constitution contemplated that instrument, as a rule for the government of *courts,* as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as ——— according to the best of my abilities and understanding, agreeably to *the constitution,* and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts,* as well as other departments, are bound by that instrument.

The rule must be discharged.[49]

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[49] The reasoning of Marshall, C. J., is similar to that of Hamilton in No. 80 of The Federalist (essays published in 1787 and 1788 expounding, and advocating the adoption, of the Constitution).

Justice Gibson of Pennsylvania in a dissenting opinion in Eakin v. Raub (1825) 12 S. & R. (Pa.) 330, 345-358, said that the constitution of Pennsylvania made no express grant of power to her courts to refuse effect to unconstitutional acts of the state legislature, and opposed all the usual bases for establishing the power by implication. He seems to have regarded the power of the federal courts to pass upon the constitutionality of Acts of Congress as based upon provisions peculiar to the federal Constitution and the reasoning by Marshall in Marbury v. Madison (1803), 1 Cranch (U. S.) 137, 2 L. ed. 60, as inconclusive so far as it purported to rest upon principles applicable to every constitution that imposed limitations on the legislature. He especially denied significance to the oath required of judges and to the circumstance of a constitution being written. He regarded the power of judicial review of legislation as "political" and extraordinary, existing only by express grant, and that the only instance of express grant to the courts of Pennsylvania was that by Article VI of the Federal Constitution to hold invalid state acts in conflict with the federal Constitution, laws and treaties. In 1845, referring to this earlier opinion, he said: "I have changed that opinion, for two reasons. The late convention [that drafted the Pennsylvania constitution of 1838,] by their silence, sanctioned the pretensions of the courts to deal freely with the Acts of the legislature; and from experience of the necessity of the case." Norris v. Clymer, 2 Pa. 277, 281. In his opinion in Eakin v. Raub, supra Justice Gibson does not refer to the *pursuance* clause of article VI and omits discussion of the question whether that clause grants to state courts power to determine, in case of conflict between a state statute and an Act of Congress, whether the latter is in pursuance of the constitution, or whether such determination would be conclusive or subject to review by some federal court.

Speaking of Article VI Judge Brooke, of the Court of Appeals of Virginia, said: "It leaves to the state judges the right to enquire whether the laws, treaties, etc. have been made in pursuance of the Constitution. Standing on the ground of that article alone, if there were no other, I should feel myself compelled to enquire whether the 25th section of the Act of Congress, under the authority of which the mandate in question was awarded, is in pursuance of the Constitution, or repugnant thereto." Hunter v. Martin (1815) 4 Munf. (Va.) 1, 24-25.

Marbury v. Madison was not the first case in which the Supreme Court passed upon the constitutionality of an Act of Congress although it was the first in which the court declined to give operative effect to an Act of Congress. On a fictitiously framed issue constituting practically a moot case the court in 1796 held an Act of Congress valid. In his opinion in this case Associate Justice Chase said that since he considered the statute consistent with the constitution "it is unnecessary, *at this time,* for me to determine, whether this court, constitutionally

"Since the opinion in Marbury v. Madison, 1 Cranch, 137, 177, was delivered, it has not been doubted that it is within judicial competency, by express provisions of the Constitution or by necessary inference and implication, to determine whether a given law of the United States is or is not made in pursuance of the Constitution, and to hold it valid or void accordingly. * * * Necessarily the power to declare a law unconstitutional is always exercised with reluctance; but the duty to do so, in a proper case, cannot be declined, and must be discharged in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question." Fuller, C. J. delivering the opinion of the court in Pollock v. Farmers' Loan and Trust Co. (1895) 157 U. S. 429, 554, 15 Sup. Ct. 673, 39 L. ed. 759.

"The reason for giving such unusual power to a judicial tribunal is obvious. It was necessary to give it from the complex character of the Government of the United States, which is in part National and in part Federal: where two separate governments exercise certain powers of sovereignty over the same territory, each independent of the other within its appropriate sphere of action, and where there was, therefore, an absolute necessity, in order to preserve internal tranquillity, that there should be some tribunal to decide between the Government of the United States and the government of a State whenever any controversy should arise as to their relative and respective powers in the common territory. The Supreme Court was created for that purpose, and to insure its impartiality it was absolutely necessary to make it independent of the legislative power, and the influence direct or indirect of Congress and the Executive. Hence the care with which its jurisdiction, powers, and duties are defined in the Constitution, and its independence of the legislative branch of the government secured.

"In No. 38 of the Federalist, written by Mr. Madison, the necessity and object of this provision is clearly stated. * * * By the second section of Article VI., the laws of Congress are made the supreme law of the land only when they are made in pursuance of the legislative power specified in the Constitution; and by the Xth amendment the powers not delegated to the United States nor prohibited by it to the States, are reserved to the States respectively or to the people. * * * And any legislation by Congress beyond the limits of the power delegated, would be trespassing upon the rights of the States or the people, and would not be the supreme law of the land, but null and void; and it would be the duty of the courts to declare it so. For whether an act of Congress is within the limits of its delegated

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possesses the power to declare an Act of Congress *void*, on the ground of its being made contrary to, and in violation of, the Constitution; but if the court have such power, I am free to declare, that I will never exercise it, *but in a very clear case*." (Italics are in the original report.) Hylton v. United States (1796), 3 Dall. (U. S.) 171, 1 L. ed. 556, and see 1 Warren, The Supreme Court in United States History (1922) pp. 146-149.

power or not is a judicial question, to be decided by the courts, the Constitution having, in express terms, declared that the judicial power shall extend to all cases arising under the Constitution." Taney, C. J., in Gordon v. United States (1864) 117 U. S. 697 (appendix) 700, 705.

"The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy. The statute here in question has successfully borne the scrutiny of the legislative branch of the government, which, by enacting it, has affirmed its validity; and that determination must be given great weight. This court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt. But if by clear and indubitable demonstration a statute be opposed to the Constitution we have no choice but to say so. The Constitution, by its own terms, is the supreme law of the land, emanating from the people, the repository of ultimate sovereignty under our form of government. A congressional statute, on the other hand, is the act of an agency of this sovereign authority, and if it conflict with the Constitution must fall; for that which is not supreme must yield to that which is. To hold it invalid (if it be invalid) is a plain exercise of the judicial power—that power vested in courts to enable them to administer justice according to law. From the authority to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect and binding on no one. This is not the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the court, to the determination of which must be brought the test and measure of the law." Sutherland, J., in Adkins v. Children's Hospital (1923) 261 U. S. 525, 544, 43 Sup. Ct. 394, 67 L. ed. 785.

"Although research has shown and practice has established the futility of the charge that it was a usurpation when this Court undertook to declare an Act of Congress unconstitutional, I suppose that we all agree that to do so is the gravest and most delicate duty that this Court is called on to perform. Upon this among other considerations the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same. United States v. Delaware & Hudson Co., 213 U. S. 366, 407, 408; United States v. Standard Brewery, 251 U. S. 210, 220; Texas v. Eastern Texas R. R. Co., 258 U. S. 204, 217; Bratton v. Chandler, 260 U. S. 110, 114; Panama R. R. Co. v. Johnson, 264 U. S. 375, 390." Holmes, J. in Blodgett v. Holden (1928) 48 Sup. Ct. 105.

MARTIN, HEIR AT LAW AND DEVISEE OF FAIRFAX v. HUNTER'S LESSEE.

1816. Supreme Court of the United States. 1 Wheaton 304.

[This case originated in an action of ejectment in a state district court in Virginia. The original defendant, an alien British subject, claimed that his title was protected by the treaty with England of 1783; the plaintiff, that by Virginia legislation the land had vested in that State and had been granted to him. The trial court gave judgment for the defendant in 1794. An appeal was revived against Martin an heir at law and devisee of Denny Fairfax and in 1810 the Court of Appeals of Virginia reversed the decision. On writ of error to the United States Supreme Court, that court, taking jurisdiction because of the right set up under the treaty and denied by the Court of Appeals, in 1813 reversed the decision of the latter court (7 Cranch 603, sub. nom. Fairfax's Devisee v. Hunter's Lessee) and remanded the case to that court "with instructions to enter judgment for the appellant Philip Martin." The mandate of the Supreme Court, using the customary language, "commanded" the Court of Appeals to take proceedings "agreeably to said judgment and instructions of said Supreme Court." The Court of Appeals requested argument of counsel whether the mandate should be obeyed and after six days argument and twenty months consideration announced in December, 1815, the judgment stated below, reported in 4 Munf. (Va.) 1. The foot-note below[50] gives some of the reasoning of the Court of Appeals. See 1 Warren, The Supreme Court in United States History (1922) 442-453 for interesting sidelights.]

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[50] Judge Cabell: " * * * Our system of government is sui generis, unlike any other that now exists, or that has ever existed. * * * The free exercise, by the states, of the powers reserved to them, is as much sanctioned and guarded by the Constitution of the United States, as is the free exercise, by the federal government, of the powers delegated to that government. If either be impaired, the system is deranged. The two governments, therefore, possessing, each, its portion of the divided sovereignty, although embracing the same territory, and operating on the same persons and frequently on the same subjects, are nevertheless separate from, and independent of, each other. From this position, believed to be incontrovertible, it necessarily results that each government must act by its own organs: from no other can it expect, command, or enforce obedience, even as to objects coming within the range of its powers. But whilst, on the one hand, neither government is left dependent upon the other, for the exercise of its proper powers, so on the other hand, neither government nor any of its departments, can act compulsively, on the other or any of its organs in their political or official capacities; with the single exception, perhaps, of the case where a state may be sued. In using the term compulsive action, I do not mean to restrain it to the idea of actual force, but to extend it to any action imposing an obligation to obey. * * * No one presumes to contend, that the state governments can operate compulsively on the general government or any of its departments, even in cases of unquestionable encroachment on state authority * * *. I can perceive nothing in the constitution which gives to the federal courts any stronger claim to prevent or redress, by any procedure acting on the state courts, an equally obvious encroachment on the federal jurisdiction. * * * It must have been foreseen that controversies would sometimes arise as to the boundaries of the two jurisdictions. Yet the constitution has provided no umpire, has erected no tribunal by which they shall be settled. * * * If the appellate

STORY, J., delivered the opinion of the court.

This is a writ of error from the Court of Appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this very cause, at February Term, 1813, to be carried into due execution. The following is the judgment of the Court of Appeals rendered on the mandate: "The court is unanimously of opinion, that the appellate power of the Supreme Court of the United States does not extend to this court, under a sound construction of the Constitution of the United States; that so much of the 25th section of the Act of Congress to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the Constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that Act; that the proceedings thereon in the Supreme Court

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power now claimed for the federal courts, is given by the Constitution, it is, unquestionably, not given in express terms, but is only deducible by inference and implication. Let us attend for a moment, to the effects and consequences of such a power.—The counsel for the appellee, claimed for the federal courts, not only the power to determine, finally and conclusively, all cases which might be carried before them in a due course of appeal, but also a right, as resulting necessarily and inevitably from the very nature of the appellate power, to determine finally and conclusively, on the extent of their own jurisdiction. * * * "Can it be believed that a power involving such consequences, which would thus place the state courts at the feet of the federal courts, and make them the unwilling instruments of their usurpation of state rights, (should such usurpation ever be attempted;) can it be believed, that such a power, if it had been intended to be given, would have been granted by implication and inference only? * * * All the purposes of the constitution of the United States will be answered by the erection of federal courts, into which any party, plaintiff or defendant, concerned in a case of federal cognizance, may carry it for adjudication; for, it was never intended to force the parties into those courts against their will. The right of the plaintiff, to have his case tried before the federal courts, is unquestionable, as he may institute his suit in the state or federal courts, at his own option; and it will be sufficient for the defendant sued in a state court, if the act of Congress shall give him the power, to remove the case at any time before judgment into the federal courts. I cannot doubt that Congress may give this power consistently with the Constitution; for, otherwise, the judicial power of the United States might be eluded at the pleasure of any plaintiff. If then the plaintiff shall elect the state jurisdiction, by bringing his suit in the state court, and the defendant shall also elect it by submitting to it, they must, from the nature of the judicial power reserved to the states, be concluded by the judgment, unless there be an appeal to some superior court, which I have endeavored to show is not the case with respect to the federal courts. If, after a judgment in a state court, in any such case, there shall be a complaint of a want of uniformity of decision, of a defective execution of the laws of the union, of a violation of rights under the Constitution, laws or treaties of the United States, or complaints of any other kind whatsoever, the answer to them all, both in relation to foreigners and others, is that the parties have elected their own tribunal; a tribunal, over which the general government has no control, and for whose decisions, therefore, it owes no responsibility." Pp. 7-16.

were *coram non judice*, in relation to this court, and that obedience to its mandate be declined by the court." * * *

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the bar.

The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The Constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the constitution, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the *States* respectively, *or to the people.*"

The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which at the present might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require.

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to the interpretation of the Constitution, so far as regards the great points in controversy.

The third article of the Constitution is that which must principally attract our attention. * * *

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the Constitution to the Supreme Court in all cases where it has not original jurisdiction; subject, however, to such exceptions and regulations as Congress may prescribe. It is, therefore, capable of embracing every case enumerated in the Constitution, which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the Constitution to the Supreme Court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the Constitution in the most general terms, and may, therefore, be exercised by Congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the Constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

As, then, by the terms of the Constitution, the appellate jurisdiction is not limited as to the Supreme Court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over State tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts.

The words are, "the judicial power (which includes appellate power) shall extend *to all cases,*" &c., and "in all other cases before mentioned the Supreme Court shall have appellate jurisdiction." It is the *case,* then, and not *the court,* that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the Constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the Constitution, be exclusive of state tribunals. How otherwise could the jurisdiction extend to *all* cases arising under the Constitution, laws, and treaties of the United States, or *to all cases* of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to *all,* but to *some,* cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the Constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the Constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this not only when the *casus foederis* should arise directly, but when it should arise, incidentally, in cases pending in state courts. This construction would abridge the jurisdiction of such court far more than has been ever contemplated in any Act of Congress.

On the other hand, if, as has been contended, a discretion be vested in Congress to establish, or not to establish, inferior courts at their own pleasure, and Congress should not establish such courts, the appellate jurisdiction of the Supreme Court would have nothing to act upon, unless it could act upon cases pending in the state courts. Under such circumstances, it must be held that the appellate power would extend to state courts; for the Constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power vested in Congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the Constitution in relation to the whole appellate power.

But it is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution, or laws of any state to the contrary notwithstanding." It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the state, but according to the Constitution, laws and treaties of the United States—"the supreme law of the land."

A moment's consideration will show us the necessity and propriety of this provision in cases where the jurisdiction of the state courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same state, and performance thereof is sought in the courts of that state; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose at the trial the defendant sets up in his defence a tender under a state law, making paper money a good tender, or a state law, impairing the obligation of such contract, which law, if binding, would defeat the suit. The Constitution of the United States has declared that no state shall make anything but gold or silver coin a tender in payment of debts, or pass a law impairing the obligation of contracts. If Congress shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the state court proceed to hear and determine it? Can a mere plea in defence be of itself a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a state court, and the defendant should allege in his defence that the crime was created by an *ex post facto* act of the state, must not the state court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated, in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue.

It must, therefore, be conceded that the Constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the Constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the state courts, which (as has been already shown) may occur; it must, therefore, extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the Constitution.

It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments, and the spirit of the Constitution. That the latter was never designed to act upon state sovereignties, but only upon the people, and that, if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake that the Constitution was not designed to operate upon states in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the Constitution does not act upon the states. The language of the Constitution is also imperative upon the states as to the performance of many duties. It is imperative upon the state legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of president and vice-president. And in these, as well as some other cases, congress have a right to revise, amend, or supersede the laws which may be passed by state legislatures. When, therefore, the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the states are, in some respects, under the control of congress, and in every case are, under the Constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the Constitution; and if they should unintentionally transcend their authority, or misconstrue the Constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of state sovereignty.

The argument urged from the possibility of the abuse of the revising power, is equally unsatisfactory. It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to engraft upon a general power a restriction which is not to be found in the terms in which it is given. From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse. In all questions of jurisdiction the inferior or [the] appellate court must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter. * * *

It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts: first, because state judges are bound by an oath to support the Constitution of the United States, and must be presumed to be men of learning and integrity; and, secondly, because Congress must have an unquestionable right to remove all cases within the scope of the judicial power from the state courts to the courts of the United States, at any time before final judgment, though not after final judgment. As to the first reason—admitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States, (which we very cheerfully admit), it does not aid the argument. It is manifest that the Constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The Constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of Congress, to have the controversies heard, tried, and determined before the national tribunals.[51] No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts. In respect to the other enumerated cases—the cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction—reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution. What, indeed, might then have been only prophecy has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

There is an additional consideration, which is entitled to great weight. The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow, that as the plaintiff may always elect the state court, the defendant may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights. To obviate this difficulty, we are referred to the power which it is admitted Congress possess to remove suits from state courts to the national courts; and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

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[51] The ground of jurisdiction in the types of cases enumerated in this sentence is the character of the parties and is independent of the subject matter of the case, while in the type of case of which the principal case, is an example the ground of jurisdiction is solely the so-called "Federal right" irrespective of the character of the parties. See U. S. Const. Art. III, § 2 and Marshall, C. J. in Cohens v. Virginia (1821) 6 Wheat. (U. S.) 264, 378, 5 L. ed. 257.

This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as Congress is not limited by the Constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied, by the legislature, to interlocutory as well as final judgments. And if the right of removal from state courts exists before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power by the Constitution does not include cases pending in state courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together. Nor, indeed, would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction.[52] It would equally trench upon the jurisdiction and independence of state tribunals.

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[52] "We may doubt, with counsel, whether such removal before issue or trial can properly be called an exercise of appellate jurisdiction. It may, we think, more properly be regarded as an indirect mode by which the federal court acquires

The remedy, too, of removal of suits would be utterly inadequate to the purposes of the Constitution, if it could act only on the parties, and not upon the state courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable; and in respect to civil suits, there would, in many cases, be rights without corresponding remedies. If state courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases, there would at once be an end of all control, and the state decisions would be paramount to the Constitution; and though in civil suits the courts of the United States might act upon the parties, yet the state courts might act in the same way; and this conflict of jurisdictions would not only jeopardize private rights, but bring into imminent peril the public interests.

On the whole, the court are of opinion, that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the Judiciary Act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the Constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one.

Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the Constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions. It is an historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact, that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important states in the Union, and that no state tribunal has ever breathed a judicial

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original jurisdiction of the causes. But it is not material whether the reasoning of the distinguished jurist [Justice Story] in this particular is correct or otherwise. The validity of such legislation has been uniformly recognized by this court since the passage of the Judiciary Act of 1789." Field, J., for the Court, in Railway Co. v. Whitton's Admr. (1871) 13 Wall. (U. S.) 270, 287, 20 L. ed. 571.

"It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted and does not create that cause." Marshall, C. J., in Marbury v. Madison (1803) 1 Cranch (U. S.) 137, 175, 176, 2 L. ed. 60.

doubt on the subject, or declined to obey the mandate of the Supreme Court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts. * * *

It is the opinion of the whole court, that the judgment of the Court of Appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the District Court, held at Winchester,[53] be, and the same is hereby affirmed. [The concurring opinion of Johnson, J., is omitted.][54]

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[53] Instead of issuing a second mandate to the Virginia Court of Appeals, the Supreme Court to avoid further friction issued its process directly to the state district court in which the suit originated. 1 Warren, The Supreme Court in United States History, (1922) p. 450. Similar situations with like action appear in Tyler v. Magwire (1873) 17 Wall. (U. S.) 253, 21 L. ed. 576 and in Williams v. Bruffy (1880) 102 U. S. 248, 26 L. ed. 135.

[54] Likewise a prosecution by a state of an alleged crime against the state is within the judicial power of the United States to review if its correct decision depends upon the interpretation of the Constitution, statutes or treaties of the United States. Included therein are any questions which the state court is called upon to decide with reference to the validity relative to the Constitution of the United States of legislative or other governmental acts state or federal. So decided upon reasoning similar to that of the principal case, in Cohens v. Virginia (1821) 6 Wheat. (U. S.) 264, 5 L. ed. 257, notwithstanding the contention of counsel that the fact that in a criminal prosecution the State is in a sense a party presented a greater difficulty. This and the principal case firmly established the Supreme Court of the United States as having judicial power to act as the final arbiter in all justiciable questions of constitutionality relative to the constitution of the United States. The method of removal for review specifically involved in these cases was that prescribed by Section 25 of the Judiciary Act of 1789, namely by writ of error after a judgment has been obtained in the highest court of the state to which the case can be carried. The present jurisdiction and procedure of the federal courts is a subject for separate study. It depends much on legislation, some of which is recent. Bunn, A Brief Survey of the Jurisdiction and Practice of the Courts of the United States is a good introduction. The student should note carefully that the constitutional range of the appellate jurisdiction of the Supreme Court is subject to restriction "under such regulations as the Congress shall make." U. S. Const., Art. III, § 2, paragraph 2. See Ex parte McCardle (1869) 7 Wall. (U. S.) 506, 19 L. ed. 264 for a striking illustration. Moreover, the whole range of original and appellate power which might constitutionally be exercised by inferior courts of the United States may not be, and has not been, given them, for Congress in exercising its power "to ordain and establish" them has so far created them with less than their constitutionally permissible jurisdiction. Thus, on the question mooted in the principal case, as to removal *before judgment* of criminal cases in State courts to Federal courts involving *any* federal question, after comment on the language of Justice Story, supra, p. 56, it has been said: "It ought, therefore, to be considered as settled that the constitutional powers of Congress to authorize the removal of criminal cases for alleged offences against state laws from state courts to the circuit [now District] courts of the United States, when there arises a federal question in them, is as ample as its power to authorize the removal of a civil case. * * * The circuit [now District] courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the state in civil cases, and there is no more difficulty in administering the state's criminal law. They are not foreign courts. The Constitution has made them courts within the states to administer the laws of

WHITNEY v. PEOPLE OF STATE OF CALIFORNIA.

1927. Supreme Court of the United States. 274 U. S. 357.

In Error to the District Court of Appeal, First Appellate District, Division 1, of the State of California.

Charlotte Anita Whitney was convicted of violating the California Criminal Syndicalism Act, and to review a judgment of the District Court of Appeal (57 Cal. App. 449, 207 P. 698), she brings error. On reargument, order (269 U. S. 530, 46 S. Ct. 22, 70 L. ed. 396) dismissing writ of error vacated and set aside, and judgment affirmed.

It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. Crowell v. Randell, 10 Pet. 368, 392; Railroad Co. v. Rock, 4 Wall. 177, 180; California Powder Works v. Davis, 151 U. S. 389, 393; Cincinnati, etc., Railway v. Slade, 216 U. S. 78, 83; Hiawassee Power Co. v. Carolina-Tenn. Co., 252 U. S. 341, 343; New York v. Kleinert, 268 U. S. 646, 650.

Here the record does not show that the defendant raised or that the State courts considered or decided any federal question whatever, excepting as appears in an order made and entered by the Court of Appeal after it had decided the case and the writ of error had issued and been returned to this Court. A certified copy of that order, brought here as an addition to the record, shows that it

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the states in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a state, in tribunals of the general government, grows entirely out of the division of powers between that government and the government of a state; that is, a division of sovereignty over certain matters. When this is understood (and it is time it should be), it will not appear strange that, even in cases of criminal prosecutions for alleged offences against a state, in which arises a defense under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding." Tennessee v. Davis (1879) 100 U. S. 257, 269, 271, 25 L. ed. 648.

The act of Congress specifically passed upon in the cited case provided for removal "before trial or final hearing" of only a narrow class of state criminal prosecutions (Rev. St. § 643) involving federal right and while other special classes have since been added, U. S. C. title 28, §§ 74, 76, the removal before judgment does not yet extend to the more common types of cases involving the constitutionality of legislation. In general such cases are only removable after judgment in the highest state court to which the case can be taken.

The complex difficulties of a federal court substituting itself as the trial court of alleged crimes against a state are pointed out in the dissenting opinion of Clifford, J. in Tennessee v. Davis, at pp. 297-299. See the tentative opinion as to how these difficulties may be met, in State v. Felts (1904) 133 Fed. 85.

was made and entered pursuant to a stipulation of the parties, approved by the court, and that it contains the following statement:

> "The question whether the California Criminal Syndicalism Act * * * and its application in this case is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property, without due process of law, and that all persons shall be accorded the equal protection of the laws, was considered and passed upon by this Court."

In Cincinnati Packet Co. v. Bay, 200 U. S. 179, 182, where it appeared that a federal question had been presented in a petition in error to the State Supreme Court in a case in which the judgment was affirmed without opinion, it was held that the certificate of that court to the effect that it had considered and necessarily decided this question, was sufficient to show its existence. And see Marvin v. Trout, 199 U. S. 212, 217, et seq.; Consolidated Turnpike v. Norfolk, etc., Railway, 228 U. S. 596, 599.

So—while the unusual course here taken to show that federal questions were raised and decided below is not to be commended—we shall give effect to the order of the Court of Appeal as would be done if the statement had been made in the opinion of that court when delivered. See [a list of cases].

And here, since it appears from the statement in the order of the Court of Appeal that the question whether the Syndicalism Act and its application in this case was repugnant to the due process and equal protection clauses of the Fourteenth Amendment, was considered and passed upon by that court—this being a Federal question constituting an appropriate ground for a review of the judgment—we conclude that this Court has acquired jurisdiction under the writ of error. The order dismissing the writ for want of jurisdiction will accordingly be set aside.

We proceed to the determination, upon the merits, of the constitutional question considered and passed upon by the Court of Appeal. Of course our review is to be confined to that question, since it does not appear, either from the order of the Court of Appeal or from the record otherwise, that any other Federal question was presented in and either expressly or necessarily decided by that court. National Bank v. Commonwealth, 9 Wall. 353, 363; Edwards v. Elliott, 21 Wall. 532, 557; Dewey v. Des Moines, 173 U. S. 193, 200; Keokuk & Hamilton Bridge Co. v. Illinois, 175 U. S. 626, 633; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 248; Haire v. Rice, 204 U. S. 291, 301; Selover, Bates & Co. v. Walsh, 226 U. S. 112, 126; Missouri Pacific Railway v. Coal Co., 256 U. S. 134, 135. It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature. Dewey v. Des Moines, supra, 199; Keokuk & Hamilton Bridge Co. v. Illinois, supra, 634. And this necessarily excludes from our consideration a question sought to be raised for the first time by the assignments of error here—not presented in or passed upon by the Court of Appeal—whether apart from the constitutionality of the Syndicalism Act, the judgment of the Superior Court, by reason of the rulings of that court on questions of pleading, evidence and the like, operated as a denial to the defendant of due process of law. See Oxley Stave Co. v. Butler County, 166 U. S. 648, 660; Capital City Dairy Co. v. Ohio, supra, 248; Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123, 134; Bass, etc., Ltd. v. Tax Commission, 266 U. S. 271, 283.

FLETCHER v. PECK.

1810. Supreme Court of the United States. 6 Cranch 87.

Error to the Circuit Court of the United States for the District of Massachusetts, in an action of covenant brought by Fletcher against Peck. * * *

Marshall, C. J. delivered the opinion of the court as follows:

The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict.

The suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the State of Georgia, the contract for which was made in the form of a bill passed by the legislature of that state.

The first count in the declaration set forth a breach in the second covenant contained in the deed. The covenant is, "that the legislature of the State of Georgia, at the time of passing the Act of sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said Act." The breach assigned is, that the legislature had no power to sell.

The plea in bar sets forth the constitution of the State of Georgia, and avers that the lands sold by the defendant to the plaintiff, were within that state. It then sets forth the granting Act, and avers the power of the legislature to sell and dispose of the premises as pointed out by the act.

To this plea the plaintiff below demurred, and the defendant joined in demurrer.

That the legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented by this demurrer, for the consideration of the court, is this, did the then constitution of the State of Georgia prohibit the legislature to dispose of the lands, which were the subject of this contract, in the manner stipulated by the contract?

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In this case the court can perceive no such opposition. In the constitution of Georgia, adopted in the year 1789, the court can perceive no restriction on the legislative power, which inhibits the passage of the Act of 1795. They cannot say that, in passing that Act, the legislature has transcended its powers, and violated the constitution.[55]

In overruling the demurrer, therefore, to the first plea, the circuit court committed no error.

The third covenant is, that all the title which the State of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor.

The second count assigns, in substance, as a breach of this covenant, that the original grantees from the State of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for, the passing of the Act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said state by virtue of such law. And that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity, &c. and so the title of the State of Georgia did not pass to the said Peck, &c.

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[55] The student should consider the phenomenon of an inferior federal court or the Supreme Court passing upon the validity of a state statute relative to the state's constitution. (That issue alone will not give a federal court jurisdiction, but it may have jurisdiction of the case because of the character of the parties, or because there is a "federal question" in the case.) Is it assumed in the principal case that even without express grant it is a function of every court in all circumstances to refuse application to a statute unauthorized or in conflict with a constitution under which it is enacted? Compare with this part of the principal case those which come to the Supreme Court through writs of error or certiorari to judgments of state courts of last resort where for instance the validity of a statute has been put in issue on a claim that it violates both the state and the national constitution. If the state court of last resort has held that the statute does not violate the state constitution the Supreme Court of the United States will not consider that question.

Does it help to say that in several situations a federal court is substituted in the place of a state court to decide an issue in which the law of a state is the whole or a part of the law of the case? Suppose the law of New York is the proper law in a case pending in an English court and a New York statute is proved applicable but challenged by the contention that it conflicts either with the constitution of New York or that of the United States, though no American court has yet passed on that question, will the English court consider it?

The plea to this count, after protesting that the promises it alleges were not made, avers, that until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf, nor the said Peck, nor any of the mesne vendors between the said Greenleaf and Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or either of them, to any of the members of the legislature of the State of Georgia.

To this plea the plaintiff demurred generally, and the defendant joined in the demurrer.

That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the state itself, to vacate a contract thus formed, and to annul rights acquired under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

If the majority of the legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned.

Whatever difficulties this subject might present when viewed under aspects of which it may be susceptible, this court can perceive none in the particular pleadings now under consideration.

This is not a bill brought by the State of Georgia to annul the contract, nor does it appear to the court, by this count, that the state of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this. One individual who holds lands in the State of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favor of the law which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.[56]

The Circuit Court, therefore, did right in overruling this demurrer.

The fourth covenant in the deed is, that the title to the premises has been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the state of Georgia.

The third count recites the undue means practised on certain members of the legislature, as stated in the second count, and then alleges that, in consequence of these practices and of other causes, a subsequent legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the state to the lands it contained. The count proceeds to recite at large this rescinding act, and concludes with averring that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void. * * * [The court held that this rescinding Act could not operate (at least not against Peck who was a purchaser for value without notice of the fraud practiced in procuring the original grant) without violating the prohibition of the United States Constitution that, "no state shall * * * pass any * * * law impairing the obligation of contracts", Article I Section 10. That it is the function of a federal court to refuse effect to a state statute in these circumstances[57] is not reasoned about unless it be in the following passages:] She [Georgia] is a part of a large empire; she is a member of the American union; and that union has a Constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. * * *

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[56] "If the Court had acceded to the contention that a state statute could be invalidated by a federal tribunal [or any other court], on allegations of fraud or bribery in its passage, a wide door would have been opened for the attack upon state legislation in countless instances in subsequent years." 1 Warren, The Supreme Court in United States History (1922), p. 397, and see the same pp. 392-399 for the great contemporary significance of this case.

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each state.

No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained.

[The reasons for holding that the rescinding act conflicted with Article I, Section 10 will be considered in a later chapter.]

PEOPLE v. WESTERN UNION TELEGRAPH CO.

1921. Supreme Court of Colorado. 70 Colo. 90.

In this cause an information was filed in the trial court against the defendants, charging them with a violation of chapter 5, Session Laws of 1911, known as "The Anti-Coercion Act," in that as a condition to the continued employment of one Holson they required of him a contract that he sever his connection with the Commercial Telegraphers' Union of America, and upon his refusal to comply discharged him. To this information defendants demurred on the ground that "the Anti-Coercion Act" was unconstitutional under the Bill of Rights of the State of Colorado and the Fourteenth Amendment to the federal Constitution. To the consideration of this issue the people objected on the ground that such consideration was prohibited by amended sec. 1, art. VI, of the state Constitution.

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[57] This is the first case in which the Supreme Court did so. For earlier instances of its being done by inferior federal courts, see ante, pp. 33-35.

The objection was overruled, "the Anti-Coercion Act" held in conflict with the federal Constitution, and final judgment entered discharging defendants and releasing their bondsmen. To review that judgment the people bring this cause here. * * *

Burke, J., after stating the facts as above.

Three questions are here presented: The right of the trial court to hear and determine the federal constitutional question; the correctness of its judgment; and the date when our decision becomes effective. * * *

That this [Anti-Coercion] act is a plain violation of the federal Constitution has been clearly determined by the Supreme Court of the United States. Coppage v. Kansas, 236 U. S. 1. In that case a decision of the supreme court of Kansas was reversed, and a statute of that state, in all material particulars identical with the one here under consideration, was declared a violation of the "due process" clause of the United States Constitution. Having determined that this cause was correctly decided below, it may be said that the constitutionality of the "Anti-Coercion Act" has now, at least, been passed upon by a court having jurisdiction, and it is therefore unnecessary to consider the objection of the people to the hearing on the demurrer. If so the same situation would be presented had we held the act constitutional. Since the passage of the amendment to sec. 1, art. VI, we have assumed the correctness of that rule. However, there has arisen such a disparity of opinion in our trial courts concerning their power to determine constitutional questions, and such a resulting confusion among members of the bar concerning the practice, that it now becomes our imperative duty, under sec. 2, art. VI, of our state Constitution, which vests in the supreme court "a general superintending control over all inferior courts," to construe sec. 1, art. VI, with reference to the power of such courts where federal constitutional questions are involved.

The jurisdiction of the district court in the premises, prior to January 22, 1913, is undisputed, and is too well settled in this country to admit of argument or require the citation of authority. On that date (if ever) said section 1 became effective. It specifies the courts in which the judicial power of the state shall be vested, and then provides:

"None of said courts except the Supreme Court shall have any power to declare or adjudicate any law of this state or any city charter or amendment thereto adopted by the people in cities acting under Article XX hereof as in violation of the constitution of this state or of the United States." * * * ["Provided that before such decision shall be binding it shall be subject to approval or disapproval by the people. * * * All such laws or parts thereof submitted as herein provided when approved by a majority of the votes cast thereon at such election shall be and become the law of this state notwithstanding the decision of the Supreme Court."

* * *

"All such charters, or amendments thereto, so submitted as herein provided, when approved by a majority of the votes cast thereon in said city or city and county, shall be and become the law of this state and of said city or city and county notwithstanding the decision of the Supreme Court."]

Paragraph 2, art. VI, of the Constitution of the United States provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." * * *

It is said that, notwithstanding the provision of the federal Constitution, above cited, the trial judge was precluded by amended sec. 1 of article VI of the state Constitution from passing upon the question raised by the demurrer. The answer is that the trial judge was bound by the mandate of the federal Constitution to apply that instrument upon all proper occasions and to hold it to be the supreme law of the land "anything in the constitution or laws of any state to the contrary notwithstanding." It is said that the judge's oath to support the Constitution of Colorado bound him to give effect to that clause thereof prohibiting him from declaring a legislative act contrary to the federal Constitution. The answer is that any section of the state constitution which is contrary to the federal Constitution is, for that reason and to that extent, null and void. It is no part of the state constitution, and no legerdemain of logic can cover it with the sanctity of a judge's oath.

The reasoning of Chief Justice Marshall in Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60, 1 U. S. Decisions, 368, is as applicable to a state constitutional provision which violates the federal Constitution as it is to a federal statute which violates that instrument; and his reasoning from the standpoint of the judicial oath as unanswerable here as there. It follows that the trial court in the instant case had the right, and it was its bounden duty, to determine the federal constitutional question raised by the demurrer. * * *

There is no sovereignty in a state to set at naught the Constitution of the Union, and no power in its people to command their courts to do so. That issue was finally settled at Appomattox. When a federal constitutional question is raised in any of the trial courts of Colorado the right is given, and the duty is imposed upon those courts, by that instrument itself, to adjudicate and determine it. That right so given can neither be taken away nor that duty abrogated by the state of Colorado, by constitutional provision or otherwise, and any attempt to do so is null and void. Such pretended constitutional inhibition is no part of the Constitution of the state of Colorado, and the judge's oath binding him to the support and enforcement of that instrument has no relation to such void provisions. The question may be brought by writ of error to this court for review, and from our judgment the cause may be taken for final determination to the Supreme Court of the United States itself. It cannot be reviewed by popular vote of the citizens of Colorado, or one of its municipalities, and any pretended constitutional provision of this state, assuming to provide such method of review is null and void. * * *

It is to be observed that the validity of said amended sec. 1, art. VI, so far as it prohibits trial courts from holding statutes and city charters to be in violation of the state Constitution, and assumes to provide a method of recalling decisions of the supreme court so holding, is not herein determined.[58] * * * The judgment is accordingly affirmed.

Mr. Chief Justice Scott not participating.

WILSON v. CITY OF FARGO.

1921. Supreme Court of North Dakota. 48 N. Dak. 447.

[Article 25 of the amendments to the constitution of North Dakota amended section 89 thereof (see Laws 1919, p. 503) so that amended it reads as follows:

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[58] In People v. Max, 70 Colo. 100, 198 Pac. 150, decided the same day, the court considered these questions and held that these amendments to the state constitution were void also in their attempt to take away the previous power of state trial courts to pass upon the validity of state statutes relative to the state constitution, (1) because these new provisions of the constitution dealt with federal and state constitutionality of state statutes inseparably and their invalidity as to the former caused them to be invalid as a whole. [The student should compare other cases of "separability" and "inseparability"]; (2) that to deprive a trial court in a criminal prosecution of power to consider a defense that a statute which the defendant was accused of violating was inoperative

"The Supreme Court shall consist of five judges, a majority of whom shall be necessary to form a quorum or pronounce a decision * * * provided, however, that in no case shall any legislative enactment or law of the State of North Dakota be declared unconstitutional unless at least four of the judges shall so decide."

This is an appeal from the dismissal of a suit to enjoin holding an election on the ground that the state statute which in terms provided for the election had not been enacted in conformity with (1) section 58 of the state constitution: No bill shall be so altered on its passage through either house as to change its original purpose, and (2) section 61: No bill shall embrace more than one subject, which shall be expressed in its title.]

BIRDZELL, J. (Speaking for the majority of the court). Immediately after the submission of this case the members of the court, recognizing the practical necessity for an early decision, carefully considered the questions involved, and within a few days after the arguments a tentative opinion was prepared by the writer of this opinion. The controlling principles therein stated were promptly agreed to by a majority of the judges. Later Mr. Chief Justice Grace and Mr. Justice Robinson filed opinions upholding the constitutionality of the act in question. Under section 89 of the constitution as amended, and under the rule of decision in such cases announced by this court in Daly v. Beery, 45 N. Dak. 287, 178 N. W. 104, the votes of the two members control the decision. * * * [In the cited case the same judge said:

"There is no way to give effect to this constitutional provision unless the members of this court respect it as a part of the fundamental law by directing a judgment to be entered in individual cases which may not conform to their views as to what the judgment should be."][59]

ROBINSON, J., (concurring with GRACE, C. J.) * * *

That amendment [25] is a rebuke to the courts for having gone too far in declaring statutes to be void because of defects in the title or procedure. * * * Manifestly it is in no way seemly or proper for a justice of the peace, a trial judge or even a majority of

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because violative of the state constitution would cause the trial to be lacking in that "due process of law" required by Amendment XIV of the federal Constitution, *Query*; (3) that the provision for popular recall of the state Supreme Court's decisions in like cases would also violate Amendment XIV, *Query*.

[59] *Cf.* De Witt v. State ex rel. Crabbe (1923) 108 Ohio St. 513, 533, 535, 141 N. E. 551, where five of seven judges thought plaintiff should not get judgment for a heavy penalty because in their opinion the statute which was the sole authority for allowing it violated the equal protection and due process clauses of the state and federal Constitutions, but that he was entitled to it was declared to be the law of the case because the other two judges held the statute valid (Article IV, § 2 of the Ohio Constitution: No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void).

the Supreme Court to override and declare void a statute passed by the unanimous vote of the legislature, and pursuant to a great popular demand, because forsooth of a mere procedural defect in the passage of the bill. * * *[60]

Section 2.—When and How the Function Will Be Exercised.

STATE v. FIRST STATE BANK OF JUD.

1925. Supreme Court of North Dakota. 52 N. Dak. 231.

Christianson, J. * * * The sole question presented and argued on the appeal is, "Is chapter 137, Laws 1923, unconstitutional?" * * * In other words, the question for the court to determine is not merely whether the statute is in conflict with the Constitution; but whether it is within the limits of reason for the Legislature to give to the Constitution the construction it has given to it in enacting the statute. 1 Willoughby, Const. Law p. 21.

In State ex rel. Linde v. Taylor, 33 N. Dak. 76, 85, 86, this court said:

"Every reasonable presumption is in favor of the constitutionality of a statute enacted by the legislature. * * * This presumption is conclusive, unless it is clearly shown that the enactment is prohibited by the Constitution of the state or of the United States. * * * The only test of the validity of an act regularly passed by a state legislature is whether it violates any of the express or implied restrictions of the state or federal constitutions.[1] * * * And he who alleges a statute to be unconstitutional must be able to point to the particular constitutional provision violated. * * *"

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[60] "Sections 58 and 61 of the constitution run along similar lines. Both were designed to prevent certain pernicious practices which experience had taught would spring up where such provisions did not exist. They were placed in the Constitution to insure better legislation.

"In considering a constitutional provision similar to section 61, the Supreme Court of Michigan, speaking through the great jurist, Cooley, said: 'The history and purpose of this constitutional provision are too well understood to require any elucidation at our hands. The practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the state. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly satisfied of its design when required to pass upon it.' People v. Mahaney, 13 Mich. 481." Christianson, C. J., in Daly v. Beery (1920) 45 N. Dak. 287, 178 N. W. 104, 114.

In considering whether the legislature transcended its constitutional powers in the enactment of a statute it is, also, well to bear in mind the fundamental difference between the Constitution of the United States and the constitution of the state of North Dakota, as regards the legislative powers which may be exercised under them.

Cooley (Cooley, Const. Lim. 7th ed. 242) said:

"We look in the Constitution of the United States for grants of legislative power, but in the constitution of the state to ascertain if any limitations have been imposed upon the complete power with which the legislative department of the state was vested in its creation. * * *

Under the Constitution of this state "all governmental power is vested in the legislature, except such as is granted to the other departments of the government, or expressly withheld from the legislature by constitutional restrictions." State ex rel. Standish v. Boucher, 3 N. Dak. 389, 396; O'Laughlin v. Carlson, 30 N. Dak. 213; State ex rel. Linde v. Taylor, supra. * * *

But, says the appellant, the legislature, by the act in question here, purported to confer upon the Supreme Court original jurisdiction of all actions for the liquidation of insolvent banking corporations; and such actions are not within the original jurisdiction of the Supreme Court as that jurisdiction is granted and defined by the constitution. A sufficient answer to the contention thus advanced is that the provisions of said chapter 137, which authorize and request the Supreme Court to assume original jurisdiction of actions for the liquidation of insolvent banking corporations, have not been put into force. The Supreme Court has not assumed jurisdiction of such actions. The jurisdiction of such actions has been assumed by the district court of Burleigh County in conformity with section 18 of said chapter 137. The instant case is pending in that court, and the order before us was entered by that court, after full hearing had therein; and such order is brought before this court for review under the provisions of said chapter 137, authorizing the review of orders of the district court in such cases. In these circumstances appellant is not concerned with the validity of the provisions of chapter 137, authorizing the Supreme Court to assume original jurisdiction (Avent v. United States, 266 U. S. 127), and cannot be heard to question their validity. "A litigant can be heard to question the validity of a statute only when, and in so far as, it is applied to his disadvantage." State ex rel. Hughes v. Milhollan, 50 N. Dak. 184; Rindge Co. v. Los Angeles County, 262 U. S. 700; Avent v. United States, supra. * * *

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[1] In Betholf v. O'Reilly (1878), 74 N. Y. 509, 514, 516, 30 Am. Rep. 323, Andrews, J. (for the court), said: "The question whether the act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. If an act can stand when brought to the test of the Constitution the question of its validity is at an end, and neither the executive or judicial department of the government can refuse to recognize or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the *dicta* of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities. Indeed, under the broad and liberal interpretation now given to constitutional guaranties, there can be no violation of fundamental rights by legislation which will not fall within the express or implied prohibition and restraints of the Constitution, and it is unnecessary to seek for principles outside of the Constitution, under which such legislation may be condemned. * * *

"Admitting, as we do, the soundness of this view, and fully approving it, we come back to the proposition that no law can be pronounced invalid, for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the State, it is not justified by public necessity, or designed to promote the public welfare. We repeat, if it violates no constitutional provision, it is valid and must be obeyed. The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, is to be found in a change by the people of their representatives, according to the methods provided by the Constitution."

MUSKRAT v. UNITED STATES.

1911. Supreme Court of the United States. 219 U. S. 346.

MR. JUSTICE DAY delivered the opinion of the court.

These cases arise under an act of Congress undertaking to confer jurisdiction upon the Court of Claims, and upon this court on appeal, to determine the validity of certain acts of Congress hereinafter referred to. * * *

These proceedings were begun under the supposed authority of an act of Congress passed March 1, 1907 (a part of the Indian appropriation bill), c. 2285, 34 Stat. 1015, 1028. As that legislation is important in this connection so much of the act as authorized the beginning of these suits is here inserted in full:

"That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the act of July first, nineteen hundred and two, entitled 'An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of townsites therein, and for other purposes,' and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two.

"And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.

"The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and, for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney General, who is hereby charged with the defense of said suits.

"Upon the rendition of final judgment by the Court of Claims or the Supreme Court of the United States denying the validity of any portion of the said acts authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two."

This act is the authority for the maintenance of these two suits.

The first question in these cases, as in others, involves the jurisdiction of this court to entertain the proceeding, and that depends upon whether the jurisdiction conferred is within the power of Congress, having in view the limitations of the judicial power as established by the Constitution of the United States.

Section 1 of Article III of the Constitution provides:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2 of the same Article provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party; to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects."

* * * It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and with the aid of appropriate legislation upon the inferior courts of the United States. * * *

As we have already seen by the express terms of the Constitution, the exercise of the judicial power is limited to "cases" and "controversies." Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred. * * *

The power being thus limited to require an application of the judicial power to cases and controversies, is the act which undertook to authorize the present suits to determine the constitutional validity of certain legislation within the constitutional authority of the court? This inquiry in the case before us includes the broader question, When may this court, in the exercise of the judicial power, pass upon the constitutional validity of an act of Congress? That question has been settled from the early history of the court, the leading case on the subject being *Marbury* v. *Madison, supra.*

In that case Chief Justice Marshall, who spoke for the court, was careful to point out that the right to declare an act of Congress unconstitutional could only be exercised when a proper case between opposing parties was submitted for judicial determination; that there was no general veto power in the court upon the legislation of Congress; and that the authority to declare an act unconstitutional sprung from the requirement that the court, in administering the law and pronouncing judgment between the parties to a case, and choosing between the requirements of the fundamental law established by the people and embodied in the Constitution and an act of the agents of the people, acting under authority of the Constitution, should enforce the Constitution as the supreme law of the land. * * *

See also in this connection Chicago & Grand Trunk Railway Company v. Wellman, 143 U. S. 339. On page 345 of the opinion in that case the result of the previous decisions of this court was summarized in these apposite words by Mr. Justice Brewer, who spoke for the court:

"Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."

Applying the principles thus long settled by the decisions of this court to the act of Congress undertaking to confer jurisdiction in this case, we find that William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July 1, 1902, and David Muskrat and J. Henry Dick, for themselves and representatives of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, are authorized and empowered to institute suits in the Court of Claims to determine the validity of acts of Congress passed since the act of July 1, 1902, in so far as the same attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, and provided for in the said act of July 1, 1902.

The jurisdiction was given for that purpose first to the Court of Claims and then upon appeal to this court. That is, the object and purpose of the suit is wholly comprised in the determination of the constitutional validity of certain acts of Congress; and furthermore, in the last paragraph of the section, should a judgment be rendered in the Court of Claims or this court, denying the constitutional validity of such acts, then the amount of compensation to be paid to attorneys employed for the purpose of testing the constitutionality of the law is to be paid out of funds in the Treasury of the United States belonging to the beneficiaries, the act having previously provided that the United States should be made a party and the Attorney General be charged with the defense of the suits.

It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution.

Nor can it make any difference that the petitioners had brought suits in the Supreme Court of the District of Columbia to enjoin the Secretary of the Interior from carrying into effect the legislation subsequent to the act of July 1, 1902, which suits were pending when the jurisdictional act here involved was passed. The latter act must depend upon its own terms and be judged by the authority which it undertakes to confer. If such actions as are here attempted, to determine the validity of legislation, are sustained, the result will be that this court, instead of keeping within the limits of judicial power and deciding cases or controversies arising between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning.[2]

The questions involved in this proceeding as to the validity of the legislation may arise in suits between individuals, and when they do and are properly brought before this court for consideration they, of course, must be determined in the exercise of its judicial functions. For the reasons we have stated, we are constrained to hold that these actions present no justiciable controversy within the authority of the court, acting within the limitations of the Constitution under which it was created. As Congress, in passing this act as a part of the plan involved, evidently intended to provide a review of the judgment of the Court of Claims in this court, as the constitutionality of important legislation is concerned, we think the act cannot be held to intend to confer jurisdiction on that court separately considered.[3] Connolly v. Union Sewer Pipe Co., 184

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[2] ADVISORY OPINIONS. The constitutions of a few states require either the judges of their supreme courts or "the Supreme Court" (Colorado) to give advisory opinions on questions of law, in Massachusetts at the request of "each branch of the legislature, as well as the governor and council" (construed not to mean the governor alone, 214 Mass. 602), in New Hampshire similar provision, in Maine at the request of the "governor, council, senate, or house of representatives," in Rhode Island, Colorado and formerly Missouri at the request of the governor or either house, and in Florida and South Dakota at the request of the governor. Commonly these questions are as to the validity of legislation or proposed legislation. Such opinions are not regarded as binding either upon the legislature or executive advised nor (Colorado doubtful) upon the judges who give the advice should the same question come before them in a litigated case. This institution has as a fore-runner the practice in England from early times whereby the king and the House of Lords in their legislative capacity required the opinions of the judges. In the absence of an express requirement of their state constitution American judges usually but not invariably have declined to give such opinions following a precedent set by Chief Justice Jay and the associate justices of the United States Supreme Court in 1793 when President Washington requested their opinion. The function has been regarded as non-judicial and where a constitution makes no provision it has been held that a statute is invalid which attempts to impose it upon the judges. See the treatise on the whole subject by Albert R. Ellingwood, (1918) Departmental Cooperation in State Government. See also Thayer's Legal Essays (1908) pp. 42-59, and 4 Mass. Law Quart. 342-352, 6 Am. & Eng. Encyc. of Law (2d ed.) 1065-1078. For adverse comment on requiring advisory opinions, see 2 Maine Law Rev. 1-5, 6 ib. 28-39, 11 ib. 15-18.

[3] Of the Court of Claims it has been said that it is not one of the courts recognized in the Constitution and that therefore the inferred restriction that the courts there recognized may exercise only judicial functions does not apply to it. Gordon v. United States (1864) 117 U. S. (appendix) 697, 698, 699. More justifiably it has been held that the courts local to the District of Columbia are not included in that part of the federal judicial system in which is vested the "judicial power of the United States" dealt with in Const. Art. III, but have been created under the power given Congress "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia (Const. Art. I, No. 8, cl. 17). In the exercise of this power Congress may create courts for the District and can confer upon them both judicial and non-judicial functions, e. g. advisory, administrative or legislative. Keller v. Potomac Electric Power Co. (1923) 261 U. S. 428, 67 L. ed. 731.

U. S. 540, 565, 46 L. ed. 679, 22 Sup. Ct. 431; Employers' Liability Cases, 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. 141.

The judgments will be reversed and the cases remanded to the Court of Claims, with directions to dismiss the petitions for want of jurisdiction.

FAIRCHILD v. HUGHES, AS SECRETARY OF STATE OF THE UNITED STATES ET AL.

1922. Supreme Court of the United States. 258 U. S. 126.

Mr. Justice Brandeis delivered the opinion of the court.

On July 7, 1920, Charles S. Fairchild of New York brought this suit in the Supreme Court of the District of Columbia against the Secretary of State and the Attorney General. The prayers of the bill are that "the so-called Suffrage Amendment [the Nineteenth to the Federal Constitution] be declared unconstitutional and void"; that the Secretary of State be restrained from issuing any proclamation declaring that it has been ratified; and that the Attorney General be restrained from enforcing it. There is also a prayer for general relief and for an interlocutory injunction. The plaintiff, and others on whose behalf he sues, are citizens of the United States, taxpayers and members of the American Constitutional League, a voluntary association which describes itself as engaged in diffusing "knowledge as to the fundamental principles of the American Constitution, and especially that which gives to each State the right to determine for itself the question as to who should exercise the elective franchise therein."

The claim to relief was rested upon the following allegations: The legislatures of thirty-four of the States have passed resolutions purporting to ratify the Suffrage Amendment; and from one other State the Secretary of State of the United States has received a certificate to that effect purporting to come from the proper officer. The proposed Amendment cannot, for reasons stated, be made a part of the Constitution through ratification by the legislatures; and there are also specific reasons why the resolutions already adopted in several of the States are inoperative. But the Secretary has declared that he is without power to examine into the validity of alleged acts of ratification, and that, upon receiving from one additional State the customary certificate, he will issue a proclamation declaring that the Suffrage Amendment has been adopted. Furthermore, "a force bill" has been introduced in the Senate which provides fine and imprisonment for any person who refuses to allow women to vote; and if the bill is enacted, the Attorney General will be required to enforce its provisions. The threatened proclamation of the adoption of the Amendment would not be conclusive of its validity, but it would lead election officers to permit women to vote in States whose constitutions limit suffrage to men. This would prevent ascertainment of the wishes of the legally qualified voters, and elections, state and federal, would be void. Free citizens would be deprived of their right to have such elections duly held; the effectiveness of their votes would be diminished; and election expenses would be nearly doubled. Thus irremediable mischief would result. [The Supreme Court of the District decreed a dismissal, the Court of Appeals of the District affirmed the decree and the plaintiff appealed to this court.]

Plaintiff's alleged interest in the question submitted is not such as to afford a basis for this proceeding. It is frankly a proceeding to have the Nineteenth Amendment declared void. In form it is a bill in equity; but it is not a case within the meaning of § 2 of Article III of the Constitution, which confers judicial power on the federal courts, for no claim of plaintiff is "brought before the court[s] for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." See In re Pacific Railway Commission, 32 Fed. 241, 255, quoted in Muskrat v. United States, 219 U. S. 346, 356. The alleged wrongful act of the Secretary of State, said to be threatening, is the issuing of a proclamation which plaintiff asserts will be vain but will mislead election officers. The alleged wrongful act of the Attorney General, said to be threatening, is the enforcement, as against election officers, of the penalties to be imposed by a contemplated act of Congress which plaintiff asserts would be unconstitutional. But plaintiff is not an election officer; and the State of New York, of which he is a citizen, had previously amended its own constitution so as to grant the suffrage to women and had ratified this Amendment. Plaintiff has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit to secure by indirection a determination whether a statute if passed, or a constitutional amendment about to be adopted, will be valid. Compare Giles v. Harris, 189 U. S. 475; Tyler v. Judges of Court of Registration, 179 U. S. 405.

Decree affirmed.

EX PARTE YOUNG.

1908. Supreme Court of the United States. 209 U. S. 123.

[The case turned upon the question whether the United States Circuit (now District) Court had jurisdiction of a bill to enjoin the State Attorney General and the Railroad and Warehouse Commission, of the state of Minnesota, from enforcing a state statute which provided for the regulation of railroad rates in a manner alleged to be unconstitutional. The bill was filed the day before the legislation was to take effect. The decision of the Circuit Court that it had jurisdiction was affirmed in the following opinion:]

Mr. Justice Peckham delivered the opinion of the court: * * * This inquiry necessitates an examination of the most material and important objection made to the jurisdiction of the Circuit Court, the objection being that the suit is, in effect, one against the State of Minnesota, and that the injunction issued against the Attorney General illegally prohibits state action, either criminal or civil, to enforce obedience to the statutes of the state. * * * The Eleventh Amendment prohibits the commencement or prosecution of any suit against one of the United States by citizens of another state or citizens or subjects of any foreign State. * * * It applies to a suit brought against a state by one of its own citizens as well as to a suit brought by a citizen of another state. Hans v. Louisiana, 134 U. S. 1. * * * Osborn v. United States Bank (1824), 9 Wheat. 738, 846, 857, * * * held that the Amendment applied only to those suits in which the state was a party on the record. In the subsequent case of Governor of Georgia v. Madrazo (1828), 1 Pet. 110, 122, 123, that holding was somewhat enlarged, and Chief Justice Marshall, delivering the opinion of the court, while citing Osborn v. United States Bank, supra, said that where the claim was made, as in the case then before the court, against the Governor of Georgia as governor, and the demand was made upon him, not personally, but officially (for moneys in the treasury of the state and for slaves in possession of the state government), the state might be considered as the party on the record (page 123), and therefore the suit could not be maintained. * * *

The cases upon the subject were reviewed, and it was held, In re Ayers, 123 U. S. 443, that a bill in equity brought against officers of a state, who, as individuals, have no personal interest in the subject-matter of the suit, and defend only as representing the state, where the relief prayed for, if done, would constitute a performance by the state of the alleged contract of the state, was a suit against the state (page 504), following in this respect Hagood v. Southern, supra. [117 U. S. 52, 67.]

A suit of such a nature was simply an attempt to make the state itself, through its officers, perform its alleged contract, by directing those officers to do acts which constituted such performance. The state alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the state.

On the other hand, United States v. Lee, 106 U. S. 196, determined that an individual in possession of real estate under the Government of the United States, which claimed to be its owner, was, nevertheless, properly sued by the plaintiff, as owner, to recover possession, and such suit was not one against the United States, although the individual in possession justified such possession under its authority.[4] See also Tindal v. Wesley, 167 U. S. 204, to the same effect. * * *

The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the federal Constitution, may be enjoined by a Federal court of equity from such action. * * *

In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed (154 U. S. 362, 366, § 19 of the act), but that may possibly make the duty more clear; if it otherwise exist it is equally efficacious. The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists. * * *

It is also argued that the only proceeding which the Attorney General could take to enforce the statute, so far as his office is concerned, was one by mandamus, which would be commenced by the state in its sovereign and governmental character, and that the right to bring such action is a necessary attribute of a sovereign government. It is contended that the complainants do not complain and they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer, to whose discretion is confided the use of the name of the State of Minnesota so far as litigation is concerned, and that when or how he shall use it is a matter resting in his discretion and cannot be controlled by any court.

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[4] Where state officers acting under state authority have erected a dyke on state land and caused injury to a private owner's land in a manner violating the federal Constitution, a federal court has jurisdiction at the latter's suit to enjoin the officers against further acts of maintenance or reconstruction of dyke, but it seems that to authorize a decree to remove the dyke from the state land the state would have to be made a party and could not be without its consent. Hopkins v. Clemson Agricultural College (1911) 221 U. S. 636, 55 L. ed. 890, 35 L. R. A. (N. S.) 243.

The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the state to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. See In re Ayres, supra, page 507. It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity. If the question of unconstitutionality with reference, at least, to the federal Constitution be first raised in a federal court that court, as we think is shown by the authorities cited hereafter, has the right to decide it to the exclusion of all other courts. * * *

It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity, therefore, has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. * * * Another obstacle to making the test on the part of the company might be to find an agent or employee who would disobey the law, with a possible fine and imprisonment staring him in the face if the act should be held valid. * * * If, however, one should be found and the prosecutor should elect to proceed against him, the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter. * * *

To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take. Over eleven thousand millions of dollars, it is estimated, are invested in railroad property, owned by many thousands of people who are scattered over the whole country from ocean to ocean, and they are entitled to equal protection from the laws and from the courts, with the owners of all other kinds of property, no more, no less. The courts having jurisdiction, federal or state, should at all times be open to them as well as to others, for the purpose of protecting their property and their legal rights.

[HARLAN, J., delivered a dissenting opinion.][5]

SCHMITT v. F. W. COOK BREWING CO.

1918. Supreme Court of Indiana. 187 Ind. 623.

TOWNSEND, J.—Appellee brewing company obtained a permanent injunction against appellant superintendent of the police of the city of Evansville, preventing the enforcement of the Prohibition Law, Acts 1917, p. 15. Appellant's demurrer to the complaint was overruled. He refused to plead further and judgment was rendered.

No question is raised as to the jurisdiction of a court of equity and, owing to the alleged property rights and to avoid a multiplicity of actions, the cause will be considered.

The sole question presented is the constitutionality of the act. * * * [The court then considered that question.]

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[5] A bill was filed in the United States Circuit Court for the Eastern District of Arkansas by a telegraph company asking that the prosecuting attorneys of the seventeen judicial circuits of the state of Arkansas be enjoined from instituting proceedings to enforce against the company the penal provisions of an Arkansas statute alleged to be in violation of the national Constitution. The court decreed dismissal of the bill, asserting that this was a suit against the state and therefore not within the court's jurisdiction. On the authority of the principal case the Supreme Court reversed the decree. Western Union Tel. Co. v. Andrews et al. (1910) 216 U. S. 165, 54 L. ed. 430.

UNITED THEATRE TICKET OFFICES, INC. v. BANTON.

1927. Supreme Court of the United States. 273 U. S. 418.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellant is engaged in the business of reselling tickets of admission to theaters and other places of entertainment in the city of New York. It employs a large number of salesmen, messenger boys and others. Its expenses are very large, and its sales average approximately 300,000 tickets per annum. These tickets are obtained either from the box office of the theater or from other brokers and distributors. It is duly licensed under section 168, c. 590, Laws N. Y. 1922, and has given a bond under section 169 of that chapter in the penal sum of $1,000, with sureties, conditioned, among other things, that it will not be guilty of any fraud or extortion. See Weller v. New York, 268 U. S. 319, 322.

Section 167 of chapter 590 declares that the price of or charge for admission to theaters, etc., is a matter affected with a public interest and subject to state supervision, in order to safeguard the public against fraud, extortion, exorbitant rates, and similar abuses. Section 172 forbids the resale of any ticket or other evidence of the right of entry to any theater, etc., "at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry," such printing being required by that section. * * *

This suit was brought to enjoin respondents from proceeding either at law or in equity to enforce the last-named section, and from revoking plaintiff's license, enforcing by suit or otherwise the penalty of the bond or prosecuting criminally appellant or any of its officers or agents for reselling or attempting to resell any ticket or other evidence of the right of entry to any theater, etc., at a price in excess of 50 cents in advance of the printed price. The bill alleges threats on the part of appellees to enforce the statute against appellant, to forfeit its license, enforce the penalty of its bond and institute criminal prosecutions against appellant, its officers and agents. It is further alleged that the terms of the statute are so drastic and the penalties for its violation so great (imprisonment for one year or a fine of $250 or both) that appellant may not resell any ticket or evidence of the right of entry at a price beyond that fixed by the statute even for the purpose of testing the validity of the law, and that appellant will be compelled to submit to the statute whether valid or invalid unless its suit be entertained, and thereby will be deprived of its property and liberty without due process of law and denied the equal protection of the law, in contravention of the Fourteenth Amendment to the federal Constitution. Following the rule frequently announced by this court, that "equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property," we sustain the jurisdiction of the District Court. Packard v. Banton, 264 U. S. 140, 143, and cases there cited. [The court proceeded to consider the alleged unconstitutionality of the statute and held it invalid on the ground that it violated the Fourteenth Amendment.][6]

TRUAX AND THE ATTORNEY GENERAL OF THE STATE OF ARIZONA v. RAICH.

1915. Supreme Court of the United States. 239 U. S. 33.

[Bill for an injunction in the United States district Court for the District of Arizona. Decree granted and defendants appeal.] * * *

MR. JUSTICE HUGHES delivered the opinion of the court.

Under the initiative provision of the constitution of Arizona (Art. IV, § 1), there was adopted the following measure which was proclaimed by the Governor as a law of the state on December 14, 1914: [The enactment required every employer of more than five workers at any one time in Arizona to employ not less than 80% who were qualified electors or native-born citizens of the United States. Violation was declared a misdemeanor subject to a fine of not less than $100 and imprisonment for not less than 30 days.]

* * *

Mike Raich (the appellee), a native of Austria, and an inhabitant of the state of Arizona but not a qualified elector, was employed as a cook by the appellant William Truax, Sr., in his restaurant in the City of Bisbee, Cochise County. Truax had nine employes, of whom seven were neither "native-born citizens" of the United States nor qualified electors. After the election at which the act was passed Raich was informed by his employer that when the law was proclaimed, and solely by reason of its requirements and because of the fear of the penalties that would be incurred in case of its violation, he would be discharged. Thereupon, on December 15, 1914, Raich filed this bill in the District Court of the United States for the District of Arizona, asserting among other things that the act denied to him the equal protection of the laws and hence was contrary to the Fourteenth Amendment of the Constitution of the United States. Wiley E. Jones, the attorney general of the state, and W. G. Gilmore, the county attorney of Cochise County, were made defendants in addition to the employer Truax, upon the allegation that these officers would prosecute the employer unless he complied with its terms and that in order to avoid such a prosecution the employer was about to discharge the complainant. Averring that there was no adequate remedy at law, the bill sought a decree declaring the act to be unconstitutional and restraining action thereunder.

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[6] Six wholesalers and retailers in Florida on behalf of themselves and all others similarly situated joined in a suit to test the validity of a Florida statute which required all merchants who offered trading stamps with goods to pay license fees and made violation of the statute a criminal offense. They alleged that the statute was unconstitutional, that its enforcement was threatened and if materialized would injure their business. They asked an injunction to restrain "the tax collectors of each county in the state, the different state's attorneys, county solicitors and prosecuting attorneys of the circuits and counties of the state of Florida." The United States District Court took jurisdiction, held the statute invalid and granted the injunction. Van Deman & Lewis Co. v. Rast (1913) 214 Fed. 827. On appeal the Supreme Court concurred in the view that the district court had jurisdiction but reversed on the ground that the statute was valid. Rast v. Van Deman & Lewis Co. (1916) 240 U. S. 342, 60 L. ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455.

On the ground of threatened injury to business, a sugar refining company obtained a decision that a statute complained of was unconstitutional and an injunction restraining the inspector of sugar refining, the governor and the attorney-general of Louisiana. This decree of the United States District Court was affirmed by the Supreme Court. McFarland v. American Sugar Ref. Co. (1916) 241 U. S. 79, 60 L. ed. 899.

Soon after the bill was filed, an application was made for an injunction *pendente lite.* After notice of this application, Truax was arrested for a violation of the act,[7] upon a complaint prepared by one of the assistants in the office of the County Attorney of Cochise County, and as it appeared that by reason of the determination of the officers to enforce the act there was danger of the complainant's immediate discharge from employment, the district judge granted a temporary restraining order.

The allegations of the bill were not controverted. The defendants joined in a motion to dismiss upon the grounds (1) that the suit was against the state of Arizona without its consent; (2) that it was sought to enjoin the enforcement of a criminal statute; (3) that the bill did not state facts sufficient to constitute a cause of action in equity; and (4) that there was an improper joinder of parties and the plaintiff was not entitled to sue for the relief asked. The application for an interlocutory injunction and the motion to dismiss were then heard before three judges, as required by section 266 of the Judicial Code. The motion to dismiss was denied and an interlocutory injunction restraining the defendants, the attorney general and the county attorney, and their successors and assistants, from enforcing the act against the defendant Truax, was granted. 219 Fed. Rep. 273. This direct appeal has been taken.

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[7] But the federal courts will not entertain a bill to restrain criminal proceedings in a state court pending there before the injunction proceedings are initiated. Cline, Dist. Atty. v. Frink Dairy Co. (1927) 274 U. S. 445, 71 L. ed. 1146.

As the bill is framed upon the theory that the act is unconstitutional, and that the defendants who are public officers concerned with the enforcement of the laws of the State are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the State. Whatever doubt existed in this class of cases was removed by the decision in Ex parte Young, 209 U. S. 123, 155, 161, which has repeatedly been followed. Ludwig v. West. Un. Tel. Co., 216 U. S. 146; West. Un. Tel. Co. v. Andrews, 216 U. S. 165; Herndon v. C., R. I. & P. Ry., 218 U. S. 135, 155; Hopkins v. Clemson College, 221 U. S. 636, 643-645; Philadelphia Co. v. Stimson, 223 U. S. 605, 607, 620; Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278, 293.

It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors' (In re Sawyer, 124 U. S. 200, 210) a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property. Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 218; Dobbins v. Los Angeles, 195 U. S. 223, 241; Ex parte Young, supra; Philadelphia Co. v. Stimson, supra, p. 621. The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employé has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will. Moran v. Dunphy, 177 Massachusetts, 485, 487; Berry v. Donovan, 188 Massachusetts, 353; Brennan v. United Hatters, 73 N. J. Law, 729, 743; Perkins v. Pendleton, 90 Maine, 166; Lucke v. Clothing Cutters, 77 Maryland, 396; London Guar. & Acc. Co. v. Horn, 101 Ill. App. 355, S. C., 206 Illinois, 493; Chipley v. Atkinson, 23 Florida, 206; Blumenthal v. Shaw, 23 C. C. A. 290, S. C., 77 Fed. Rep. 954. It is further urged that the complainant cannot sue save to redress his own grievance (McCabe v. Atchison, Topeka & Santa Fe Ry., 235 U. S. 151, 162); that is, that the servant cannot complain for the master, and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens and if enforced would compel the employer to discharge a sufficient number of his employés to bring the alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting of the requirements of the act and avoiding threatened prosecution under its provisions. It is, therefore, idle to call the injury indirect or remote.[8] It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had.[9]

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[8] Accord: Hammer v. Dagenhart (1918) 247 U. S. 251, 62 L. ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724.

[9] In Society of Sisters v. Governor of Oregon et al. (1924), 296 Fed. 928, a bill for an injunction to restrain the governor and other officials of the state of Oregon from threatening or attempting to enforce a statute of that state was filed in the United States District Court for Oregon long before the statute was to go into effect. The statute was adopted Nov. 22, 1922 and by its terms was to become effective Sept. 1, 1926. On March 31, 1924 the court (after holding the statute unconstitutional) granted an injunction. On appeal this decree was affirmed by the Supreme Court. Pierce, Governor of Oregon et al. v. Society of Sisters (1925) 268 U. S. 510, 69 L. ed. 1070, 39 A. L. R. 468. The gist of the statute was that it required parents and guardians of all children between the ages of 8 and 16 to send them to public schools. The plaintiffs were owners of private schools. Two points urged by defendants and discussed in the opinions below and on appeal were (1) that the bills were prematurely brought and (2) that the plaintiffs were not of a class of persons against whom the state officials would proceed in their future enforcement of the act.

In Terrace v. Thompson (1923) 263 U. S. 197, 68 L. ed. 255, a landowning citizen and an alien sought to enjoin the enforcement of a state statute which if constitutional would render invalid a lease of land by the owner to the alien which the two *desired* to make. The court considered the alleged unconstitutionality and sustained the statute. How does such a decision differ from a "declaratory judgment"?

In Davis & Farnum Mfg. Co. v. Los Angeles (1903) 189 U. S. 207, 218-221, 47 L. ed. 778, a threatened interest was of a character considered not substantial enough to support such a bill. Query, under the later decisions? On a bill brought by a plaintiff who had a different interest the same court passed upon the validity of the legislation objected to in the above case. Dobbins v. Los Angeles (1904) 195 U. S. 223, 241, 49 L. ed. 169.

SHAREHOLDER'S BILL. Where the requisites peculiar to a representative suit by corporate shareholders are present a bill to enjoin public officers from enforcing an unconstitutional statute may be in that form, for examples Smyth v. Ames (1898) 169 U. S. 466, 515-519, 42 L. ed. 819; Hill v. Wallace, Sec. of Agr. (1922) 259 U. S. 44, 66 L. ed. 822. See also Pollock v. Farmers' Loan & Trust Co. (1895) 157 U. S. 429, 39 L. ed. 759, where such a representative suit was filed to question a tax act of Congress and the dismissal on demurrer in the United States Circuit Court was reversed by the Supreme Court which held the act unconstitutional and remanded the suit with directions to issue a decree restraining the directors and officers of the corporation from "voluntarily" *paying* the tax, although an act of Congress validly prohibited courts to entertain suits to restrain the *collection* of federal taxes. See the dissenting opinions, 157 U. S. Esp. pp. 609-612, 653. Cf. the decision with the extract from the opinion printed ante, p. 44, and with Corbus v. Alaska Treadwell Gold Mining Co. (1903) 187 U. S. 455, 47 L. ed. 256 (federal tax statute) and Dodge v. Woolsey (1855) 18 How. (U. S.) 331, 15 L. ed. 401 where a shareholder's bill was used to question the constitutionality of a state tax statute and to restrain its enforcement, and a decree restraining the state tax *collector* was affirmed.

The question then is whether the act assailed is repugnant to the Fourteenth Amendment. * * * [The court so held.]

MR. JUSTICE MCREYNOLDS dissenting.

I am unable to agree with the opinion of the majority of the court. It seems to me plain that this is a suit against a State to which the Eleventh Amendment declares "the judicial power of the United States shall not be construed to extend." Fitts v. McGhee, 172 U. S. 516. If Ex parte Young, 209 U. S. 123, and the cases following it support the doctrine that Federal courts may enjoin the enforcement of criminal statutes enacted by state legislatures whenever the enjoyment of some constitutional right happens to be threatened with temporary interruption, they should be overruled in that regard. The simple, direct language of the Amendment ought to be given effect, not refined away.

That the challenged act is invalid I think admits of no serious doubt.

CAVANAUGH ET AL. v. LOONEY, ATTORNEY GENERAL OF THE STATE OF TEXAS ET AL.

1919. Supreme Court of the United States. 248 U. S. 453.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The University of Texas is a state institution under immediate control of officers known as Regents, appointed by the Governor, with its principal educational departments in Travis and Galveston counties. An act of the legislature, approved August 30, 1911 (S. B. No. 20, c. 6, General Laws, Texas), undertook to authorize the Regents to purchase or condemn through proceedings in the district courts such lands within those counties as they might deem expedient for extension of campus or other university purposes. Appellants have long owned and used as a residence homestead twenty-six acres in Travis County desirable as an addition to the university grounds. Having failed in their efforts to purchase, the Regents were about to meet and ask the Attorney General to institute proceedings to condemn this entire tract. Thereupon appellants instituted this proceeding against them and the Attorney General in the United States District Court seeking to restrain their threatened action "on the ground among others that said law conflicts with the Constitution of the United States, * * *."

A special court [of three judges] assembled as provided by § 266 Judicial Code, denied application for preliminary injunction without opinion and allowed this direct appeal.

It is now settled doctrine "that individuals, who, as officers of the state, are clothed with some duty in regard to the enforcement of laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the federal Constitution, may be enjoined by a federal court of equity from such action." Ex parte Young, 209 U. S. 123, 155, 156; [other citations are omitted]. But no such injunction "ought to be granted unless in a case reasonably free from doubt," and when necessary to prevent great and irreparable injury. Ex parte Young, supra, 166. The jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable.

When considered in connection with established rules of law relating to the power of eminent domain, complainants' allegation of threatened "irreparable loss and damage" appears fanciful. The detailed circumstances negative such view and rather tend to support the contrary one. Nothing indicates that any objections to the validity of the statute could not be presented in an orderly way before the state court where defendants intended to institute condemnation proceedings; and if by any chance the state courts should finally deny a federal right the appropriate and adequate remedy by review here is obvious. Exercising a wise discretion we think the court below properly denied an injunction. Upon the record it was not called upon to inquire narrowly into the disputable points urged against the statute. No more are we.

The judgment of the court below is

Affirmed.

STATE OF MISSOURI v. HOLLAND.

1920. Supreme Court of the United States. 252 U. S. 416.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918, c. 128, 40 Stat. 755, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the states by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the state and contravene its will manifested in statutes. The state also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a state.[10] Kansas v. Colorado, 185 U. S. 125, 142. Georgia v. Tennessee Copper Co., 206 U. S. 230, 237. Marshall Dental Manufacturing Co. v. Iowa, 226 U. S. 460, 462. A motion to dismiss was sustained by the District Court on the ground that the act of Congress is constitutional. 258 Fed. Rep. 479. Acc. United States v. Thompson, 258 Fed. Rep. 257; United States v. Rockefeller, 260 Fed. Rep. 346. The State appeals.

[The Court proceeded to consider the constitutionality of the statute and sustained it.]

COMMONWEALTH OF PENNSYLVANIA v. STATE OF WEST VIRGINIA.

STATE OF OHIO v. STATE OF WEST VIRGINIA.

1923. Supreme Court of the United States. 262 U. S. 553.

Mr. Justice Van Devanter delivered the opinion of the Court.

These are suits, one by the Commonwealth of Pennsylvania and the other by the State of Ohio, to enjoin the State of West Virginia from enforcing an act passed by her legislature (c. 71, Acts 1919) which the complainants believe will largely curtail or cut off the supply of natural gas heretofore and now carried by pipe lines from West Virginia into their territory and there sold and used for fuel and lighting purposes. Although distinct, the suits are so much alike that they have been presented at the bar substantially as a single case. They will be dealt with accordingly in this opinion.

The West Virginia Act is set forth at length in the margin. The complainants challenge its validity on the ground that it directly interferes with interstate commerce and therefore contravenes the commerce clause of the Constitution of the United States; and they rest their right to relief on the grounds that to enforce the act will subject them to irreparable injury in respect of many of their public institutions and governmental agencies, which long have been and now are using this gas, and will subject them to further and incalculable injury in that (a) it will imperil the health and comfort of thousands of their people who use the gas in their homes and are largely dependent thereon, and (b) will halt or curtail many industries which seasonally use great quantities of the gas and wherein thousands of persons are employed and millions of taxable wealth are invested. * * *

The act whose enforcement is sought to be enjoined was passed by the legislature of West Virginia February 10, 1919, and went into effect May 11th following. These suits were brought eight days thereafter by direction of the legislatures of the complainant States, and by leave of this Court. Interlocutory injunctions were prayed and granted at the outset and are still in force.

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[10] Accord: State of Colorado v. Toll (1925) 268 U. S. 228, 69 L. ed. 927.

Three questions bearing on the propriety of entertaining the suits were raised soon after the suits were begun and consideration of them was postponed to the final hearing.

The first question is whether the suits involve a justiciable controversy between States in the sense of the Judiciary Article of the Constitution. We are of opinion that they do and that every element of such a controversy is present.

Each suit presents a direct issue between two States as to whether one may withdraw a natural product, a common subject of commercial dealings, from an established current of commerce moving into the territory of the other. The complainant State asserts and the defendant State denies that such a withdrawal is an interference with interstate commerce forbidden by the Constitution. This is essentially a judicial question. It concededly is so in suits between private parties, and of course its character is not different in a suit between States.

What is sought is not an abstract ruling on that question, but an injunction against such a withdrawal presently threatened and likely to be productive of great injury. The purpose to withdraw is shown in the enactment of the defendant State before set forth and is about to be carried into effect by her officers acting in her name and at her command. The State is the principal and the action of her officers rightly may be imputed to her, even though a suit for an injunction might lie against them.

The attitude of the complainant States is not that of mere volunteers attempting to vindicate the freedom of interstate commerce or to redress purely private grievances. Each sues to protect a twofold interest—one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are substantial and both are threatened with serious injury.

Each State uses large amounts of the gas in her several institutions and schools,—the greater part in the discharge of duties which are relatively imperative. A break or cessation in the supply will embarrass her greatly in the discharge of those duties and expose thousands of dependents and school children to serious discomfort, if not more. To substitute another form of fuel will involve very large public expenditures.

The private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law. * * *

The second question is whether the suits were brought prematurely. They were brought a few days after the West Virginia act went into force. No order under it had been made by the Public Service Commission; nor had it been tested in actual practice. But this does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the act certainly would operate as the complainant States apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.

Turning to the act, we find that by its first section it lays on every pipe line company a positive duty,—to the extent of its supply of gas produced in the State, whether produced by it or others,—to satisfy the needs, whether for domestic, industrial or other use, of all intending consumers, whether old or new, who are willing to pay for the gas and want it for use within the section of the State in which it is produced, in that through which it is transported or in that wherein it is supplied to others. This is a substantive provision whose terms are both direct and certain, and to which immediate obedience is commanded. No order of the commission is required to give it precision or make it obligatory, and it leaves nothing to the discretion of those who are to enforce it. On the contrary, it prescribes a definite rule of conduct and in itself puts the rule in force. It imposes an unconditional and mandatory duty, as counsel for the State admit, and obviously is intended to enforce a preferred recognition and satisfaction of the needs of consumers within the State, present and prospective, regardless of the effect on the interstate stream or on consumers outside the State. * * *

It must be held therefore that the suits were not brought prematurely.

The third question is whether the requisite parties have been brought into the suits. It is objected that the pipe line companies have not been brought in. But there is nothing which makes their presence essential. The complainant States make no complaint and seek no relief against them. They are supplying gas in those States and evidently will continue to do so, if not restrained or prevented by the defendant State. It is only with her that the complainant States are in controversy. It also is objected that the consumers in the defendant State who will be benefited if the act is enforced have no representation in the suits. But this is a misconception. They are represented by that State, and there is nothing in the situation requiring that they be specially represented or brought in. With equal basis it could be objected in a suit to prevent the enforcement of a statute reducing railroad freight rates, or in one to prevent the enforcement of a municipal ordinance reducing telephone or electric light rates, that shippers or users who would be benefited by the reduction must be specially represented or brought in. Such an objection would of course be untenable; and so of the objection here. [The reasoning upon which the statute was held to violate the Commerce Clause will be considered in a later chapter.]

Mr. Justice Brandeis, dissenting. * * *

First. This Court is without jurisdiction of the subject-matter. The bills present neither a "case," nor a "controversy," within the meaning of the Federal Constitution. Marbury v. Madison, 1 Cr. 137; Muskrat v. United States, 219 U. S. 346, 356, 359; Texas v. Interstate Commerce Commission, 258 U. S. 158. They are not proceedings "instituted according to the regular course of judicial procedure" to protect some right of property or personal right. They are, like McChord v. Louisville & Nashville R. R. Co., 183 U. S. 483, 495, an attempt to enjoin, not executive action, but legislation. They are instituted frankly to secure from this Court a general declaration that the West Virginia Act of February 17, 1919, is unconstitutional. Compare Giles v. Harris, 189 U. S. 475, 486. The well settled rule that the Court is without power to entertain such a proceeding applies equally, whether the party invoking its aid is a State or a private person. And the rule cannot be overcome by giving to pleadings the form of a bill in equity for an injunction. Compare Fairchild v. Hughes, 258 U. S. 126; Atherton Mills v. Johnston, 259 U. S. 13, 15; Texas v. Interstate Commerce Commission, supra.

Moreover, it is not shown that there is, in a legal sense, danger of invasion of the alleged rights. It is shown that the States of Pennsylvania and Ohio are, in their public institutions, themselves consumers of West Virginia gas—a "makeweight" as suggested in Georgia v. Tennessee Copper Co., 206 U. S. 230, 237. And it is shown that these and many other consumers within the plaintiff States would suffer serious injury if the West Virginia supply were cut off. But it is not shown that discontinuance of the supply is threatened or that there is, in a legal sense, danger that the supply will be stopped. The mere enactment of the statute, obviously, does not constitute a threat to interrupt the flow of gas into the plaintiff States. The importation into Ohio and Pennsylvania is conducted, not by the State of West Virginia, but wholly by twelve privately owned public service corporations. If the importation ceases it will be, primarily at least, because of acts or omissions of these twelve corporations. Yet there is not even an allegation that these corporations threaten, or intend, to discontinue the importation; or that they will be compelled to do so unless the State of West Virginia is enjoined from enforcing the statute. * * *

For, under West Virginia legislation, no executive officer and no court has power or jurisdiction to declare, or to enforce performance of, such alleged duty of a public service corporation until primary resort has been had to the Public Service Commission and the application to it has been acted upon, either by granting or by denying relief. * * *

It is possible that the Commission would never be called upon to act. It is possible that if called upon, the Commission would refuse to make an order. It is possible that if the Commission made an order, the order would be of such a character as not to affect seriously the interests which plaintiffs seek to protect. And it is possible that if any order were made, the state court would suspend its operation and would eventually annul it. The act makes such careful provision for judicial review of the orders of the Commission and for postponing the incidence of penalties or other liabilities until after such review can be had, that there could never be occasion for invoking in respect to this statute the doctrine of Ex parte Young, 209 U. S. 123. For the Commission is without power to enforce an order or to impose a penalty. To overcome disobedience, or disregard, of an order, resort must, under the West Virginia statutes, be had to the courts; and to this end an original proceeding must be instituted. Whether the suit to enforce obedience is brought by the Commission or by others, the corporation is given opportunity to defend on the ground that the order is, for any reason, invalid. * * *

MR. JUSTICE HOLMES. * * *

I agree substantially with my brothers MCREYNOLDS and BRANDEIS, but think that there is jurisdiction in such sense as to justify a statement of my opinion upon the merits of the case. I think that the bill should be dismissed.

MR. JUSTICE MCREYNOLDS, dissenting.

It seems to me quite clear that the record presents no justiciable controversy; certainly none within the original jurisdiction of this Court. * * *

LIBERTY WAREHOUSE CO. ET AL. v. GRANNIS, COMMONWEALTH ATTY.

1927. Supreme Court of the United States. 273 U. S. 70.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This proceeding was commenced by a petition filed by the plaintiffs in error on the law side of the Federal District Court for Eastern Kentucky, seeking to obtain a judgment declaring their rights under an Act of the Kentucky Legislature.

The Declaratory Judgment Law of Kentucky, Acts of 1922, ch. 83, provides that in any action in a court of record of that Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may, by means of a petition on the law or equity side of the court, as the nature of the case may require, ask for and obtain "a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked"; and that further relief, based on such declaratory judgment, may be granted by the court whenever necessary or proper, either in the same proceeding or in an independent action, upon notice to any adverse party whose rights have been adjudicated by the declaratory judgment.

The petition alleged that the plaintiffs, a Kentucky corporation and a citizen of North Carolina, were engaged in operating a looseleaf tobacco warehouse in Kentucky, in which they sold leaf tobacco at public auction for their customers and patrons; that their rights were materially and seriously affected by Chapter 10 of the Kentucky Acts of 1924, regulating the sales of leaf tobacco at public auction; that this Act was invalid and repugnant to the Bill of Rights and Constitution of Kentucky, the commerce clause of the Constitution of the United States, the due process and equal protection clauses of the Fourteenth Amendment, and the Sherman Anti-Trust Law; that an actual controversy existed with respect thereto, in that the plaintiffs had been threatened with various civil and criminal punishments and penalties for the violation of the Act, which were about to be enforced thereunder; that in conducting their business, it was necessary for them to know whether the Act was valid or invalid, and whether they were liable for the crimes therein denounced, and subject to the fines and penalties it prescribed, and they could not continue their business without a financial loss, amounting to confiscation of their rights, business and property, unless the court made a declaration of their rights and duties under the Act; that they made this application to the court in accordance with the Federal Conformity Statute and the Declaratory Judgment Law of Kentucky "for the purpose of securing a declaration of their rights and duties" under the Act of 1924, and having the "court determine whether in the conduct of their business it will be necessary for them to comply" with the provisions of the Act, or whether it is "invalid in whole or in part, and if so, in what part"; and that the Commonwealth Attorney was made a party defendant as the representative of the Commonwealth charged with the duty of enforcing the Act, and who, as such, "prepared the indictments referred to herein." No other reference, however, was made to any such indictments in the petition.

The plaintiffs prayed the court "by its judgment to declare what their rights and duties under said Act of 1924 are, and that a judgment be rendered declaring said Act of 1924 invalid, and for all proper relief."

The defendant demurred to the petition, on the ground, among others, that the court had no jurisdiction of the cause of action set forth, having no power or authority as a Federal Court to entertain a proceeding for a declaration of the rights of parties or to act under the provisions of the Declaratory Judgment Law of Kentucky. This demurrer was sustained. Twelve days later a final judgment was entered, reciting that the plaintiffs having failed to amend their petition, and the court being of opinion that it had no jurisdiction of the action, the same was dismissed. This direct writ of error was allowed upon the question of jurisdiction, under section 238 of the Judicial Code, before the amendment made by the Jurisdictional Act of 1925 became effective.

The sole purpose of the petition, as shown by its express allegations, is to obtain a declaration from the District Court of the rights and duties of the plaintiffs under the Act of 1924, and a determination of the extent to which they must comply with its provisions in the conduct of their business. This is its entire scope. While the Commonwealth Attorney is made a defendant as a representative of the Commonwealth, there is no semblance of any adverse litigation with him individually; there being neither any allegation that the plaintiffs have done or contemplate doing any of the things forbidden by the Act before being advised by the court as to their rights, nor any allegation that the Commonwealth Attorney has threatened to take or contemplates taking any action against them for any violation of the Act, either past or prospective. And no relief of any kind is prayed against him, by restraining action on his part or otherwise.

The question whether the District Court has jurisdiction to entertain such a petition for a declaration of rights admits of but one answer under the prior decisions of this Court.

We need not review these at length. It suffices to say that in the light of the decisions in Muskrat v. United States, 219 U. S. 346, 357; Fairchild v. Hughes, 258 U. S. 126, 129; Texas v. Interstate Commerce Comm., 258 U. S. 158, 162; Keller v. Potomac Elec. Co., 261 U. S. 428, 444; Massachusetts v. Mellon, 262 U. S. 447, 488; New Jersey v. Sargent, 269 U. S. 328, 330, and Postum Cereal Co. v. California Fig-Nut Co., 272 U. S. 643, this day decided—in which the principles stated in earlier cases are considered and applied—it is not open to question that the judicial power vested by Article III of the Constitution in this Court and the inferior courts of United

States established by Congress thereunder, extends only to "cases" and "controversies" in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights, or the prevention, redress, or punishment of wrongs; and that their jurisdiction is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case.

[Here portions of the opinion in Muskrat v. United States, ante, p. 71 are quoted.]

And in New Jersey v. Sargent, supra, it was held that this Court could not entertain a bill for an injunction against federal officers charged with the administration of a federal statute, which did not show that any justiciable right of the State was being, or about to be, affected prejudicially by the application of the statute, but, in effect, sought merely to obtain an abstract judicial declaration that, in certain features, the statute exceeded the authority of Congress and encroached upon that of the State.

It follows necessarily from these decisions that the District Court, as a court of the United States established under Article III of the Constitution, had no jurisdiction to entertain the petition for the declaratory judgment.

Manifestly the Federal Conformity Statute, R. S. § 914 (U. S. Code, tit. 28, § 724) conferred upon the court no jurisdiction to proceed in accordance with the Declaratory Judgment Law of Kentucky. This statute relates only to "practice, pleadings, and forms and modes of procedure"; and neither purports to nor can extend the jurisdiction of the district courts beyond the constitutional limitations. See Southern Pacific Co. v. Denton, 146 U. S. 202, 209; Mexican Central Ry. v. Pinkney, 149 U. S. 194, 206.

The plaintiffs in error also rely in argument here upon § 274a of the Judicial Code (U. S. Code, tit. 28, § 397), which provides that on finding that a suit at law should have been brought in equity, or *vice versa*, the court shall order any amendments to the pleadings which may be necessary to conform to the proper practice, and that any party may amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. This statute relates merely to a case in which the objection is to the side of the court on which the suit is brought, and not to the entire lack of jurisdiction in the court. It is plain that it has no application here, where the court was without jurisdiction to entertain the petition for a declaratory judgment either upon the equity or the law side.

The judgment dismissing the petition for want of jurisdiction is accordingly

Affirmed.[11]

FIDELITY NATIONAL BANK AND TRUST CO. v. SWOPE ET AL.

1927. Supreme Court of the United States. 274 U. S. 123.

[The case involved the question whether a special procedure established by the charter of Kansas City, Missouri, for determining in a state court the validity of special tax levies for street improvements constituted a "case" or "controversy" within the judicial power of the United States either to review, or to be removable if the parties were citizens of different states. In part the charter provided:

> "The public work described above shall be provided for by ordinance, and the city may provide that after the passage of the ordinance and after an approximate estimate of the cost of the work shall have been made by the board of public works, the city shall file a proceeding in the circuit court of Jackson county, Missouri, in the name of the city, against the respective owners of land chargeable under the provisions of this section with the cost of such work. In such proceeding the city shall allege the passage and approval of the ordinance providing for the work, and the approximate estimate of the cost of said work; and shall define and set forth the limits of the benefit district, prescribed by the ordinance, within which it is proposed to assess property for the payment of said work. The prayer of the petition shall be that the court find and determine the validity of said ordinance, and the question of whether or not the respective tracts of land within said benefit district shall be charged with the lien of said work in the manner provided by said ordinance."]

MR. JUSTICE STONE delivered the opinion of the Court. * * *

That this proceeding authorized by section 28 of the Kansas City Charter was judicial in character appears from an inspection of the statute and the record in the circuit court. The proposed improvement having been authorized, the benefit district established, the estimated cost ascertained, all by action of the city council or the board of public works essentially legislative in character, the jurisdiction of the state court was invoked in an adversary proceeding to determine the validity of the liens imposed or to be imposed under the ordinance. That court is a court of general jurisdiction, having plenary power to determine all questions arising under the state law or the laws and Constitution of the United States. Section 2436, Mo. Rev. Stat. 1919; Schmelzer v. Kansas City, 295 Mo. 322. These questions are required to be determined in a trial in accordance with the laws and Constitution of the state. The sole duty and power of the court is to pass upon questions of law and to inquire judicially into the facts so far as necessary to ascertain the applicable rules of law. See Keller v. Potomac Elec. Co., 261 U. S. 428, 440. Under this procedure, the judgment to be awarded finally determines, subject to appeal, the validity of the ordinance authorizing the improvement, the limits of the benefit district, the method of apportioning benefits, and the validity of the proposed liens. That the issues thus raised and judicially determined would constitute a case or controversy if raised and determined in a suit brought by the taxpayer to enjoin further proceedings under the ordinance could not fairly be questioned. Compare Risty v. Chicago, R. I. & Pac. Ry. Co., 270 U. S. 378. They cannot be deemed any the less so because, through a modified procedure, the parties are reversed and the same issues are raised and finally determined at the behest of the city. We do not think significant the fact that under section 28 the city might pay, though it did not, a part of the cost of the improvement and that the council, in authorizing the special tax, is required to deduct from the estimated cost the amount which may be paid by the city. These provisions could not restrict the authority or capacity of the court to pass upon the validity of the benefit district and the special tax actually authorized by the ordinance.

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[11] See Declaratory Actions as "Cases" or "Controversies," by Edwin M. Borchard (1927) 36 Yale Law Jour. 845. Compare the following:—Several states by statute have allowed appeals to be taken in criminal cases by the state after acquittal not for the purpose of reversing the judgment, but for the purpose of obtaining a declaration of law to be followed in subsequent cases. In United States v. Evans (1907) 30 App. D. C. 58, affd. on certiorari in (1909) 213 U. S. 297, 53 L. ed. 803, it was held that to make a declaration of law on such an appeal was not a judicial function. *Contra*: State v. Allen (1920) 107 Kans. 407, 419, 191 Pac. 476 and other cases collected in 19 Mich. Law Rev. 79-80.

While ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function. Naturalization proceedings, Tutun v. United States, 270 U. S. 568; suits to determine a matrimonial or other status; suits for instructions to a trustee or for the construction of a will, Traphagen v. Levy, 45 N. J. Eq. 448; bills of interpleader, so far as the stakeholder is concerned, Wakeman v. Kingsland, 46 N. J. Eq. 113; bills to quiet title where the plaintiff rests his claim on adverse possession, Sharon v. Tucker, 144 U. S. 533, are familiar examples of judicial proceedings which result in an adjudication of the rights of litigants, although execution is not necessary to carry the judgment into effect, in the sense that no damages are required to be paid or acts to be performed by the parties. Cf. Kennedy v. Babcock, 19 Misc. (N. Y.) 87; Cohen v. N. Y. Mutual

Life Ins. Co., 50 N. Y. 610, 625. Nor is it essential that only established and generally recognized forms of remedy should be invoked.

"Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status." Tutun v. United States, supra. 577.

Thus naturalization proceedings, Tutun v. United States, supra, or a special statutory proceeding to determine judicially whether the claim made by a domestic corporation against a foreign country upon which an award had been made by a United States commissioner pursuant to treaty, had been furthered by fraud, the statute authorizing distribution of the fund in accordance with the judgment, La Abra Silver Mining Co. v. United States, 175 U. S. 423, are cases or controversies within the meaning of the Constitution.

Tregea v. Modesto Irrigation District, 164 U. S. 179, is cited as authority for the proposition that the proceeding had in the Missouri court is not judicial in character. But this court in that case rested its decision on its interpretation of the California statute in question. It held in effect that the proceeding authorized was not adversary, being a proceeding by the trustee of an irrigation district against the district itself, and that it was essentially ex parte, its purpose being to secure evidence on the basis of which the court could render an advisory opinion as to the validity of a pending bond issue. These were considerations which could only lead to the conclusion reached that the proceeding was not a case or controversy of which this court could take cognizance in the exercise of its appellate jurisdiction.

The present statute admits of no such construction. The proceeding is in terms directed to be "against the respective owners of land chargeable under the provisions of this section with the cost of such work," and the specific issue to be determined by the judgment of the court is whether or not the respective tracts in the benefit district shall be charged with the lien as provided by the ordinance. The court is directed to render judgment "either validating such ordinance, and proposed lien against the lots, * * * within said benefit district or against such lots, * * * as the court may find legally chargeable, * * * or the court may render judgment that such ordinance or proposed lien are, in whole or in part, invalid and illegal." The plain effect of these provisions is to authorize the court to examine and determine the validity and effect of the legislative action in establishing the benefit district. The result of the proceeding is to establish judicially, as against the property owners in the district, the validity of such action and of the liens established or to be established conformably to the statute on the specific property described.

The issues presented and the subject-matter are such that the judicial power is capable of acting upon them. There is no want of adverse parties necessary to the creation of a controversy as in Muskrat v. United States, 219 U. S. 346. The judgment is not merely advisory as in Liberty Warehouse Co. v. Grannis, 273 U. S. 70; New Jersey v. Sargent, 269 U. S. 328; Fairchild v. Hughes, 258 U. S. 126; Massachusetts v. Mellon, 262 U. S. 447; Texas v. Interstate Commerce Commission, 258 U. S. 158, 162. It operates to determine judicially the legal limits of the benefit district and to define rights of the parties in lands specifically described in the pleadings. So far as it affects owners of land in the benefit district who are citizens of other states, the controversy is a "suit" which may be removed to the federal courts. Jud. Code, § 28; Road District v. St. Louis Southwestern Ry., 257 U. S. 547.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY v. OREGON.

1912. Supreme Court of the United States. 223 U. S. 118.

[In 1902 the State of Oregon amended its constitution and made provision, in addition to legislation by the ordinary legislatures, for legislation by popular initiative and direct vote of the people. By this method a statute taxing corporations was adopted. In a suit brought by the state to collect the tax the defendant, the telephone company, pleaded that the tax statute was invalid by reason of Article IV, Section 4 of the federal Constitution. The State Supreme Court affirmed a decision which sustained a demurrer to this defense and on writ of error the case was brought to this court. The chief contention of the plaintiff in error is:

"The guaranty of Article IV, Section 4, of the federal Constitution is to the people of the states, and to each citizen, as well as to the states as political entities. Section 4 of Article IV therefore prohibits the majority in any state from adopting an unrepublican constitution. The initiative is in contravention of a republican form of government. Government by the people directly is the attribute of a pure democracy and is subversive of the principles upon which the republic is founded. Direct legislation is, therefore, repugnant to that form of government with which alone Congress could admit a state to the Union and which the state is bound to maintain."]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

We premise by saying that while the controversy which this record presents is of much importance, it is not novel. It is important, since it calls upon us to decide whether it is the duty of the courts or the province of Congress to determine when a state has ceased to be republican in form and to enforce the guarantee of the Constitution on that subject. It is not novel, as that question has long since been determined by this court conformably to the practice of the Government from the beginning to be political in character, and therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress. * * *

The contention [of the plaintiff in error], if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is at one and the same time one and the same government which is republican in form and not of that character.

Before immediately considering the text of § 4 of Art. IV, in order to uncover and give emphasis to the anomalous and destructive effects upon both the state and the national governments which the adoption of the proposition implies, as illustrated by what we have just said, let us briefly fix the inconceivable expansion of the judicial power and the ruinous destruction of legislative authority in matters purely political which would necessarily be occasioned by giving sanction to the doctrine which underlies and would be necessarily involved in sustaining the propositions contended for. First. That however perfect and absolute may be the establishment and dominion in fact of a state government, however complete may be its participation in and enjoyment of all its powers and rights as a member of the national government, and however all the departments of that government may recognize such state government, nevertheless every citizen of such state or person subject to taxation therein, or owing any duty to the established government, may be heard, for the purpose of defeating the payment of such taxes or avoiding the discharge of such duty, to assail in a court of justice the rightful existence of the state. Second. As a result, it becomes the duty of the courts of the United States, where such a claim is made, to examine as a justiciable issue the contention as to the illegal existence of a state and if such contention be thought well founded to disregard the existence in fact of the state, of its recognition by all of the departments of the federal

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government, and practically award a decree absolving from all obligation to contribute to the support of or obey the laws of such established state government. And as a consequence of the existence of such judicial authority a power in the judiciary must be implied, unless it be that anarchy is to ensue, to build by judicial action upon the ruins of the previously established government a new one, a right which by its very terms also implies the power to control the legislative department of the government of the United States in the recognition of such new government and the admission of representatives therefrom, as well as to strip the executive department of that government of its otherwise lawful and discretionary authority. * * *

We shall not stop to consider the text to point out how absolutely barren it is of support for the contentions sought to be based upon it, since the repugnancy of those contentions to the letter and spirit of that text is so conclusively established by prior decisions of this court as to cause the matter to be absolutely foreclosed * * * [by] the leading and absolutely controlling case—Luther v. Borden, 7 How. 1.

The case came from a Circuit Court of the United States. It was an action of damages for trespass. The case grew out of what is commonly known as the Dorr Rebellion in Rhode Island and the conflict which was brought about by the effort of the adherents of that alleged government sometimes described as "the government established by a voluntary convention" to overthrow the established charter government. The defendants justified on the ground that the acts done by them charged as a trespass were done under the authority of the charter government during the prevalence of martial law and for the purpose of aiding in the suppression of an armed revolt by the supporters of the insurrectionary government. The plaintiffs, on the contrary, asserted the validity of the voluntary government and denied the legality of the charter government. In the course of the trial the plaintiffs to support the contention of the illegality of the charter government and the legality of the voluntary government "although that government never was able to exercise any authority in the state nor to command obedience to its laws or to its officers," offered certain evidence tending to show that nevertheless it was "the lawful and established government," upon the ground that its powers to govern have been ratified by a large majority of the male people of the state of the age of 21 years and upwards and also by a large majority of those who were entitled to vote for general officers cast in favor of a constitution which was submitted as the result of a voluntarily assembled convention of what was alleged to be the people of the State of Rhode Island. The Circuit Court rejected this evidence and instructed the jury that as the charter government was the established state government at the time the trespass occurred, the defendants were justified in acting under the authority of that government. This court, coming to review this ruling, * * * pointed out that owing to the inherent political character of such a question its decision was not by the Constitution vested in the judicial department of the government, but was on the contrary exclusively committed to the legislative department by whose action on such subject the judiciary were absolutely controlled. The court said (p. 42):

"Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a state, has treated the subject as political in its nature, and placed the power in the hands of that department.

"The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

"Under this article of the Constitution it rests with Congress to decide what government is the established one in a state. For, as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

Pointing out that Congress, by the act of February 28, 1795 (1 Stat. 424, c. 36), had recognized the obligation resting upon it to protect from domestic violence by conferring authority upon the president of the United States, on the application of the legislature of a state or of the governor, to call out the militia of any other state or states to suppress such insurrection, it was suggested that if the question of what was the rightful government within the intendment of § 4 of Art. IV was a judicial one, the duty to afford protection from invasion and to suppress domestic violence would be also judicial, since those duties were inseparably related to the determination of whether there was a rightful government. If this view were correct, it was intimated, it would follow that the delegation of authority made to the president by the act of 1795 would be void as a usurpation of judicial authority, and hence it would be the duty of the courts, if they differed with the judgment of the president as to the manner of discharging this great responsibility, to interfere and set at naught his action; and the pertinent statement was made (p. 43): "If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order."

The fundamental doctrines thus so lucidly and cogently announced by the court, speaking through Mr. Chief Justice Taney in the case which we have thus reviewed, have never been doubted or questioned since, and have afforded the light guiding the orderly development of our constitutional system from the day of the deliverance of that decision up to the present time. * * *

It is indeed a singular misconception of the nature and character of our constitutional system of government to suggest that the settled distinction which the doctrine just stated points out between judicial authority over justiciable controversies and legislative power as to purely political questions tends to destroy the duty of the judiciary in proper cases to enforce the Constitution. The suggestion but results from failing to distinguish between things which are widely different, that is, the legislative duty to determine the political questions involved in deciding whether a state government republican in form exists, and the judicial power and ever-present duty whenever it becomes necessary in a controversy properly submitted to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power.

How better can the broad lines which distinguish these two subjects be pointed out than by considering the character of the defense in this very case? The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised they would have been justiciable, and therefore would have required the calling into operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes is not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the state that it establish its right to exist as a state, republican in form.

As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction.

COMMONWEALTH OF MASSACHUSETTS v. MELLON, SECRETARY OF THE TREASURY ET AL.

FROTHINGHAM v. MELLON, SECRETARY OF THE TREASURY ET AL.

1923. Supreme Court of the United States. 262 U. S. 447.

Mr. Justice Sutherland delivered the opinion of the Court.

These cases were argued and will be considered and disposed of together. The first is an original suit in this Court. The other was brought in the Supreme Court of the District of Columbia. That court dismissed the bill and its decree was affirmed by the District Court of Appeals. Thereupon the case was brought here by appeal. Both cases challenge the constitutionality of the Act of November 23, 1921, c. 135, 42 Stat. 224, commonly called the Maternity Act. Briefly, it provides for an initial appropriation and thereafter annual appropriations for a period of five years, to be apportioned among such of the several states as shall accept and comply with its provisions, for the purpose of co-operating with them to reduce maternal and infant mortality and protect the health of mothers and infants. It creates a bureau to administer the act in co-operation with state agencies, which are required to make such reports concerning their operations and expenditures as may be prescribed by the federal bureau. Whenever that bureau shall determine that funds have not been properly expended in respect of any State, payments may be withheld.

It is asserted that these appropriations are for purposes not national, but local to the states, and together with numerous similar appropriations constitute an effective means of inducing the states to yield a portion of their sovereign rights. It is further alleged that the burden of the appropriations provided by this act and similar legislation falls unequally upon the several states, and rests largely upon the industrial states, such as Massachusetts; that the act is a usurpation of power not granted to Congress by the Constitution—an attempted exercise of the power of local self-government reserved to the states by the Tenth Amendment; and that the defendants are proceeding to carry the act into operation. In the Massachusetts case it is alleged that the plaintiff's rights and powers as a sovereign state and the rights of its citizens have been invaded and usurped by these expenditures and acts; and that, although the state has not accepted the act, its constitutional rights are infringed by the passage thereof and the imposition upon the state of an illegal and unconstitutional option either to yield to the federal government a part of its reserved rights or lose the share which it would otherwise be entitled to receive of the moneys appropriated. In the Frothingham case plaintiff alleges that the effect of the statute will be to take her property, under the guise of taxation, without due process of law.

We have reached the conclusion that the cases must be disposed of for want of jurisdiction without considering the merits of the constitutional questions.

In the first case, the State of Massachusetts presents no justiciable controversy either in its own behalf or as the representative of its citizens. The appellant in the second suit has no such interest in the subject-matter, nor is any such injury inflicted or threatened, as will enable her to sue.

First. The State of Massachusetts in its own behalf, in effect, complains that the act in question invades the local concerns of the state, and is a usurpation of power, viz.: the power of local self-government reserved to the states.

Probably, it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligation but simply extends an option which the state is free to accept or reject. But we do not rest here. Under Article III, § 2, of the Constitution, the judicial power of this Court extends "to controversies * * * between a State and citizens of another State" and the Court has original jurisdiction "in all cases * * * in which a State shall be party." The effect of this is not to confer jurisdiction upon the Court merely because a state is a party, but only where it is a party to a proceeding of judicial cognizance. Proceedings not of a justiciable character are outside the contemplation of the constitutional grant. In Wisconsin v. Pelican Insurance Co., 127 U. S. 265, 289, Mr. Justice Gray, speaking for the Court, said:

"As to 'controversies between a State and citizens of another State.' The object of vesting in the courts of the United States jurisdiction of suits by one state against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff state were compelled to resort to the courts of the state of which the defendants were citizens. Federalist No. 80; Chief Justice Jay, in Chisholm v. Georgia, 2 Dall. 419, 475; Story on the Constitution, §§ 1638, 1682. The grant is of 'judicial power,' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other state at all."

That was an action brought by the State of Wisconsin to enforce a judgment of one of its own courts for a penalty against a resident of another state, and, in pursuance of the doctrine announced by the language just quoted, this Court declined to assume jurisdiction upon the ground that the courts of no country will execute the penal laws of another.

In an earlier case it was held that a proceeding by mandamus by one state to compel the governor of another to surrender a fugitive from justice was not within the powers of the judicial department, since the duty of the governor in the premises was in the nature of a moral rather than a legal obligation. Kentucky v. Dennison, 24 How. 66, 109. In New Hampshire v. Louisiana; New York v. Louisiana, 108 U. S. 76, this Court declined to take jurisdiction of actions to enforce payment of the bonds of another state for the benefit of the assignors, citizens of the plaintiff states. In Georgia v. Stanton, 6 Wall. 50, 75, and kindred cases, to which we shall presently refer, jurisdiction was denied in respect of questions of a political or governmental character. On the other hand, jurisdiction was maintained in Texas v. White, 7 Wall. 700; Florida v. Anderson, 91 U. S. 667; and Alabama v. Burr, 115 U. S. 413, because proprietary rights were involved; in Georgia v. Tennessee Copper Co., 206 U. S. 230, 237, because the right of dominion of the state over the air and soil within its domain was affected; in Missouri v. Holland, 252 U. S. 416, because, as asserted, there was an invasion, by acts done and threatened, of the quasi-sovereign right of the state to regulate the taking of wild game within its borders; and in other cases because boundaries were in dispute. It is not necessary to cite additional cases. The foregoing, for present purposes, sufficiently indicate the jurisdictional line of demarcation.

What, then, is the nature of the right of the state here asserted and how is it affected by this statute? Reduced to its simplest terms, it is alleged that the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the states. Nothing is added to the force or effect of this assertion by the further incidental allegations that the ulterior purpose of Congress thereby was to induce the states to yield a portion of their sovereign rights; that the burden of the appropriations falls unequally upon the several states; and that there is imposed upon the states an illegal and unconstitutional option either to yield to the federal government a part of their reserved rights or lose their share of the moneys appropriated. But what burden is imposed upon the states, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the states where they reside. Nor does the statute require the states to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.

In the last analysis, the complaint of the plaintiff state is brought to the naked contention that Congress has usurped the reserved powers of the several states by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power.

In Georgia v. Stanton, *supra*, this Court held that a bill to enjoin the Secretary of War, and other officers, from carrying into execution certain acts of Congress, which it was asserted would annul and abolish the existing state government and establish another and different one in its place, called for a judgment upon a political question and presented no case within the jurisdiction of the Court. Mr. Justice Nelson, speaking for the Court, said (6 Wall. 77):

"That these matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court."

In Cherokee Nation v. Georgia, 5 Pet. 1, an injunction was sought to prevent certain acts of legislation from being carried into execution within the territory of the Cherokee Nation of Indians, the original jurisdiction of this Court being invoked on the ground that plaintiff was a foreign nation. It was asserted that the acts in question, if executed, would have the effect of subverting the tribal government and subjecting the Indians to the jurisdiction of the State of Georgia. It was held that the Cherokee Nation could not be regarded as a foreign nation, within the meaning of the Judiciary Act, but Chief Justice Marshall, delivering the opinion for the majority, said, further (p. 20):

"That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might, perhaps, be decided by this court, in a proper case, with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned; it savors too much of the exercise of political power, to be within the proper province of the judicial department." And Mr. Justice Thompson, with whom Mr. Justice Story concurred, in the course of an opinion, said (p. 75):

"It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here." See also Luther v. Borden, 7 How. 1; Mississippi v. Johnson, 4 Wall. 475, 500; Pacific Telephone Co. v. Oregon, 223 U. S. 118; Louisiana v. Texas, 176 U. S. 1, 23; Fairchild v. Hughes, 258 U. S. 126.

It follows that in so far as the case depends upon the assertion of a right on the part of the state to sue in its own behalf we are without jurisdiction. In that aspect of the case we are called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government. No rights of the state falling within the scope of the judicial power have been brought within the actual or threatened operation of the statute and this Court is as much without authority to pass abstract opinions upon the constitutionality of acts of Congress as it was held to be, in Cherokee Nation v. Georgia, *supra,* of state statutes. If an alleged attempt by congressional action to annul and abolish an existing state government "with all its constitutional powers and privileges," presents no justiciable issue, as was ruled in Georgia v. Stanton, *supra,* no reason can be suggested why it should be otherwise where the attempt goes no farther, as it is here alleged, than to propose to share with the state the field of state power.

We come next to consider whether the suit may be maintained by the state as the representative of its citizens. To this the answer is not doubtful. We need not go so far as to say that a state may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here. Ordinarily, at least, the only way in which a state may afford protection to its citizens in such cases is through the enforcement of its own criminal statutes, where that is appropriate, or by opening its courts to the injured persons for the maintenance of civil suits or actions. But the citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a state, as *parens patriae,* may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity for the protection of its citizens (Missouri v. Illinois, 180 U. S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents then as *parens patriae,* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

Second. The attack upon the statute in the Frothingham case is, generally, the same, but this plaintiff alleges in addition that she is a taxpayer of the United States; and her contention, though not clear, seems to be that the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law. The right of a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this Court. In cases where it was presented, the question has either been allowed to pass *sub silentio* or the determination of it expressly withheld. Millard v. Roberts, 202 U. S. 429, 438; Wilson v. Shaw, 204 U. S. 24, 31; Bradfield v. Roberts, 175 U. S. 291, 295. The case last cited came here from the Court of Appeals of the District of Columbia, and that court sustained the right of the plaintiff to sue by treating the case as one directed against the District of Columbia, and therefor subject to the rule frequently stated by this Court, that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation. Roberts v. Bradfield, 12 App. D. C. 453, 459-460. The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this Court. Crampton v. Zabriskie, 101 U. S. 601, 609. Nevertheless, there are decisions to the contrary. See, for example, Miller v. Grandy, 13 Mich. 540, 550. The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. IV Dillon Municipal Corporations, 5th ed., § 1580, *et seq.* But the relation of a taxpayer of the United States to the federal government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect.

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. Gaines v. Thompson, 7 Wall. 347. We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.

No. 24, Original, dismissed.
No. 962 [Frothingham case] affirmed.

BURKE v. SNIVELY.

1904. Supreme Court of Illinois. 208 Ill. 328.

Mr. Justice Boggs delivered the opinion of the court:

This was a bill in chancery filed in the circuit court of Sangamon county by the appellant, against the appellees Snively, Newton and Sackett, in their official capacity as Commissioners of the Illinois and Michigan Canal, and the appellee James S. McCullough, as Auditor of Public Accounts of the state, and the appellee Fred A. Busse, as Treasurer of the state, to restrain the said Auditor of Public Accounts from drawing his warrant in favor of the said canal commissioners for certain sums of money appropriated by an act of the General Assembly approved May 15, 1903, (Laws of 1903, p. 45,) for the maintenance and protection of the Illinois and Michigan canal and for the necessary and extraordinary expenses thereof, and enjoining the said state Treasurer from paying any moneys out of the public funds of the state on any such warrant, should one be or have been drawn. * * *

The bill alleges that the complainant is a citizen of the State of Illinois and the owner of real and personal property which is subject to taxation in said state and is taxed therein, and further alleges that such appropriations of the public moneys are prohibited by the provisions of the constitution of 1870 with reference to canals, and that the acts of the legislature authorizing such appropriations of the public moneys are therefore void, and the prayer of the bill is, that such alleged misappropriation of the moneys of the state be restrained and enjoined. Appellees contend the bill is a suit against the State of Illinois, and should be dismissed for the reason that section 26 of article 4 of the constitution of 1870 declares the state shall not be made a party to any action at law or suit in chancery.

The bill is not a suit against the state. It does not implead or ask any relief against the state. The relief asked is, that officials of the state charged by law with the performance of official duties be restrained from a misuse of moneys entrusted to them or from applying such moneys to purposes not warranted by law. * * *

In equity the money in the state treasury is the money of the people of the state, and suits by a tax-payer to restrain the misappropriation by public officers of such money to an unauthorized purpose are not suits against the state. We have frequently maintained the jurisdiction of courts of equity to entertain bills in behalf of tax-payers to restrain misappropriation of funds by public authorities. * * *

An unconstitutional statute is not law, and an appropriation of public funds in pursuance of an unconstitutional statute is a misuse of funds, which may be restrained by injunction. * * *

We may therefore consider the contention of the appellant that the General Assembly was wanting in power to authorize the public moneys to be taken out of the treasury of the state and applied to maintenance and operation of the Illinois and Michigan canal. [The court held that the appropriation statute conflicted with the canal provision of the state constitution, that the circuit court erred in dissolving the temporary injunction, that it should have granted a perpetual injunction, and remanded the case to it with directions to do so.][12]

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[12] Where under a statute which in alleged violation of the state constitution gave O'Connell as county treasurer and tax collector in addition to his salary a percentage of inheritance taxes collected by him, the court said: "It is further contended that the complainant [as 'owner of property' and 'taxpayer'] could not resort to a court of equity to prevent the illegal appropriation of a part of the inheritance taxes because he had contributed nothing to that fund, but any difference in right based on that ground is without substance. * * * If the defendant, William L. O'Connell, has retained and appropriated to himself moneys which belong in the public fund the amount would have to be replaced by taxation, the burden of which would fall upon the taxpayers." Jones v. O'Connell (1915) 266 Ill. 443, 450-451, 107 N. E. 731.

A bill to enjoin the highest officers of the state from expending public money in pursuance of a statute may be brought "to test the validity and constitutionality" of the statute, by "any taxpayer" "to enable him to protect public rights" even though he has no special interest and would suffer no special injury,

ASPLUND v. HANNETT ET AL.

1926. Supreme Court of New Mexico. 31 N. Mex. 641.

WATSON, J. * * * On what does appellant base his claim of right to invoke the equitable remedy of injunction? The wrong alleged is the enactment of Laws 1925, c. 66, in violation of the constitution, and the proposal of the governor to carry out its provisions. The result is an illegal misapplication of public moneys. A citizen and taxpayer can have but two interests; his interest in the upholding and enforcement of the Constitution, and his interest to prevent illegal imposition of taxes. There is no warrant for any distinction between the taxpaying and the nontaxpaying citizen as respects his interest in upholding the constitution generally. As a taxpayer he has an interest in the disposition of the state's property and funds according as his taxes may be affected thereby. So we seem to have two questions: The first, whether a citizen may appeal to the courts to prevent a violation of the constitution; the second, whether a taxpayer may apply to them to prevent misuse of public funds.

The first question does not, in our judgment, require extended discussion. In our scheme of government, the function of the courts is to declare and apply the law in the decision of justiciable controversies. We are not placed over the other departments of government, generally, to review or interfere with their acts, as the special guardian of the constitution. Ours is the judicial power. In the exercise of that power—the hearing and determination of causes of action—we necessarily enforce the supremacy of the constitution and disregard all enactments and proceedings violative of it. That is the beginning and the end of the much discussed and misunderstood power of the courts to declare the unconstitutionality of statutes. From many expositions of this doctrine we select two which come readily to hand, and insert them here. [Quotations from Lieber's Civil Liberty and Self-Government (1888), p. 162 and Cooley, Const. Lim. (7th ed.) 76-78 [8th ed. 104-107] are omitted.]

The constitutionality of a statute is not in itself a cause of action, nor a head of equity jurisdiction. Cruickshank v. Bidwell, 176 U. S. 73; Terrace v. Thompson, 263 U. S. 197; Muskrat v. United States, 219 U. S. 346.

So we conclude that, as a citizen, appellant is without standing to question the constitutionality of the act in question, and we proceed to the consideration of the other question, Has a taxpayer

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held in White Eagle Oil & Ref. Co. v. Gunderson (1925) 48 S. Dak. 608, 205 N. W. 614, 43 A. L. R. 397. (Semble also that "any elector" may bring such a bill.)

such an interest as entitles him to an injunction to restrain devastavit of public funds?

Of course, it is well understood that equity awards its injunctive writ only to prevent irreparable injury for which there is no adequate and complete remedy at law. The injury must consist, to speak broadly, in the invasion of some right of the complaining party. We have here to determine whether appellant's right meets the requirements. We have already decided that he has no right, cognizable by courts, to complain solely of a violation of the constitution. Such right as he there possesses is political, enforceable only as other political rights are maintainable. The right we now seek is a legal right. As it is asserted only in connection with his status as a taxpayer, it is a right affecting his property, through the fact that he contributes to the expense of government by enforced contributions in the form of taxes. As already pointed out, it is not satisfactorily shown that appellant will be in any way injuriously affected in his property by the proposed expenditures. Perhaps his failure to show such injury should be deemed decisive. We prefer, however, to assume, for the purposes of this case, that the necessary result of the proposed use of the "permanent reservoirs for irrigating purposes, income fund," will result in increasing state taxes. * * *

In a note entitled, "Right of citizen or taxpayer to enjoin waste or unlawful expenditure of state funds," L. R. A. 1915D, 178, it is said that such right "seems generally sustained in California, Florida, Hawaii, Illinois, Indiana, Maryland, Oregon, Pennsylvania, and Tennessee, and perhaps in Colorado and Kansas." It is further said: "The action is not allowed in New York, Louisiana, South Dakota, and Washington," and that "the same has been held in a federal court and in Porto Rico." After abstracting decisions from these jurisdictions, other decisions are classified as being "inconclusive or doubtful." The author expresses no view as to which is the better doctrine. Accepting the correctness of the classification, more jurisdictions are to be counted as supporting appellant's contention. [A review of many cases is omitted.]

Where the courts have discussed, on principle, the taxpayer's right to enjoin waste or misapplication of state funds, we find generally that they have been influenced by the lack of any other remedy or by the supposed duty of the court always to check a threatened violation of the constitution.

The lack of other remedy is not sufficient. True, lack of an adequate remedy at law is essential to the jurisdiction of equity in injunction, but it does not in itself give rise to it. The party seeking the relief must have a right in respect to which he is threatened with irreparable injury. So the existence of the right is as essential as the lack of other remedy. There are many rights for which the citizen must look to the other branches of his government, and which it is not within the power of the courts to secure to him. To vindicate such rights his remedies are political.

Enough has already been said of the mistaken view that the judiciary alone is responsible for the upholding of the constitution. Within our own field we have that responsibility. But if we invade those of the legislative or of the executive, we ourselves become violators of the fundamental law.

It has seemed to some courts an important consideration that the attorney general (the public's law officer) could not be expected, because of his position or affiliation, to intervene in the public behalf, or that he had actually appeared in opposition. This, it seems to us, is not a matter for consideration. What may be the attorney general's right or duty in the premises cannot be decisive. Even if the constitution and statutes have failed to provide for any remedy, it is not for the courts to create one. As said in Long v. Johnson, supra: [70 Misc. Rep. 308, 127 N. Y. S. 756.]

> "It is true that the doctrine that redress of alleged public wrongs must be sought only through the state or its law officers and not by an individual, receives, as suggested by the attorney for the plaintiff here—a somewhat severe jolt, when as in this case actual or proposed wrongdoing is alleged against a state commission and the attorney general appears in the defense of the officials attacked; nevertheless courts must proceed according to the existing statutes and decisions and new remedies, if desirable, must be furnished by the legislature."

The cases which we have examined involve many other points than that we have under consideration—the ministerial or discretionary character of the official duty, whether it is a suit against the state, whether the same principles apply in injunction and mandamus. In most of them the constitutionality of statutes is involved along with the question of the taxpayer's injury, because of the illegal expenditure. Different constitutional and statutory provisions are under consideration bearing upon all of these questions. Anything like an analysis it would be impracticable for us to attempt. We are satisfied, however, that the injunction here prayed for is the ordinary equitable writ and remedy. Whatever may be its nature when originally granted in the Supreme Court, issued from the district court, it is not a prerogative nor a quasi prerogative writ. It is a private remedy for the protection of individual rights, except as the state may have occasion to appear as plaintiff. An individual, to invoke the remedy, must have legal or equitable rights to be protected. A right which he shares, as a taxpayer, in common with all other taxpayers, is not such an individual right as qualifies him, under general principles, to relief by injunction. Exception has been made where the threatened injury to taxpayers consists in *devastavit* of municipal funds. This exception is perhaps better supported by practical considerations than on principle. A minority of courts consider it enlargement of equity jurisdiction by judicial decision. Even so, it does not run counter to any fundamental principle of government. But to extend the doctrine so as to entertain a private suit to restrain the acts of a co-ordinate branch of the government, the injurious effects of which acts are public only, we cannot regard otherwise than as usurpation of power not conferred. * * *

Not having found any legal or logical principle to support a taxpayer's suit to enjoin the expenditure of state funds, we are constrained to hold that he has no such right in this state. We hold to this view notwithstanding the contrary conclusion of eminent judges and able courts, and an apparently increasing tendency to admit the right. * * *

STATE EX REL. BUFORD v. CARLEY ET AL.

1925. Supreme Court of Florida. 89 Fla. 361.

Whitfield, J.—In quo warranto proceedings brought by the Attorney General of the state to test the validity of Chapter 9686, Laws of Florida, Acts of 1923, under which the functions of a municipal corporation called Belleair Heights are being exercised, [the statute was challenged on the ground that, being one of numerous bills that were rushed through during the last hour of the legislative session some of the procedure required by the state constitution for the enactment of statutes was not observed.]

The purpose of the provision of the constitution that "every bill shall be read by its sections * * * on its final passage" is to inform the legislators and the public of the contents of each bill and to prevent hasty legislation.

Our constitution does not require that the journals shall show affirmatively that a bill was read "by sections" on its final passage, and if they do not so show, the presumption, in the absence of affirmative evidence to the contrary, would be that it was read by sections as required. * * * Acts of the legislature duly enrolled and signed by the officers of the two houses and filed in the office of the secretary of state with the approval of the governor thereon, are *prima facie* valid and authoritative laws, but the journals of the two houses that enacted them may be resorted to to ascertain whether the mandatory requirements of the constitution have been complied with by the legislature in their enactment, and if such journals show explicitly, clearly and affirmatively that any essential constitutional requirement has not been complied with, or if they fail to show any essential step in the progress of enactment that the constitution expressly requires them to show, such for example, as the entry of the aye and noes upon the final passage of any bill in either house, then such journals would prevail as evidence, and the enrolled bill, as evidence of law, would have to fall. The journals kept by the two houses of the legislature of their proceedings are public records of which the courts of the state will take judicial notice. State ex rel. Turner v. Hocker, 36 Fla. 358, text 359, 18 South. Rep. 767.

Parol evidence is not admissible against the affirmative showing of the journals of the legislature. Wade v. Atlantic Lumber Co., 51 Fla. 638, 41 South. Rep. 72. * * *

The courts have no substantive power to review and nullify legislative proceedings or enactments; but, in adjudicating litigated rights under a statute, the courts may determine whether the legislative journals show that the statute was not duly enacted. * * *

Even if the legislative journal of the senate *conclusively* shows that the senate was in session only one hour and seventeen minutes, and even if the court may by a judicial consideration of natural laws find that it was a physical impossibility for each of the bills passed during the session of one hour and seventeen minutes to have been consecutively "read by its sections" "on its final passage," yet only one of the bills is here involved, and that one could easily have been separately "read by its sections" "on its final passage," and parol evidence not being admissible to contradict the legislative journal entries, it must be assumed that as to the bill here involved, the journal entry that it was "read by its sections" "on its final passage," is true. The court will not assume that legislative journal entries as to the bill in litigation are untrue; and the truth of such entries as to other bills is not presented for adjudication. This should be the holding here, even though upon a challenge of the validity of each of the other bills passed at the same sitting of the senate, a similar result would follow, and consequently all of the enacted bills would be held valid, when it was in fact an impossibility to read and pass all of them in the manner that is mandatorily required by the constitution, within the time during which the journal states that the senate was in session. A similar discussion applies to the proceedings of the house. * * *[13]

The writ is dismissed.

Ellis, Terrell, and Strum, J. J., concur.

West, C. J., concurs specially.

Browne, J., dissents.

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[13] "So far as provisions of the state constitution are affected, their construction by the Supreme Court of the state is conclusive on the national courts. This disposes of the assignment of error about local and special bills, notice of which had not been published, [as required by the state constitution] as it is the settled law of the state that the legislature is the sole judge whether this provision has been complied with, and if it chose to disregard it, and passed a bill without

McCHORD v. LOUISVILLE AND NASHVILLE R. R. CO.

1902. Supreme Court of the United States. 183 U. S. 483.

These are appeals from the final decrees of the Circuit Court of the United States for the District of Kentucky, perpetually enjoining Charles C. McChord and others, railroad commissioners of the State of Kentucky, from doing any of the things required by, or from taking any action whatever against complainants under a certain act of the general assembly of the Commonwealth of Kentucky, approved March 10, 1900, c. 2, * * *

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

By the decrees the Railroad Commission of the Commonwealth of Kentucky was permanently restrained from proceeding under the act of March 10, 1900, which was alleged and held to be unconstitutional.

Conceding that the mere fact that a duly enacted law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, it is contended that ground of equity jurisdiction existed here in the want of adequate remedy by the ordinary processes of law for the threatened consequences of the exercise of the power to fix rates in multiplicity of suits and irreparable injury. * * *

The fixing of rates is essentially legislative in its character, and the general rule is that legislative action cannot be interfered with by injunction. * * *

In New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 472, the general rule was stated and applied, and Mr. Justice Harlan, who delivered the opinion of the court, said: "We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the state, it will be time enough for equity to interfere, and, by injunction to prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. This may involve the plaintiff in a multiplicity of actions. But that circumstance cannot justify any such decree as it asks."

The rule was also applied by Mr. Justice Field in Alpers v. San Francisco, 32 Fed. Rep. 503, where complainant sought an injunc-

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notice having been published, no issue upon the subject can be raised in the courts. Davis v. Gaines, 48 Ark. 370, 385, 3 S. W. 184; Waterman v. Hawkins, 75 Ark. 120, 86 S. W. 844; Caton v. Western Clay Drainage Dist., 87 Ark. 8, 112 S. W. 145." Bush v. Branson (1918) 248 Fed. 377, 379.

tion to restrain the passage of an ordinance which he alleged would impair the obligation of a contract he had with the city. Mr. Justice Field said: "This no one will question as applied to the power of the legislature of the state. The suggestion of any such jurisdiction of the court over that body would not be entertained for a moment. The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends. * * * The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary." * * *

The result of these considerations is that the duty of enforcing its rates rests on the commission and that none of the consequences alleged to be threatened can be set up as the basis of equity interposition before the rates are fixed at all. Whether after they are determined their enforcement can be restrained is a question not arising for decision on this record,[14] and we are not called on to dispose of other contentions of grave importance, which were pressed in argument, as if now requiring adjudication.

Decrees reversed and cases remanded to the Circuit Court with a direction to sustain the demurrers and dismiss the bills.[15]

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[14] The cases are numerous in which the enforcement of rates fixed by state commissions has been enjoined by a federal court when the rates have been found by the court to be so low as to be "confiscatory" and therefore in violation of the due process of law clause of the Fourteenth Amendment,—that is, the executive or administrative, not the legislative, action of the commissions has been enjoined. "The principle is not confined to the maintenance of suits for restraining the enforcement of statutes which as enacted by the state legislature are in themselves unconstitutional. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 390, 38 L. ed. 1021, was a case not of an unconstitutional statute, but of confiscatory, and therefore unconstitutional, action taken by a state commission under a constitutional statute. * * * In Raymond v. Chicago Union Trac. Co., 207 U. S. 20, 38, 52 L. ed. 78, 12 Ann. Cas. 757, the court upheld the right of action in a federal court to restrain the collection of taxes that had been assessed at a different rate and by a different method from that employed with respect to other taxpayers of the same class, in defiance of the provisions of a constitutional statute that required equalization, and also in denial of the equal protection of the laws within the meaning of the Fourteenth Amendment." Greene v. Louisville & Interurban R. Co. (1917) 244 U. S. 499, 507, 61 L. ed. 1280, Ann. Cas. 1917E, 88.

[15] "Being a co-ordinate branch of the state government, distinct from and independent of the judiciary, it is unquestionably true that the legislature is not

SPIES v. BYERS, COUNTY CLERK ET AL.

1919. Supreme Court of Illinois. 287 Ill. 627.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court.

The appellant, Louis G. Spies, filed his bill in the circuit court of Sangamon county on July 31, 1918, alleging that he was a citizen and taxpayer of Kankakee county, engaged in the business of conducting a private bank in the village of Chebanse, and praying for an injunction restraining Charles W. Byers, county clerk of Sangamon county, and each county clerk of the remaining 101 counties, from causing to be printed on the ballots at the ensuing election the proposition to vote for or against an act approved by the Governor on June 22, 1917 [Laws 1917, p. 206], amending the title and certain sections of an act concerning corporations with banking powers [Laws 1887, p. 89], and from incurring any expense with reference

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amenable to the courts. They have no power to interfere in any manner with the proceedings of either of its component branches, or with the action of their respective clerks in making up the journals of their proceedings, so long as they are acting in obedience to the will of those bodies. This proposition is self-evident, otherwise the judiciary would be superior to the legislative branch of the government. We are speaking only of the power of the courts relating to their interference with legislative proceedings, and not of their long recognized, and frequently exercised right and power to declare, in a proper case, a legislative act unconstitutional, after it has been passed." Fox v. Harris (1916) 79 W. Va. 419, 423, 91 S. E. 209.

Compare the following cases:

State ex rel. Benton v. Elder (1891) 31 Nebr. 169, 47 N. W. 710, 10 L. R. A. 796. The state constitution required the speaker of the house of representatives, before the house should upon organization proceed to other business, to open and publish in the presence of a majority of both houses in joint session the returns of elections of state officers. At such a joint session the speaker acquiesced in a resolution of the joint body that he should not do so at that time. Upon petition of one who claimed that the returns would show that he had been elected the court issued a mandamus to the speaker, saying that the resolution of the joint session was void. The court announced that "wherever a specific duty is required by law of a particular officer, unattended with the exercise of any degree of official judgment or element of discretion, and on the performance of which individual rights depend, mandamus is the appropriate remedy."

Ex parte Echols (1866) 39 Ala. 698, 88 Am. Dec. 749. The court refused to order the speaker of a house of representatives to do an act "in the regular course of legislation, upon which he is called to decide" (send to the senate a bill alleged to have passed the house, the speaker having ruled that a necessary two-thirds vote had not been given, and on appeal from the speaker's ruling the house had sustained it). The court said that it could not review the decision of the house.

Turnbull v. Giddings (1893) 95 Mich. 314, 54 N. W. 887, 19 L. R. A. 853. A court will not attempt to compel officers of a legislative chamber to enter upon its journal a protest made by a member, although the state constitution expressly makes it the right of a member to have such protest entered, where it is the duty of such officers to enter only such matter as the chamber directs and the chamber has refused to direct the entry,—the chamber, not the officers, having control of the journals.

to said proposition, which had been certified to the county clerks by Louis L. Emmerson, secretary of state, as required by the act, and in accordance with a general statute providing for the publication of propositions required by law to be submitted to the electors. A temporary injunction was ordered and issued as prayed for. The appellees, Charles W. Byers, county clerk, and Louis L. Emmerson, secretary of state, entered their appearances and moved the chancellor to dissolve the injunction for want of equity on the face of the bill. The motion was sustained, and the appellant having elected to abide by his bill, the injunction was dissolved and the bill dismissed, at his cost, and he appealed from the decree. * * *

These facts were alleged in the bill and admitted by the motion: The bill for the act was introduced in the senate and passed and was thereupon presented to the house of representatives for its action. * * * [The house amended sections 8 and 11 and passed the bill as thus amended.] The bill went back to the senate for its action with respect to the amendments, and the senate refused to concur, and the house refused to recede. As a result a joint committee of conference was appointed, which made a report recommending the adoption of the amendments proposed by the house, and the measure was passed by both houses as amended. The bill was sent to the governor, with sections 8 and 11 reading as they originally stood when the bill first passed the senate and in that form it was approved by him. The bill as signed by the governor and as finally filed and enrolled in the office of the secretary of state, and as it appears in the printed statutes is not the same as the act finally passed by both houses of the General Assembly. * * *

Under the general delegation of legislative power the proceeding for the enactment of laws prescribed is that bills may originate in either house but may be altered, rejected or amended by the other, and no bill shall become a law without the concurrence of a majority of the members elected to each house. When so adopted every bill, before it becomes a law, must be presented to the governor, and if he approves he shall sign it, and thereupon it shall become a law. In the case of any law authorizing or creating corporations or associations with banking powers further action is required, and the necessary legislative steps are the concurrence of a majority of the members of the senate and house of representatives, the approval by the governor and an affirmative vote by a majority of the votes cast at an election for or against the law.

Courts are endowed by the constitution with judicial power, only, and are prohibited from interfering with other branches of the government in the exercise of their powers. They cannot obstruct the exercise of legislative functions, and have no more right to interfere in the process of legislation where the final act is the exercise of legislative power at an election than there would be at any other stage of the process. No one would contend that a court could enjoin either branch of the general assembly from passing a bill, or the governor from acting upon it, on the ground that the completed legislative act would be invalid, and the same rule necessarily applies to any interference with the electors in the final act of legislation. Courts have no general power to consider proposed and uncompleted legislation to determine whether an act will be valid or invalid if enacted into law. After legislation has been completed, the courts, in determining the rights of litigants respecting personal, civil or property rights, may, and it is their duty to, refuse to enforce a statute which is invalid, but their jurisdiction is limited to the determination of such rights. They can neither direct the enactment of a law[16] nor prevent its enactment on any ground whatever, and that being so, a court of equity would have no power to entertain a bill of a tax-payer on account of the expense of the legislation. The trifling cost of putting the proposition on the ballots would be in the same category with any other expense of the legislative branch of the government. These principles have been declared in various cases with respect to the submission of amendments to constitutions, elections under the initiative and referendum, elections under ordinances alleged to be invalid, and other like proceedings, with the reasoning of which we agree. Scott v. James, 114 Va. 297; Duggar v. City of Emporia, 84 Kan. 429; State v. Thorson, 9 So. Dak. 149; People v. Mills, 30 Colo. 262; City of Dallas v. Dallas Consolidated Street Railway Co., 105 Tex. 337; Threadgill v. Cross, 26 Okla. 402. There are some decisions adopting a different view, but they are contrary to the weight of authority and we do not regard the reasoning as sound. * * *

It is also to be noted that the bill was filed at a time when it was uncertain whether the act in question would be approved by the people, and if it should never become a law the appellant would suffer no injury to his business as a private banker. If the act should be adopted and its validity be brought before a court of equity in the exercise of its jurisdiction, the question would then arise whether the act as a whole would be void or its validity would be affected only as to changes made by the amendments.

The decree is affirmed.[17]

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[16] "Nor have the courts any power to compel the legislature to act in any case, however imperatively the duty may be imposed upon that body." Carter, J. in People v. Thompson (1895) 155 Ill. 451, 475, 40 N. E. 307.

[17] Accord: On like facts except that the measure sought to be kept off the ballot was one initiated by popular petition. The court said that to enjoin submission would limit the people acting legislatively to the proposal and adoption of valid laws only, whereas courts disclaimed power to so restrict legislatures. State v. Osborn (1914) 16 Ariz. 247, 143 Pac. 117.

With the issue whether legislative proceedings which may result in invalid legislation may be arrested at the outset, compare the problem whether a higher court should issue a writ of habeas corpus to one who is about to be tried in a lower court for violation of a statute which he asserts is unconstitutional, for the

NOTE.

CONSTITUTIONAL LAW: POWER OF THE COURTS TO ENJOIN LEGISLATIVE PROCEEDINGS: INITIATIVE AND REFERENDUM—A question frequently before the courts in the past came up again in the case of Harnett v. County of Sacramento.[18] The case was on a bill for an injunction against the holding of a county initiative election. It was alleged that to hold the election would cost the taxpayers $6,500, and that the measure would be void if passed, as being contrary to state law and beyond the power of the county as a legislative body.

The court granted the injunction. It devoted only a short paragraph of the opinion to the objection that, in view of the separation of powers doctrine, a court could not constitutionally use the injunction to arrest legislative proceedings. What was said in this paragraph does no more than indicate that the judges thought this particular election should be enjoined, and were not going to let a separation of powers doctrine stand in the way.[19]

This almost unreasoned decision on an important point like the power of the courts to interfere with pending legislation, suggests two related, yet distinct lines of inquiry:

1. What is the present state of the law on the subject?
2. What is there to be said for and against a result like that of the principal case?

I. It has been repeated so often as to be almost trite, that a court cannot intervene to hold up the proceedings of a co-ordinate

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sole purpose of determining the validity of the statute and thus avoiding at the outset the possibility of an erroneous conviction. A case and note on this point are printed infra, pp. 192-200, with others on a different point which is sometimes regarded as cognate.

[18] (Mar. 27, 1925) 69 Cal. Dec. 352, 235 Pac. 445 [195 Cal. 676].

[19] The court cited Felt v. Waughop (1924) 193 Cal. 498, 225 Pac. 862, and Cal. Code Civ. Proc. § 526a. Felt v. Waughop was a petition for a writ of mandate to strike out the name of an ineligible candidate for the office of city attorney. The writ was granted. A court which felt itself empowered to grant this writ would not see very great obstacles in the way of enjoining an election on an initiative measure. The argument is one of analogy: a court which was disinclined to grant an injunction would have had no difficulty in distinguishing the two cases.

California Code Civ. Proc. § 526a simply says that an injunction may be obtained to prevent illegal expenditure of public money by a public officer. In short, the court considered as illegal the expenditure necessary to hold an election on an act which would be void if passed. Contrast this with the attitude of the District Court of Appeal in Randolph v. Stanislaus County (1919) 44 Cal. App. 322, 186 Pac. 625. Here, in a similar situation, the injunction was refused on the basis of Cal. Civ. Code, § 3423 (4) and 3423 (6), viz., "3423 * * * An injunction cannot be granted:

"Fourth—To prevent the execution of a public statute, by officers of the law *for the public benefit.*

"Sixth—To prevent the exercise of a public office, *in a lawful manner*, by the person in possession." (Italics added.)

The two courts evidently had widely differing views as to the desirability of allowing a vote on a statute which would later have to be declared invalid. The pros and cons of this question will be taken up in the latter part of this note.

branch of the government. Both executive and legislature are supposed to be free from judicial control. If such is actually the case, Harnett v. Sacramento is contrary to the general rule. As a matter of fact, careful examination makes this doubtful.

As is well known, the doctrine of judicial review of legislation was originally one of ignoring a statute where conflicting statutory and constitutional provisions were both applicable to the case at bar.[20] It has since been extended to suits to enjoin the enforcement, as distinguished from the enactment, of statutes alleged to be unconstitutional.[21] The attempts to induce a further extension after the manner of the principal case, namely to arrest proposed legislation in the course of enactment, have taken the following forms:

A. Bills against local legislative bodies;
  1. County boards of supervisors;[22]
  2. City councils;[23]
B. Bills against ministerial officers whose duty it is to call (hold) elections;
  1. To restrain local elections;
    a. On popular initiative measures;[24]
    b. On measures referred by the local legislative body;
      (1) After the body itself has voted favorably;[25]

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[20] Marbury v. Madison (1803) 1 Cranch (U. S.) 137, 2 L. ed. 60.

[21] Reclamation District v. Superior Court (1916) 171 Cal. 672, 154 Pac. 845; Moulton v. Parks (1883) 64 Cal. 166, 30 Pac. 613. The best case on this point is perhaps Pennsylvania v. West Virginia (1923) 262 U. S. 553, 591-94, 67 L. ed. 1117, 32 A. L. R. 300, in which the doctrine is fully discussed as to a civil statute. Compare the dissenting opinions of Justices McReynolds (262 U. S. 553, 603) and Brandeis (id. 610-616) in which the opposite view is set out at length. See also Porterfield v. Webb (1923) 263 U. S. 225, 68 L. ed. 278; Lipke v. Lederer (1922) 259 U. S. 557, 66 L. ed. 1061; Wilson v. New (1917) 243 U. S. 332, 61 L. ed. 755, L. R. A. 1917E, 938; Truax v. Raich (1915) 239 U. S. 33, 60 L. ed. 131, L. R. A. 1916D, 545.

[22] Glide v. Superior Ct. (1905) 147 Cal. 21, 81 Pac. 225; Randolph v. Stanislaus County (1919) 44 Cal. App. 322, 186 Pac. 625; Alpers v. San Francisco (1887) 32 Fed. 503; Spring Val. Water-Works v. Bartlett (1883) 16 Fed. 615. See also Chicago, B. & Q. R. Co. v. Winnett (1908) 162 Fed. 242 and McChord v. Louisville & N. R. Co. (1902) 183 U. S. 483, 46 L. ed. 289 (bills against the state railroad commissions).

[23] Missouri & K. I. R. Co. v. City of Olathe (1907) 156 Fed. 624; People v. City of New York (1859) 32 Barb. (N. Y.) 35, 19 How. Prac. 155; Whitney v. City of New York (1858) 28 Barb. (N. Y.) 233; Wheeler v. Philadelphia (1873) 77 Pa. 338, 32 Leg. Int. 75. Alpers v. San Francisco (1887) 32 Fed. 503 and Spring Val. Water-Works v. Bartlett (1883) 16 Fed. 615 could also be included in this class.

[24] Duggan v. Emporia (1911) 84 Kans. 429, 114 Pac. 235, Ann. Cas. 1912A, 719; Davis v. Whitehead (1921) 86 Okla. 273, 208 Pac. 216; Little v. Barksdale (1908) 81 S. Car. 392, 63 S. E. 308.

[25] De Kalb County v. Atlanta (1909) 132 Ga. 727, 65 S. E. 72; Macon v. Hughes (1900) 110 Ga. 795, 36 S. E. 247; Dubuisson v. Board of Supervisors (1909) 123 La. 443, 49 So. 15; Bassel v. Shanklin (Tex. Civ. App., 1919), 183 S. W. 105; Woods v. Ball (Tex. Civ. App., 1914), 166 S. W. 4; Roper & Gilley v. Lumpkins (1914) 111 Tex. 107, 230 S. W. 144, (Tex. Civ. App., 1914), 163 S. W. 110. (In some of these the municipality is made the defendant, but the purpose of the bill and the effect of the injunction where granted were as indicated in the body of the note.)

(2) Without such previous voting;[26]

2. To restrain state elections;
   - a. On constitutional amendments passed by the legislature and referred to the people;[27]
   - b. On statutes initiated by the people;[28]
   - c. On statutes passed by the legislature and referred to the people.[29]

It is to be noted that there are no cases of bills against a state legislature. The courts repudiate the notion that they have any such veto or supervisory power,[30] and the impossibility of obtaining such an injunction seems to have been fairly taken for granted by litigants.

However, aside from this, the rank of the bodies and the diversity of the processes as a rule seem to justify no distinctions.[31] On the assumption that they do not, the cases may be classified as follows:

1. Those in which no property rights are involved. Here the injunction is refused on the ground of separation of powers and on the lack of equity jurisdiction to protect political rights.[32]
2. Those in which the property rights of the complainant are made an important point.

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[26] Cleveland Cliffs Iron Co. v. Village of Kinney (1919) 262 Fed. 980; Thompson v. Mahoney (1907) 136 Ill. App. 403; Solomon v. Fleming (1892) 34 Nebr. 40, 51 N. W. 304; Hood v. Sutton (1917) 175 N. Car. 98, 94 S. E. 686; Gulick v. Linn (1923) 90 Okla. 201, 216 Pac. 460 (the proceedings were irregular here: the election having been called by the governor on his own initiative); Richardson v. Mayes (Tex. Civ. App., 1920), 223 S. W. 546; Wilton v. Pierce County (1910) 61 Wash. 386, 112 Pac. 386.

[27] Livermore v. Waite (1894) 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312; People ex rel. O'Reilly v. Mills (1902) 30 Colo. 262, 70 Pac. 322; Gaskins v. Dorsey (1920) 150 Ga. 638, 104 S. E. 433; Weinland v. Fulton (1918) 99 Ohio St. 10, 121 N. E. 816; Frantz v. Autry (1907) 18 Okla. 561, 91 Pac. 193; Wells v. Bain (1873) 75 Pa. 39, 15 Am. Rep. 563; State ex rel. Cranmer v. Thorson (1896) 9 S. Dak. 149, 68 N. W. 202, 33 L. R. A. 582.

[28] State v. Osborn (1914) 16 Ariz. 247, 143 Pac. 117; Pfeifer v. Graves (1913) 88 Ohio St. 473, 104 N. E. 529.

[29] Tolbert v. Long (1910) 134 Ga. 292, 67 S. E. 826, 137 Am. St. 222; Clayton v. Calhoun (1886) 76 Ga. 270; Power v. Ratliff (1916) 112 Miss. 88, 72 So. 864; Conner v. Gray (1906) 88 Miss. 489, 41 So. 186; Chappell v. McCown (1919) 103 S. Car. 6, 87 S. E. 147.

[30] Nougues v. Douglass (1857) 7 Cal. 65, 70 (*dictum*); Des Moines Gas Co. v. Des Moines (1876) 44 Iowa 505, 509, 24 Am. Rep. 756 (*dictum*); Cooley, Const. Limitations, p. 192.

[31] The exceptions to the general rule are:

(a) In California, the legislature, acting as a constitutional convention, has been held not to have the full rank of a legislative body, and so to be subject to an injunction, where, sitting as a legislature it would not be. Livermore v. Waite (1894) 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312.

(b) In Georgia referendum elections in accordance with the provisions of a bill which has already passed the legislature have been held not to be legislative proceedings, and so subject to injunction where legislative proceedings would not be. Gaskins v. Dorsey (1920) 150 Ga. 638, 104 S. E. 433; De Kalb County v. Atlanta (1909) 132 Ga. 727, 65 S. E. 72.

[32] State v. Osborn (1914) 16 Ariz. 247, 143 Pac. 117; Glide v. Superior

Under the second class there are two lines of decisions:

a. Applying the reasoning of the first class and arriving at the same result.[33]

b. Admitting that, as a rule, the right to legislate without effect is inviolate, but insisting that equity may interfere to protect the complainant from irreparable property damage or loss.[34] The instant case is a good example of this view.

As between the last two, it can properly be said that the latter[35]

Ct. (1905) 147 Cal. 21, 81 Pac. 225; Cleveland Cliffs Iron Co. v. Village of Kinney (1919) 262 Fed. 980; Chicago, B. & Q. R. Co. v. Winnett (1908) 162 Fed. 242; Gaskins v. Dorsey (1920) 150 Ga. 638, 104 S. E. 433; Thompson v. Mahoney (1907) 136 Ill. App. 403; Dubuisson v. Board of Supervisors (1909) 123 La. 443, 49 So. 15; Power v. Ratliff (1916) 112 Miss. 88, 72 So. 864; Hood v. Sutton (1917) 175 N. Car. 98, 94 S. E. 686; People v. City of New York (1859) 32 Barb. (N. Y.) 35, 19 How. Prac. 155; Whitney v. City of New York (1858) 28 Barb. (N. Y.) 233; Weinland v. Fulton (1918) 99 Ohio St. 10, 121 N. E. 816; Davis v. Whitehead (1921) 86 Okla. 273, 208 Pac. 216; Frantz v. Autry (1907) 18 Okla. 561, 91 Pac. 193; Chappell v. McCown (1919) 103 S. Car. 6, 87 S. E. 147; Little v. Barksdale (1908) 81 S. Car. 392, 63 S. E. 308; State ex rel. Cranmer v. Thorson (1896) 9 S. Dak. 149, 68 N. W. 202, 33 L. R. A. 582; Richardson v. Mayes (Tex. Civ. App., 1920), 223 S. W. 546.

[33] People ex rel. O'Reilly v. Mills (1902) 30 Colo. 262, 70 Pac. 322; Missouri & K. I. R. Co. v. Olathe (1907) 156 Fed. 624; Alpers v. San Francisco (1887) 32 Fed. 503; Clayton v. Calhoun (1886) 76 Ga. 270; Pfeifer v. Graves (1913) 88 Ohio St. 473, 104 N. E. 529; McChord v. Louisville & N. R. Co. (1902) 183 U. S. 483, 46 L. ed. 289.

[34] Livermore v. Waite (1894), 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312; Spring Valley Water-Works v. Bartlett (1883) 16 Fed. 615; Tolbert v. Long (1910) 134 Ga. 292, 67 S. E. 826, 137 Am. St. 223; De Kalb County v. Atlanta (1909) 132 Ga. 727, 65 S. E. 72; Macon v. Hughes (1900) 110 Ga. 795, 36 S. E. 247; Holmberg v. Jones (1901) 7 Idaho 752, 758, 65 Pac. 563 (dictum); Conner v. Gray (1906) 88 Miss. 489, 41 So. 186 (semble); Solomon v. Fleming (1892) 34 Nebr. 40, 51 N. W. 304; Whitney v. City of New York, 28 Barb. (N. Y.) 233, 237 (dictum); Gulick v. Linn (1923) 90 Okla. 201, 216 Pac. 460; Wells v. Bain (1873) 75 Pa. St. 39, 15 Am. Rep. 563; Bassel v. Shanklin (Tex. Civ. App., 1919), 183 S. W. 105; Wheeler v. Philadelphia (1873) 77 Pa. 338, 32 Leg. Int. 75; Woods v. Ball (Tex. Civ. App., 1914) 166 S. W. 4; Roper & Gilley v. Lumpkins (1914) 111 Tex. 107, 230 S. W. 144, (Tex. Civ. App., 1914) 163 S. W. 110; Wilton v. Pierce County (1910) 61 Wash. 386, 112 Pac. 386 (injunction against canvassing the results of an election where this in itself would cause expense).

In some of these cases the injunction is granted against an election authorized by a void act. This has been held not to be a distinction from facts like those of the instant case. Cleveland Cliffs Iron Co. v. Village of Kinney, 262 Fed. 980, 986. But cf. supra, n. 31, part (b).

[35] It is possible that some of the cases in which no mention is made of the property rights of the complainant, either in the opinion or in the reported pleadings, may nevertheless involve them. Where this element is present in the pleadings it is sometimes glossed over by the court, so it may be present oftener than appears in the reports. If so, the weight of authority may be the other way, and subsequent remarks on this point would have to be modified accordingly.

The courts in a few jurisdictions are troubled with the idea that the taxpayer's interest in an election is so slight that it can not be considered sufficient property interest to allow equity to take jurisdiction. See Dubuisson v. Board of Supervisors (1909) 123 La. 443, 49 So. 415; Ellingham v. Dye (1912) 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200; State ex rel. Cranmer v. Thorson (1896) 9 S. Dak. 149, 68 N. W. 202, 33 L. R. A. 582.

But the weight of authority is probably the other way. Livermore v. Waite (1894) 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312; Macon v. Hughes (1900) 110 Ga. 795, 36 S. E. 247; Wells v. Bain (1873) 75 Pa. 39, 15 Am. Rep. 563;

preponderates. The principal case would then represent the weight of authority.[36]

II. If the foregoing conclusions are correct, the situation with regard to injunctions against legislative proceedings may be summed up as follows. Where waste of public funds or other property loss is threatened, courts will not enjoin the elected state legislature, though some of them will enjoin local legislatures as well as the people acting directly.

The distinction between enjoining the state legislature and enjoining the local legislature, may be put on a sound theoretical basis. It is that a local legislative body is not co-ordinate with a state court, and therefore does not enjoy the state legislature's immunity from judicial interference.[37]

But how explain the distinction between enjoining the state legislature and enjoining the electorate? Logically, if the judiciary has no control over the action of the people's representatives, it can have no control over the action of the people themselves. The explanation may possibly be found in the facts that the problem arose at a comparatively late period,[38] when the public had already

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Wheeler v. Philadelphia (1873) 77 Pa. 338, 22 Leg. Int. 75; Roper v. Lumpkins (1914) 111 Tex. 107, 230 S. W. 144, (Tex. Civ. App.), 163 S. W. 110.

[36] Earlier California cases would have led one to predict a contrary result in the principal case. Glide v. Superior Ct. (1905) 147 Cal. 21, 81 Pac. 225, decided that no injunction would issue to restrain a legislative act where the complainant suffered no material injury from the mere holding of the election. The general tone of the case indicates that the result might well have been the same even if the complainant's property rights had been involved. This is perhaps emphasized by the careful statement of one of the concurring judges that the case decided nothing more than that an injunction would not be granted where no property rights were involved. Concurring opinion of Beatty, C. J., Glide v. Superior Court, 147 Cal. 21, 30, 81 Pac. 225. The holding of the District Court of Appeal in Randolph v. Stanislaus County has already been referred to (supra, n. 19).

The outstanding California case favoring the injunction was, of course, Livermore v. Waite (1894) 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312.

It is interesting to note that the principal case brings about an anomalous situation. Cal. Civ. Code, § 3423 (7) prohibits injunctions against the legislative acts of municipal corporations. But against the people of a county an injunction may be issued. Where such distinctions are made at all, the injunction is usually allowed against municipal corporations, and not against larger political units. See, infra, n. 37.

[37] It is true that courts granting the injunction against municipalities rarely do so with express reference to this distinction. The decision is made without indication of what it would be, were a different defendant before the court. But see Roberts v. Louisville (1891) 92 Ky. 95, 17 S. W. 216, 13 Ky. L. 406, 13 L. R. A. 844, where the lower rank of the municipal legislative body is made the *ratio decidendi*.

On the other hand, many of the cases in which the injunction is refused stress the point that a municipal legislature enjoys all the immunities of a state legislature. Of course, it may well be said that considerations such as these are beside the point, at least so far as municipal corporations are concerned. A municipal corporation is a creature of the state, and has just as much immunity as the state has chosen to give it. Cf. Cal. Civ. Code § 3423 (7).

[38] The first constitution containing a referendum clause applicable to general legislation was that of South Dakota, in 1897. Lobingier, The People's Law, p. 359.

seen other modifications of the separation of powers in government; that on the surface the injunction is not directed at the electorate-legislature at all, but merely at some ministerial officer;[39] and that direct legislation, in some respects, calls for supervision more urgently than does representative legislation. This last point will be discussed more fully later.

The practical result of this situation is that with regard to local and referendum measures, the courts are called upon to determine constitutionality (or other questions of validity) without having the previous approval of the legislature to guide them.

To this there are the following important objections:

1. The presumption of constitutionality,[40] which is present as to acts which have passed the legislature, is here lacking alike as to all—Those which will and those which will not pass. Accordingly, more laws are likely to be held unconstitutional.
2. Alternatively, or possibly in any case, the courts would be given a large measure of legislative power.[41] This is so, principally because questions of constitutionality are often mixed questions of law and of policy. The latter would have to be decided by the judiciary where the legislature would have largely decided them before.[42]

For the other side the outstanding points may be summed up as follows:

1. Questions arising under detailed and specific state constitutions will, as a rule, involve law only, unintermingled with policy. The same is true to an even greater extent of cases of local laws which are alleged to conflict with a state statute.[43] If the right to injunction were to be

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[39] Probably, mostly because the judges are not restrained by the psychological inhibitions against enjoining the legislature. That it is legislative processes which are being enjoined is generally recognized. For the clearest exposition of this, see State v. Osborn (1914) 16 Ariz. 247, 143 Pac. 117.

[40] A statute is presumed to be constitutional until proven otherwise. See, for example, Adkins v. Children's Hospital (1923) 261 U. S. 525, 544, 67 L. ed. 785, 24 A. L. R. 1238.

[41] The separation of powers will be assumed to be a good thing. Whatever its merits or demerits, there is not room or opportunity to discuss them in this note.

[42] Though the courts may be exercising such power at present, under any system of anticipatory judicial review they would be doing so with official sanction rather than by way of conscious or unconscious usurpation. The psychological difference which this makes, would, in the long run, make the injunction against legislative proceedings not a mere recognition of what exists but a further extension of it.

[43] In extreme cases validity may be determined by arithmetic. Cf. the principal case (where the measure proposed to change the boundaries of the supervisor districts so as to give the latter populations of 35,000, 34,500, 29,500, respectively, for three and 29,000 for the remaining two. California Pol. Code, § 4029 provides that when such a change is made, the districts after the change must have approximately equal populations); and Gulick v. Linn, supra, n. 26 (where the state statute provided that county lines should at no point be less than 15 miles from the county seat, and the measure in question proposed to establish a county having its county seat 11 miles from the boundary).

confined to such as these, the separation of powers would be only slightly abrogated.

2. It is an inefficient system which allows several thousand dollars to be spent in passing an act, only to be told that the "act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as if it had never been passed."[44]

This situation is even more likely to arise with direct than with representative legislation, since such large expenditures are rare[45] in merely passing a bill in the legislature, while they are the rule in enacting it at the polls. Nor have the people exercised their power of direct legislation infrequently.[46]

Since the question thus resolves itself into one of balancing the importance of the tripartite form of government against public economy, the sole remaining consideration is the suggestion that allowing anticipatory judicial review of questions under detailed state constitutions and under statutes might afford a partial solution. Clearly, it would at best be partial, since no provision is made for questions under the federal constitution, nor for those states which have constitutions of the old style.[47] But even aside from this, while such a course might make the question of balancing less acute, it would not remove it. Virtually all state constitutions contain a paraphrase of the federal constitution (except for parts which are inapplicable); it is improbable that the remaining parts will never give rise to questions of policy. Again, as a rule cases like the present one will probably not require the courts to go into questions of policy in determining the validity of the local statute, yet those which do will loom largest in the public eye. It is just then that an injunction would be most unwelcome.

As has already been pointed out, some states have chosen to surrender some legislative independence in favor of cheaper law-making. It might be added that there is no available evidence that they have suffered in consequence.

What trend there is toward the injunction against legislative proceedings may simply be the same that has always existed. In that case it can be expected to continue to receive much the same treatment as it has in the past; and the present state of the law on the subject will not undergo any great changes for some time to come.

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[44] Norton v. Shelby County (1886) 118 U. S. 425, 442, 30 L. ed. 178.

[45] The only cases in which large expenditures could arise before the initiative and referendum were used for ordinary legislation were local option elections and elections on state constitutional amendments.

[46] See Oberholtzer, The Initiative, Referendum and Recall in America, chap. XVI; Barnett, The Operation of the Initiative, Referendum and Recall in Oregon, pp. 78-80.

[47] E. g., Massachusetts. See O. K. McMurray, Some Tendencies in Constitution Making, 2 Cal. Law Rev., 203 ff.

On the other hand, it may be a new development—either as a manifestation of a general tendency toward "government by injunction" (which is sometimes said to be present in other fields),[48] or as an attempt to cope with the problems which are the outgrowth of the introduction of direct legislation for every-day use. Under these circumstances the present state of the law would represent a transition stage. It would be one step in a process of readjustment of the relative powers of the judiciary and the legislature in this particular field.

The solution is, of course, like the solution of most problems of constitutional law, a matter of trial and error. The course finally adopted will be the one which experience will have shown to have the greatest practical advantages and the least practical disadvantages in the long run.—George G. Olshausen (1925) 14 Cal. Law Rev. 37-44.

Section 3.—Effect of Unconstitutionality: Reliance Upon Validity of Legislation.

SUMNER ET AL. v. BEELER.

1875. Supreme Court of Indiana. 50 Ind. 341.

PETTIT, C. J.—This suit was brought by the appellee against the appellants, to recover damages for an illegal arrest, imprisonment, prosecution, and causing him to be fined on the charge of being found drunk, under the ninth section of the Baxter bill of 1873.

The defendants answered jointly and separately, by the general denial and by a third paragraph in justification under the ninth section of said law. * * *

This section has been held to be unconstitutional, or, in other words, that it is not law, [because the content of the section was not indicated in the title of the Act as required by the state constitution]. The State v. Young, 47 Ind. 150.

No question in law is better settled, and this is admitted by the counsel for the appellants in their brief, than that ministerial officers and other persons are liable for acts done under an act of the legislature which is unconstitutional and void. All persons are presumed to know the law, and if they act under an unconstitutional enactment of the legislature, they do so at their peril, and must take the consequences.

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[48] See, e. g., Government by Injunction, 5 Cornell Law Quarterly, 424.

There was no error in sustaining the demurrer to this paragraph of the answer. * * *

The judgment is affirmed, at the costs of the appellants.[1]

GROSS v. RICE.

1880. Supreme Judicial Court of Maine. 71 Maine 241.

[Action of trespass to the person, and false imprisonment. Tried in the Supreme Judicial Court on an issue of law on facts agreed. The plaintiff after discharge from imprisonment brought this action against the warden for sixty-eight days detention beyond the term for which he had been sentenced. It was admitted that in detaining the prisoner for these sixty-eight days the warden acted in strict conformity with the statute stated in the opinion. It was agreed that if on these facts the action was not maintainable the plaintiff was to be non-suited. Otherwise he was to have judgment against the defendant for damages to be assessed by a jury.]

Peters, J. The sentence was for four years. For good conduct, the prisoner had credits which gave some deduction from the sentence. For bad conduct, he was in solitary confinement one hundred and forty-four days. The punishment in solitary confinement was at various times and for various causes. Among the causes were disturbance, laziness, insolence, noise, breaking rules of workshop, assault upon a fellow convict, disobedience, refusal to work, threats, spoiling work, and laughing and talking. He was not discharged, until he had served his sentence and sixty-eight days imprisonment additional thereto. This detention was in pursuance of section 40, c. 140, R. S., which provides that a convict shall not be discharged from the state prison until he has remained the full term for which he was sentenced, excluding the time he may have been in solitary confinement for violation of the rules and regulations of the prison.

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[1] "It is contended * * * that an unconstitutional law is no law, and therefore must be considered as never having been written. This is a fallacy. The rule of universal application is, that all laws are presumed to be constitutional until the contrary is decided. * * * Rights can be acquired under a law which may be determined to have been unconstitutional, and pains and penalties be avoided by those who justify their acts as having been committed under a law, however that law may have been subsequently declared to have been unconstitutional. If a piece of property is sold under a *fi. fa.* issued in the case of A v. B, and C purchases it, if it should thereafter be determined in a litigation between D and C that the law under which A obtained his judgment against B was unconstitutional, would B be entitled to get back his property from C? If the legislature passed a law regulating trials in criminal cases, and A, being indicted for murder, was tried under that law, found guilty, sentenced and was hung, and in the case of B, tried before the same tribunal for the same offense, B's counsel should, after conviction, and on a motion in arrest of judgment, convince the judge that the law under which he was trying the case was unconstitutional, and the prisoner be discharged, would the sheriff who had hung A be liable to be punished? Certainly, if the position contended for be correct that an unconstitutional law is *ipso facto* null and void," * * *. Morgan, J. in Factors & Traders' Ins. Co. v. New Orleans (1873) 25 La. Ann. 454, 460.

Is this section of the statute valid and constitutional? We think not.

By the declaration of rights in our state constitution, the accused, in criminal prosecutions other than cases of martial law and impeachment, has the right of a public trial by jury, and cannot be deprived of his life, liberty, property or privileges, but by the judgment of his peers or the law of the land. By the Fourteenth Amendment to the national Constitution, no state shall deprive any person of life, liberty or property, without due process of law. It is not now worth while to discuss the effect of any verbal differences between the state and national prohibitions, as we feel clear that the clause in the national Amendment is directly applicable to the question presented.

No one would for a moment deny the proposition, that a person cannot be taken to the state prison and detained there, as a punishment, without an accusation, trial by jury, conviction and sentence. Nothing less than these forms would amount to due process of law, where an infamous punishment is to be inflicted. No one would deny that such an act, done by the state, would be in direct defiance of the constitutional amendment. But a man, lawfully imprisoned, is detained in prison beyond the term of his sentence, without any new accusation, trial and sentence as a justification therefor. Is not this detention a new imprisonment? Is there a difference whether the person is seized within or without the walls of the prison, to be incarcerated? Does not the constitutional inhibition in its terms apply as clearly and literally to this act as to the other? Suppose the statute was not in existence, and never had been passed. Would it be pretended that the warden would be justified in detaining a convict for a single day over his sentence? If he did, would not the act deprive the prisoner of his liberty without any process of law and without any legal excuse or justification whatever? The state orders it to be done. Does not the state then deprive the prisoner of his liberty without due process of law?[2] Here, punishments are inflicted upon the prisoner during the term of his sentence; for solitary confinement is deemed a much severer infliction than hard labor. After his sentence has expired, he is imprisoned anew for sixty-eight days without a formal accusation, or trial or sentence by any court. It is clear that the imprisonment for more than the four years was not warranted by the sentence itself, nor could it be. A man cannot be sentenced for a crime or offence before he has committed any; not for an offence to be committed; not conditionally. The plaintiff was punished, after his term of sentence, for having been punished during the term. The detention was not as a punishment bestowed by the warden in the exercise of his discretion, but was one imposed by the legislature as a consequence of the warden's doings. In effect, the plaintiff was punished both during his term of sentence and after it, for the same offence. He was doubly punished for a violation of the rules and regulations of the prison. The very statement of the proposition would seem to be its proof. *Res ipsa loquitur.*

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[2] Why was the state not liable? Compare the following case:—

A city acting in accordance with a statute directed its commissioner of highways to remove part of a house from an area over which a street was being opened. The commissioner gave a peremptory notice to the owner to remove it. If the statute was valid the city had the right to remove the house at the owner's expense if he did not do so. He did so. A tenant under an unexpired lease sued the owner for damages for eviction. After this suit was begun the statute, in a suit between other parties, was held unconstitutional. The court in the instant case reasoned that the city would be liable to the tenant, that the officer would not be, nor the defendant, both having acted in obedience to the city's orders. Dunn v. Mellon (1892) 147 Pa. St. 11, 23 Atl. 210.

It is said that the warden must have the power to inflict punishments upon prisoners for the prison discipline. There can be no doubt of that. It is not to be denied, that the punishment of refractory convicts is a matter within the discretion of the warden, within reasonable limits. Nor is it denied, that the warden had the right to hold the convict in solitary confinement for the time and upon the charges that he did so hold him, during the term of sentence. We are of the opinion, that the warden had no authority to detain or punish him after his sentence had expired. It would be according to due process of law to do the one thing, and in defiance of it to do the other. [After further discussion of the constitutionality of the statute, the opinion continues:]

A point is raised for the defence, that the warden should be protected, because the statute had not been declared unconstitutional when he acted under it. We do not comprehend the logic of a statute having effect as if constitutional, when not so; to be a law for one purpose and not another; a law for one man and not another. It must be either valid or invalid from the beginning, or from the date of the constitutional provision affecting it. Judge Cooley says, (Const. Lim. *188), "when a statute is adjudged to be unconstitutional, it is as if it had never existed." Such is much the better opinion upon the authorities, and such has been the view of the question in the practice in this State. An unconstitutional law is not a law. It is null and void. The warden is only liable to the perils that more or less follow official stations. He had no warrant of court that could protect him. He is liable for the actual, not punitive, damages for the injury suffered.[3]

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[3] In Williams v. Morris (1911) 22 Ohio Cir. Dec. (32 O. C. R.) 453, 458, it is held that where the act for which an officer made an arrest without warrant is declared by state statute to be a crime, the officer is not liable merely because the statute is unconstitutional, on the ground that a statute is presumed to be valid until a court has declared it invalid and "courts should protect officers and others in the administration of the law as it appears in the statute, promulgated by proper authority, and so long as they do not transcend the authority given by such

WALTON, VIRGIN and LIBBEY, JJ., concurred.

DANFORTH, J., being a relative of the defendant, did not sit.

[Appleton, C. J., Barrows and Symonds, J. J., dissented from holding the statute invalid. The dissenting opinions of Appleton, C. J. and of Barrows, J. are omitted. The latter concluded:]

At least, the doubt whether the legislature have exceeded their constitutional power in this instance, ought to restrain us from pronouncing the law invalid.

TRAMMELL v. TOWN OF RUSSELLVILLE ET AL.

1879. Supreme Court of Arkansas. 34 Ark. 105.

[The council of the incorporated town of Russellville passed an ordinance requiring all sellers of alcoholic liquor within the town to pay an annual tax of $300 and made selling without compliance with the ordinance a finable offense. Upon an information filed in the mayor's court charging Trammell with a violation of the ordinance the mayor issued to the town marshall a warrant for the

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statute, their action should be upheld and they should not be mulcted in damage merely because the law is afterwards declared unconstitutional."

In Barling v. West (1871) 29 Wis. 307, 9 Am. Rep. 576 and Chapman v. Selover (1916) 172 App. Div. 858, 159 N. Y. S. 632 officers were held liable for arrest without warrant in circumstances in which such an arrest would have been legal had the city ordinance which purported to authorize it been valid. The latter case was reversed in (1919) 225 N. Y. 417, 122 N. E. 206, on the ground that the ordinance was valid.

It is usually held that where a harmful act (seizure of chattels, invasion of land, etc.) done by an executive, administrative or ministerial officer would be a tort if not authorized by legislation, it is a tort though done in strict accordance with invalid legislation. Reliance in good faith upon supposedly valid legislation is no defense even though the invalidity is not judicially determined until after the act. Hopkins v. Clemson Agr. College (1911) 221 U. S. 636, 55 L. ed. 890 (liability of a corporate personality which was a state agency, invading plaintiff's land); Saratoga State Waters Corp. v. Pratt (1920) 227 N. Y. 429, 433, 447, 125 N. E. 834 (public officer who prevented enjoyment by plaintiff of his right in land); Merrit v. St. Paul (1866) 11 Minn. 223, 232 (city acting as a private suitor sued out a warrant of attachment of property in compliance with statute); Nass v. Maxwell (Tex. Civ. App., 1895), 32 S. W. 565 (for impounding in accordance with statute plaintiff's hogs damaging defendant's land, the defendant held liable in damages for conversion and detention and all costs in trial court which had given judgment for defendant and for all costs in the Supreme Court); Waterloo Woolen Mfg. Co. v. Shanahan (1890) 58 Hun 50, 11 N. Y. S. 829, 33 N. Y. St. 361 (officer violating private water-rights); Titus v. Poland Coal Co. (1923) 275 Pa. St. 431, 119 Atl. 540 ("The statute under which defendant sought to take the land in question being unconstitutional, was void * * * and it follows that defendant was a mere trespasser upon plaintiff's land, and title to the buildings * * * it placed thereon vested at once in the owner of the land" and for removal of the buildings without plaintiff's consent defendant is liable for their value.); Kinneen v. Wells (1887) 144 Mass. 497, 11 N. E. 916 (action of tort lies against registrars of voters for refusing to register a voter who would have been ineligible to vote had the statute the officers relied upon been valid); and see the statutory liability enforced in Myers v. Anderson (1915) 238 U. S. 368, 59 L. ed. 1349.

arrest of Trammell; the marshall arrested him under the warrant, and in the mayor's court he was tried, convicted and sentenced to pay a fine from which judgment he appealed to the circuit court. What disposition was made of this appeal is not reported. Another like proceeding was begun against Trammell for a later act of selling but before trial the circuit court enjoined the enforcement of the ordinance. For the above arrests Trammell brought this action for false imprisonment against the incorporated town, the mayor personally and the marshall.]

Harrison, J. * * * It is, and was upon the trial, conceded that the town council had no authority to pass such an ordinance, and that the same was void, as was held in regard to a similar ordinance, in Tuck v. Town of Waldron, 31 Ark. 462.

Municipal corporations are created by the state for political objects, and invested with a portion of governmental power, to be exercised for local purposes connected with the public good. "They possess, according to many courts," says Judge Dillon, "a double character, the one *governmental, legislative* or *public*; the other, in a sense, *proprietary* or *private*. The distinction between them," he continues, "though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common law liability of municipal corporations for the negligence of their servants, agents or officers in the execution of corporate duties and powers. On this distinction, indeed, rests the doctrine of such implied liability. In its governmental or public character, the corporation is made by the state one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state, and not for itself." Dillon on Municipal Corporations, 39.

For acts done by them in their public capacity, and in discharge of the duties imposed upon them for the public benefit, cities and towns incur no liability to persons who may be affected or injured by them. * * *

Then, for neither the act of the council in passing the ordinance, the acts of the mayor in issuing the warrants, nor those of the marshall and his deputy in making the arrests, was the town liable to the plaintiff. * * *

That the marshall and his deputy were protected from liability by the warrants, we think is clear.

The judgment is affirmed.[4]

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[4] The person who makes affidavit of complaint initiating the prosecution is not liable in such circumstances, nor is the prosecuting attorney, nor the justice of the peace before whom the conviction is had, nor the officer who executes the warrant, that is, where the invalidity of the legislation defining the offense is the sole defect. Bohri v. Barnett (1906) 144 Fed. 389.

RUSH v. BUCKLEY ET AL.

1905. Supreme Judicial Court of Maine. 100 Maine 322.

Two actions for false imprisonment heard together.

WISWELL, C. J. The plaintiff had been arrested upon two occasions, brought before the Augusta Municipal Court, tried, convicted, sentenced to pay a fine in each case and committed to jail in default of such payment, upon warrants issued by that court. The offense alleged in the complaint and warrant in each case was the violation of an ordinance of the City of Augusta regulating public carriages therein, and which prohibited all persons from driving such a carriage in the City of Augusta without a license therefor, under a penalty therein provided. In these two cases, reported and argued together, the plaintiff sues the judge of the municipal court who issued the warrants, the officer who served them and the persons who made the two complaints, for false imprisonment, upon the ground that the ordinance had never gone into effect, and was void, because it never had been published in some newspaper printed in Augusta as required by the statute authorizing such ordinances. R. S., c. 4, sec. 93, paragraph IX. * * *

As to the liability of the defendants who made the original complaints upon which the warrants were issued: It is settled by an almost unbroken line of authorities, that where a person does no more than to prefer a complaint to a magistrate, in a matter over which the latter has a general jurisdiction, he is not liable in trespass for false imprisonment for the acts done under the warrant which the magistrate thereupon issues, even though the magistrate has no jurisdiction over the particular complaint.[5] Barker v. Stetson, 7 Gray 53; Langford v. Boston & Albany R. R. Co., 144 Mass. 431; Gifford v. Wiggins, 50 Minn. 401, 52 N. W. 904; Murphy v. Walters, 34 Mich. 180; Teal v. Fissel, 28 Fed. R. 351. If the complaint is malicious, and without probable cause, the complainant would be answerable in another form of action,[6] and it would be no defense that the facts stated to the magistrate, upon which the warrant was issued, did not constitute a criminal offense. Finn v. Frink, 84 Maine 261. In order for a complainant to be liable in this form of action, whether his motives were malicious or not, he must do something more than merely to make complaint before a magistrate having jurisdiction of the party and over the general subject-matter, by interfering and instigating the officer to enforce the warrant. * * *

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[5] Accord: Bohri v. Barnett (1906) 144 Fed. 389; Tillman v. Beard (1899) 121 Mich. 475, 80 N. W. 248 (citing several cases). Contra: Scott v. Flowers (1900) 60 Nebr. 675, 84 N. W. 81 (verdict for $2,500).

[6] In Birdsall v. Smith (1909) 158 Mich. 390, 122 N. W. 626, it was held that in an action for malicious prosecution the question whether prosecutor had probable cause can not depend upon what may be held as to the validity of the statute under which the prosecution was instituted. The court said that every statute should be considered valid until there is a judicial determination to the contrary and that the prosecutor had a right to act upon that assumption. See also Goodwin v. Guild (1895) 94 Tenn. 486, 29 S. W. 721, where a city mayor instituted a prosecution for violation of an ordinance subsequently held unconstitutional, and was held not liable in suit for malicious prosecution, although the validity of the ordinance had been mooted in the town and the mayor acted with a view to test it.

As to the liability of the officer: For reasons founded on public policy, and in order to secure a prompt and effective service of legal process, the law protects its officers in the performance of their duties, if there is no defect or want of jurisdiction apparent on the face of the writ or warrant under which they act. The officer is not bound to look beyond his warrant. He is not to exercise his judgment touching the validity of the process in point of law; but if it is in due form, and is issued by a court or magistrate apparently having jurisdiction of the case or subject-matter, he is to obey its commands. In such case, he may justify under it although in fact it may have been issued without authority, and therefore be wholly void.[7] * * * Where, however, the process is void on its face, or where the court or magistrate issuing the warrant has no general jurisdiction over the subject-matter, the officer is not protected by his process.

We have had numerous illustrations of this latter rule in the reported decisions of this court, some of which may be referred to for the purpose of showing the ground upon which all of these decisions have been based. In Warren v. Kelley, 80 Maine 512,[8] the process commanded the officer to seize a vessel for the purpose of enforcing a lien created by a state statute for repairs upon a vessel. The statute authorizing the enforcement of such a lien by a proceeding in the state court was unconstitutional. The court had no jurisdiction over the subject-matter, which, by the Constitution of the United States, was vested in the federal courts. It was therefore held by this court that the officer was not protected by the process, because the process was absolutely void inasmuch as the state court had no jurisdiction over the subject-matter, and, "sufficient appeared upon its face (the process) to show that it was not from a court of competent jurisdiction in reference to the subject-matter." * * *

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[7] That is, void in the sense that the prisoner is entitled to immediate discharge which if refused he may obtain by writ of habeas corpus or other summary process.

[8] The cited case followed Campbell v. Sherman (1874) 35 Wis. 103 where the statute and the grounds of its invalidity were the same. The Wisconsin court said: "That a proceeding against a vessel to enforce a contract for pilot's wages is a subject of admiralty jurisdiction, and partakes of all the incidents of a suit in admiralty, is equally well settled. It therefore results from these propositions of law, that the [state] circuit court which issued the warrant commanding the sheriff to seize and safely keep the steamer Ida Campbell to answer any lien which should be established against the boat in favor of the plaintiff in that action for pilot's wages, had no jurisdiction of the cause, and its process was void. It gives no strength to the position of defendant's counsel, nor does it aid the discussion, to say that the circuit court is a court of general jurisdiction, when it is conceded that it had no jurisdiction over a proceeding exclusively vested in the courts of the United States. For as to the subject matter of such a suit, it had no jurisdiction whatever, and the act of the legislature clothed the court with no power to try and determine it." The warrant was said to show its invalidity because it referred to the statute and directed the seizure of a vessel in enforcement of a lien for wages. The holding of these two cases is accepted in the American Institute of Law Restatement of Torts, No. 3, pp. 97-98. For a discussion of other points of the principal case see ibid. pp. 99-103.

It is apparent that in all of these decisions of our own court, some of which are cited and relied upon by counsel for the plaintiff, the officer was held liable because of the fact that the process under which he attempted to justify was void upon its face, or because the court or magistrate by whom the process was issued had no jurisdiction over the subject-matter, and the process itself clearly showed the want of jurisdiction. None of these cases are authority for the proposition that a warrant, fair upon its face, which discloses no defect or want of jurisdiction, and which was in fact issued by a court having general jurisdiction of offenses of like nature, does not afford protection to the officer. Upon the other hand, the doctrine that an officer is protected under such circumstances is abundantly supported by the authorities. * * *

The case of Hofschulte v. Doe, 78 Fed. R. 436, is very much in point and contains a full discussion of this question. It was there decided that when a court which, though of inferior and local jurisdiction, has general jurisdiction with respect to the violation of the ordinances of the town, entertains a complaint under such an ordinance, and thereupon issues process, fair on its face, to an officer, the process is a justification to the officer in doing the acts thereby required, notwithstanding the ordinance under which the court acts is invalid, and that no action lies against an officer for the acts done by him pursuant to such process.

In accordance with these general principles it is clear that the officer who served these warrants upon the plaintiff is not liable in damages to him, even if the ordinance upon which the complaints and warrants were based had never gone into effect for the reason before stated. The warrants were issued by the judge of the municipal court of the city of Augusta, which court had general jurisdiction over the subject-matter of the violation of city ordinances. When we speak of a court as having jurisdiction over the subject-matter, we mean, as said in State v. Neville, 110 Mo. 345, 19 S. W. 491, "the power to hear and determine cases of the general class to which the proceeding in question belongs." The complaints were for the violation of a city ordinance in regard to the regulation of public carriages. The city had power to pass such an ordinance, express authority therefor being given by the statute R. S., c. 4, sec. 93, paragraph 9. * * * If it were necessary for an officer, before serving a warrant issued by such a court, having general jurisdiction of offenses of this nature, and over the alleged offender, to first make inquiries as to whether all of the necessary preliminaries necessary to make a city ordinance effective had been complied with, it would cause intolerable delay and very seriously interfere with the efficient administration of the criminal laws. The ministerial officer is bound to know the jurisdiction of the court which issues process to him, he is bound to know whether, from constitutional or other reasons, the court has jurisdiction over offenses of that nature,[9] but he is not bound to inquire into the question of fact as to whether or not a city ordinance in relation to a subject-matter, concerning which the city is by statute authorized to pass ordinances, has been published as required by the statute.

We finally come to a consideration of the question as to whether, under the circumstances which have already been stated, the judge of the municipal court is liable in damages to the plaintiff for any of the acts done by him. The rule is well established that judges of courts of superior jurisdiction are not liable to civil actions for their judicial acts, even where such acts are in excess of their jurisdiction. As to whether this immunity from civil liability is equally applicable to a judge of an inferior court, or to a magistrate of limited jurisdiction, is a question about which the authorities are not in entire accord. We favor the doctrine, towards which, we think, there is a strong tendency in more recent judicial opinion, that where a judge of an inferior court, or a magistrate, is invested by law with jurisdiction over the general subject-matter of an alleged offense, that is, has the power to hear and determine cases of the general class to which the proceeding in question belongs, and decides, although erroneously, that he has jurisdiction over the particular offense of which complaint is made to him, or that the facts charged in the complaint, constitute an offense, and acts accordingly in entire good faith, such erroneous decision is a judicial one for which he should not be, and is not, liable in damages to a party who has been thereby injured. We can perceive of no good reason why the judge of general local, but inferior, jurisdiction should not be as fully protected against the consequences of his erroneous judicial decision, concerning a matter within the limits of his general jurisdiction over offenses of the same general nature, as should judges of superior courts for their judicial mistakes.

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[9] Is a mittimus issued to a prison warden by a court after conviction of a person on a charge of felony a justification of the warden for confinement of the prisoner where under the statutes of the state the court has no jurisdiction to try felonies? Would the reason that the court had no jurisdiction be material? In Patterson et al. v. Prior (1862) 18 Ind. 440, 81 Am. Dec. 367 where Prior had been convicted and sentenced to imprisonment in a state prison and had been discharged upon habeas corpus because the court had no jurisdiction of felonies, (a statute giving it jurisdiction had been impliedly repealed by a later statute, both being passed at the same session of the legislature; see Spencer v. State (1854) 5 Ind. 41), it was assumed that Miller, the warden, and Patterson, lessee of the prison, committed a tort by confinement of Prior and in an action of assumpsit, waiving the tort, judgment was given Prior for the value of his labor against Patterson who had received the benefit of the labor but not against Miller who had acted merely as warden and had received no benefit. See also Patterson v. Crawford (1859) 12 Ind. 241, but compare Thompson v. Bronk (1901) 126 Mich. 455, 85 N. W. 1084. Where, as is usual, the state receives the benefit why could not recovery be had against it in such a case? Should the warden be liable for false imprisonment either civilly or criminally? Compare with the hypothetical case put by Morgan, J., p. 133, n., supra.

In the application of this doctrine, the distinction must be observed between mere excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. This distinction was very clearly pointed out in the case of Bradley v. Fisher, 13 Wall. 335, a leading case upon the question of judicial liability. In illustration of this distinction, the court in that case said: "Thus, if a probate court, invested only with authority, over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by law made an offense, and proceed to the arrest and trial of a party charged with such acts, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction,[10] or of the jurisdiction of the court held by him, for

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[10] In Henke v. McCord (1880) 55 Iowa 378, 385, 7 N. W. 623 though holding the ordinance invalid for violation of which the justice of the peace issued the warrant of arrest, and admitting that judicial officers have no immunity for acts done without jurisdiction, the court said, "when the information was presented to the justice in this case all the matters pertaining to his right to issue a warrant were properly brought within his jurisdiction. He was called upon to exercise judicial powers. If the ordinance was valid it was his duty to issue the warrant. A refusal to do so would be a disregard of the obligations imposed upon him by his office. He could justify his refusal only upon the ground that the ordinance was invalid. He was thus called upon to pass judicially upon the validity of the ordinance. In making this determination he acted strictly within his jurisdiction. * * * There is neither reason nor justice, it seems to us, in holding a justice of the peace liable to a civil action for such an error of judgment." Followed in Brooks v. Mangan (1891) 86 Mich. 576, 49 N. W. 633, 24 Am. St. 137, and the same reasoning is adopted in Bohri v. Barnett (1906) 144 Fed. 389.

On a like issue it has been said, "The jurisdiction of the magistrate was not derived from, and did not depend upon, the act which is challenged, but upon the general statutes of the state. He had jurisdiction to pass upon every question involved in the action, including the validity of the law imposing the penalty." Therefore it was held that though the challenged act which defined the offense these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle for exemption from liability which obtains for errors committed in the ordinary prosecution of a suit, where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons." The particular appropriateness of this language above quoted to this case is apparent. * * *

Emery, J. I think the majority opinion holds doctrines impairing the right of personal liberty and subversive of long established rules of law of this state. * * * The Augusta Municipal Court, however, is an inferior court of limited jurisdiction, which is presumed not to have jurisdiction until it affirmatively appears that jurisdiction has been expressly conferred. Hersom's Case, 39 Maine, 476; Gurney v. Tufts, 37 Maine, 130; Thurston v. Adams, 41 Maine, 419, 423; Wills v. Whittier, 45 Maine, 544; Inman v. Whiting, 70 Maine, 445. It has jurisdiction expressly conferred by statute to entertain complaints "charging a person with the commission of an offense," R. S., ch. 133, sec. 6; but I find no statute nor other authority conferring upon it jurisdiction to entertain a complaint only charging an act which is not an "offense." * * *

In Warren v. Kelley, 80 Maine, 512, the officer was held liable because the supposed statute authorizing the seizure had no force, being unconstitutional. * * * Despite the able argument in the opinion, I think it remains unrefuted and irrefutable that a lifeless ordinance and a lifeless statute are equally without force whatever the cause, and that the one can afford no more protection than the other.[11] * * *

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and prescribed the penalty might be invalid, yet a warrant of arrest in execution for nonpayment of the penalty was a justification to a person who directed its execution. Hallock v. Dominy (1877) 69 N. Y. 238.

A judgment which results from applying as the law of the case an unconstitutional statute is at worst an erroneous judgment, but it is not a "void" judgment if the court's jurisdiction of the case does not depend upon the statute. Brandhoefer v. Bain (1895) 45 Nebr. 781, 64 N. W. 213.

For instances in which justices of the peace acted wholly without jurisdiction see Heller v. Clarke (1904) 121 Wis. 71, 98 N. W. 952; De Courcey v. Cox (1892) 94 Cal. 665, 30 Pac. 95.

[11] The language of many of the earlier opinions support this undiscriminating generality, though the facts of some of them might have justified the result upon more restricted reasoning. In Fisher v. McGirr (1854) 1 Gray (Mass.) 1, 45, 46, 61 Am. Dec. 381, Shaw, C. J., said:—"If the magistrate or tribunal, from which the process issues, has jurisdiction, and the process is apparently regular, the officer may safely follow and obey it, and justify himself under it. But if the magistrate has no jurisdiction, the process is not merely voidable, but wholly void; the officer taking the property under it, has no authority, and is therefore liable to an action of trespass, * * *. The law relied on for a justification, being void, gave the magistrate no jurisdiction and no authority to issue the

COTTAM v. OREGON CITY.

1899. United States Circuit Court, D. Oregon. 98 Fed. 570.

This was an action to recover damages for alleged false imprisonment. On demurrer to complaint.

Bellinger, District Judge. This is an action brought against Oregon City, a corporation, and against Ryan, who is the recorder, and Burns, the acting chief of police, of the city, for damages resulting from the arrest and imprisonment of the plaintiff on what is admitted to have been a groundless complaint. The action taken by the officers grows out of an ordinance passed by the city requiring all persons selling goods, or soliciting the sale of goods, to pay a license tax therefor. * * *

It is established, upon the authority of the supreme court of the United States, that an ordinance of the character in question, so far as it applies to persons soliciting the sale of goods in behalf of those doing business in another state, is a regulation of interstate commerce, and void. Robbins v. District, 120 U. S. 489, 7 Sup. Ct. 592, 32 L. ed. 292. The rule does not extend so far as to make the ordinance void, except as it is applied to interstate business, and not then if the solicitor carries his goods with him, and thereby becomes a peddler, and so comes within reach of the general or police power of the state,—a distinction, whether wise or otherwise, that is clearly made, although there was a strong dissent from the chief justice, concurred in by Justices Field and Gray.

If the officers of the city acted without any jurisdiction, if there was a clear absence of jurisdiction, if the ordinance was of such a character that any authority exercised under it was a void authority, the defendants are liable, and this would result in any such case, whether the court was of general jurisdiction or was inferior. * * * The distinction between the two cases is confined to the mere presumption that exists in favor of the court of superior jurisdiction,—to the presumption, in other words, that the court of

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search warrant." The statute was held invalid because it purported to authorize magistrates to issue search warrants lacking in the specificness required by the state constitution. [Is it unreasonable to require officers whose duty it is to issue or execute warrants to know the requirements of the constitution as to specificness of warrants?] In Ely v. Thompson (1820) 3 A. K. Marsh. (Ky.) 70, it was said that the state constitution "is an instrument that every officer of government is bound to know and preserve, at his peril, whether his office be judicial or ministerial; and he can not justify an act against its provisions, even with the authority of the legislature to aid him, however much that may mitigate his case." The court held a justice of the peace and a constable liable for issuing and serving a warrant of arrest and sentencing and executing sentence (thirty lashes) because the statute which purported to authorize the proceeding was unconstitutional. This statute declared the offense and perhaps also was the source of jurisdiction or authority for the peculiar proceedings.

superior jurisdiction, in acting, has acted within its jurisdiction, unless the absence of all jurisdiction is shown; but, where there is an absence of all jurisdiction in either case, the liability is equal. Nor is there any reason for the exemption of judges of the superior court of record from liability to civil suit for their judicial acts exercised when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of this jurisdiction, that does not equally apply in cases where the jurisdiction is an inferior one. * * *

In this case, so far as appears, there was jurisdiction under the ordinance of the city to collect license taxes, and that was what was done, and what is complained of in the present case; but in the enforcement of that ordinance the recorder and chief of police erred in the conclusion that the plaintiff was within its provisions, and for this erroneous judgment they are sought to be held liable in damages. Now, can it be said to be clearly apparent that there is no jurisdiction in such case? Technically construed, it does not appear from the complaint that the plaintiff was soliciting orders for goods manufactured in another state. It is immaterial, except for the purposes of jurisdiction in this court, that the plaintiff was a citizen of the state of California. The material thing with reference to this liability is the soliciting of orders for goods manufactured out of the state, and this does not appear. But, for the purposes of this demurrer, I will assume that it does appear. Now, upon such a state of facts, might not the recorder issue a warrant for the arrest of the plaintiff, and might not the chief of police execute such warrant, in ignorance of the fact that the business in which the plaintiff was engaged was interstate business? And the conclusion might reasonably be reached by the officers charged with the enforcement of this ordinance that even such business was not exempt from the payment of the license tax. Such was the opinion of the chief justice and two of his associates in the case of Robbins v. District. If there was convincing reason for such a conclusion on the part of these learned men, why should a recorder and chief of police of the city of Oregon City be held liable in a civil action in damages for taking the same view? It is clearly not a case where there is a clear absence of jurisdiction of the subject-matter, since, as already stated, the city is authorized to collect license tax from persons soliciting business, and, at the most, it is only in the case of persons soliciting for the sale of merchandise outside of the state that the party would be exempt from liability to pay the license. It seems very clear that the officers, in the execution of this ordinance, are within the rule of exemption from civil liability. They are certainly within the reason of the rule, and, so being, are exempt.* * *

In this case the plaintiff could have relieved himself from the damages which he has sustained by the payment of the license tax, in which case he would have had his remedy against the city to recover the money thus paid, without serious injury or damage to himself; and so he ought not to be permitted to make use of imprisonment, which has, in a sense, been voluntarily submitted to by him, for the purpose of recovering damages. The demurrer is sustained.

ELLINGER v. COMMONWEALTH.

1903. Supreme Court of Virginia. 102 Va. 100.

[By statute the legislature authorized the State Fish Commissioner to settle as between the state and Ellinger a disputed low watermark line and did so by, in effect, quit claiming on behalf of the state to Ellinger a part in dispute in exchange for Ellinger's quit claim of a part. The legislature, not satisfied, shortly thereafter directed this suit for rescission to be filed by the attorney-general. The Supreme Court affirmed the decree below granting rescission, on the ground that the statute was "null and void" because its purpose was not stated in its title in the manner required by the state constitution. The court then added:]

KEITH, P. * * * It is suggested that the state has acquiesced in or ratified, or is in some way morally bound by, what was done. The legislature, it is true, to a large extent represents the commonwealth, but it does so in subordination to the constitution of the state. It can do nothing which that instrument prohibits and, in what is confided to it, must conform in its mode of action to the requirements of the constitution. If it transcends its power, or if it acts in contravention of the constitution, its acts are void; they confer no rights and bind no man, and all the world is charged with notice of the limitations which the constitution imposes. But, even if it were not so, if it be that the state can be charged by reason of acquiescence in or ratification of, the unauthorized acts of its agent, there is nothing in this record by which the state can be so compromised, for from the recital of facts at the beginning of this opinion it sufficiently appears that the state was energetic in discovering and prompt to disavow the whole course of procedure by which she was divested of her rights.

If, relying upon the act approved February 26, 1894, Ellinger has in good faith expended money, it may be that he has some ground upon which to appeal to the General Assembly to be reimbursed, but upon that aspect of the case we are not sufficiently advised to entertain an opinion, and it would be beyond our province in any event to give expression to it. The General Assembly, with full knowledge of all the attending circumstances, will doubtless do whatever good faith and fair dealing shall dictate.

We are of opinion that the case must be affirmed.

Affirmed.

NORWOOD v. GOLDSMITH ET AL.

1910. Supreme Court of Alabama. 168 Ala. 224.

[County boards of revenue had statutory authority to consider claims for refund of taxes "paid under mistake of law, upon an illegal assessment made under color of law." Such a board allowed plaintiff's claim on their determination that the statute under which he had paid the tax was unconstitutional, and issued a warrant on the county treasurer. The latter refused to honor the warrant. Plaintiff then proceeded by motion in the county circuit court for judgment against the treasurer and his sureties under a statute authorizing such summary action where a county treasurer should "fail on demand and without good excuse" to pay an allowed claim. From a judgment denying the motion Norwood appealed.]

Mayfield, J. [after holding the assessment statute unconstitutional proceeded:]

It is here insisted by appellee Goldsmith that appellant cannot proceed against him as treasurer until he has first had the local law, under which the taxes were paid, collected, and held, declared void in a proper proceeding by a court of competent jurisdiction; that neither he nor the board of revenue can pass upon the constitutionality of the local act. A complete answer to this, though in the inverse order, is that both he and the board of revenue have already passed upon the constitutionality of the act—one holding it valid, and the other, void—and that he has brought this, a "proper proceeding," in a court of competent jurisdiction to so test the constitutionality of such act.

All persons or officers are of necessity required to pass upon the validity of all acts or proposed statutes under which they are required to act or to decline to act. In so acting or declining to act under such proposed statute he must necessarily pass upon it for himself. He may do so with or without advice from attorneys or other sources of information. But courts are the one source from which he can get no information, in advance, as to whether he should, in any particular instance, observe or decline to observe the requirements of the proposed act or statute. Every executive officer, or every person as for that matter, is presumed to know the law—a presumption often violent but always necessary. Hence every man is his own constructionist. If two differ as to the construction of a given act, and it is acted upon or declined to be acted upon by the one, to the hurt or injury of the other, and the one is sued in the courts by the other for so acting or declining to act, and in the decision of the cause it becomes necessary to pass upon the validity of the act in order to determine the rights of the parties in that suit, the court will then—but not until then—pass upon the constitutionality of the act; and it is then only passed upon by the court in so far as the rights of these particular parties to the particular suit are concerned. When so decided by the highest court of the land all people, including executive and judicial officers, ought and usually do consider that particular question as settled and binding; but this is only so by the rules of policy, propriety, and common consent, and the credence which the people have in the opinions of such courts. * * *

It has often been decided by this court that "county warrants import a prima facie, though not a conclusive, liability against the county. The warrant is a mere command or order from one public county officer to another to pay from the county funds as therein directed. Strictly speaking, no action can be maintained upon the warrants against the county, or any officer or person. If the treasurer has funds in his hands lawfully applicable to the payment of the warrant, it is his official duty to pay it; but he is not bound by virtue of any contractual obligation as a party to the instrument. For his wrongful refusal to pay he is liable officially, and, being liable officially, his official bondsmen are also liable. The action, however, is not on the warrant, but is for a breach of his official duty.—Savage v. Mathews, 98 Ala. 535, 13 South. 328; Grayson v. Latham, 84 Ala. 546, 4 South. 200, 866. No action can be brought against a county on a claim until it has been presented to the court of commissioners, as required, and until it is disallowed or reduced by the court, and the reduction refused by the claimant. —Looney v. Jackson Co., 105 Ala. 597, 17 South. 105." State ex rel. Norwood v. Goldsmith, 162 Ala. 171, 50 South. 396.

It follows that the judgment appealed from is erroneous and must be reversed, and the cause is remanded.

Reversed and remanded.[12]

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[12] In applying the rule that a ministerial officer charged by statute with an absolute and definite duty, in the performance of which an individual has a special interest, is liable personally if he refuses or omits performance, it has been held no defense that he in good faith erroneously believed the statute to be unconstitutional. Thus where an officer declined under such belief to present to county supervisors a private person's claim against the county, judgment against the officer for the amount of the claim was affirmed. Clark v. Miller (1874) 54 N. Y. 528.

The People v. Salomon (1870) 54 Ill. 39: A statute of Illinois authorized the state board of tax-equalization to make horizontal increases of the assessed valu-

Dowdell, C. J., and Simpson and McClellan, JJ., concur.

McClellan, J. I concur in the conclusion on this appeal on the ground that the appellant had the right to elect whether he would invoke mandamus to compel the county treasurer to pay the warrant in question, validly issued as it clearly was, out of the funds so illegally gathered, or to proceed summarily, as was done in this instance, against the officer and his sureties as for the breach of his official duty to pay the warrant.—Wyker v. Francis, 120 Ala. 509, 519, 24 South. 895, et seq. The reasoning and authorities in Wyker v. Francis are, in my opinion, conclusive on the question that mandamus is an available remedy in cases of the character in hand. In

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ation of property in counties of the state. In accordance with this statute the board ordered the clerk of the court of Cook county, who was the appropriate officer for the purpose, to enter on the books of the county collectors an increase of twenty-four per cent. He did not do so, acting under his belief that the statute was unconstitutional. Mandamus was sought against him and he pleaded the unconstitutionality of the statute. The court held the statute valid, and issued a mandamus ordering him to extend the increase on the books. He did not do so. Brought before the court to answer a charge that this was a contempt, he set up that before the mandamus proceedings had begun he had delivered the books to the various collectors who now refused to return the books, that it was their legal duty to retain the books because without them they could not perform their duties as collectors. Conceding these facts to be true, the court held that they did not purge the contempt, (1) because respondent had not disclosed in the mandamus proceedings that he had then already delivered out the books to the collectors, and mainly (2), addressing the respondent: "you are endeavoring to excuse your disobedience to a command of the court, by setting up your own previous disobedience to a command of the legislature."

"The law under which this additional tax was imposed, had passed the legislature under all the forms of the constitution, and had received executive sanction, and became, by its own intrinsic force, the law to you, to every other public officer in the state, and to all the people. You assumed the responsibility of declaring the law unconstitutional, and at once determined to disregard it, to set up your own judgment as superior to the expressed will of the legislature, asserting, in fact, an entire independence thereof. * * * To allow a ministerial officer to decide upon the validity of a law, would be subversive of the great objects and purposes of government, for if one such officer may assume infallibility, all other like officers may do the same, and thus an end be put to civil government, one of whose cardinal principles is, subjection to the laws. * * * Had the property owners, who were subjected to this additional tax, considered the law unconstitutional, they could, in the proper courts, have tested the question, and it was their undoubted right so to do. Your only duty was obedience. * * *

"The court, therefore, in view of all the circumstances, have come to the conclusion, that you make your fine to the people of the state, of one thousand dollars, and it is further considered, that you stand committed until the fine and costs are paid."

It has sometimes been held that in mandamus proceedings against a public officer to compel him to perform a statutory duty he may not put in issue the validity of the statute but the great weight of authority is that he may do so. The latter is especially true where the officer risks personal liability by obedience or disobedience. Cases are collected in 38 C. J. pp. 921-922. A good discussion is in State v. Candland (1909) 36 Utah 406, 104 Pac. 285, 24 L. R. A. (N. S.) 1260, 140 Am. St. 834. See also Norman v. Kentucky Board of Managers (1892) 93 Ky. 537, 20 S. W. 901, 14 Ky. L. 529, 18 L. R. A. 556.

On a petition for a mandamus to compel an officer to perform his duty, petitioner may challenge the validity of a statute which appears to repeal or conflict with the alleged duty and get its validity decided, and a mandamus granted or refused accordingly, though a few cases are contra. See cases collected in a note in 16 L. R. A. (N. S.) 266.

consequence of the rulings made in the opinion in this case and upon the considerations referred to in Wyker v. Francis, it appears clear to the writer that State ex rel. Norwood v. Goldsmith, County Treasurer, 162 Ala. 171, 50 South. 394, and Hines v. Salter, 154 Ala. 248, 45 South. 587, are not only in conflict with the opinion on this appeal but also are unsound and should be overruled. It was ruled in the former case, denying the writ of mandamus prayed, that the remedy at law was adequate. Wyker v. Francis, at page 523, 120 Ala., at page 895, 24 South., contains a full answer to this proposition. Indeed, it is too evident for doubt that the legal remedy as for misfeasance of the officer is in no sense the substance or effect of the remedy mandamus offers to compel the payment out of funds held by the county.

MINNESOTA SUGAR CO. v. IVERSON.

1903. Supreme Court of Minnesota. 91 Minn. 30.

Writ of certiorari issued from the supreme court upon petition of Minnesota Sugar Company, to review the act of respondent, as State Auditor, in refusing to issue a warrant upon the state treasurer for $19,925.36, to which amount petitioner claimed to be entitled as bounty under the provisions of Laws 1895, c. 205, as amended by Laws 1899, c. 307. Writ discharged. * * *

Collins, J. We shall first express our views on the right of the petitioner to the writ. In State v. Clough, 64 Minn. 378, 67 N. W. 202, it was stated that to render the proceedings of special tribunals, commissioners, or ministerial officers judicial in their nature, they must affect the rights and property of a citizen in a manner analogous to that in which such rights are affected by the proceedings of courts acting judicially. Further discussion in that opinion was merely elaborative of the above concise proposition. The perplexity in determining whether or not certiorari will lie in any given case arises out of the difficulty in distinguishing between legislative, executive, or ministerial acts, and those of a judicial nature, in which an officer, commissioner, or a special tribunal is called upon to act in a judicial or quasi-judicial capacity. This is the chief distinguishing test, as is conceded by the attorney general. If the determination of the tribunal or the officer called upon to act affects the rights or property of a citizen analogous to the manner in which they are affected by proceedings or decisions of courts acting judicially, the proceedings in question are of a judicial nature, and the writ will lie. If they do not so affect rights or property, the determination in question must be considered as ministerial, legislative, or administrative, as the case may be, and so treated by the courts. The character of the office or tribunal does not determine the question, but, rather the nature of the act performed.

Under the 1899 statute the state auditor is made the officer who has to pass upon and determine the validity of all claims for bounty made by any party under the act. If the auditor, by acting in conformity with the statute, has the power of adjudication upon the rights of persons and property, his acts must be quasi-judicial, at least. He is the special tribunal or officer called upon to determine what the law is, and what the legal rights of the parties are, and he acts judicially when passing upon the constitutionality of the law and disposing of such rights. In the case at bar the state auditor exercised no ministerial duties whatever when he declined and refused to allow the claim upon the ground that the law upon which the petitioner was obliged to rely was unconstitutional. He disposed of the petitioner's property rights in precisely the manner in which they might be affected or swept away by proceedings in the courts. He ascertained no facts, nor was he compelled so to do, according to the stipulation, for they were agreed upon. He did not have to construe the law, because its terms were plain and beyond controversy. The facts being undisputed, the auditor declared that the law in question was obnoxious to the constitutional provisions, and for that reason alone he refused to comply with it.

In State v. Dunn, 86 Minn. 301, 304, 90 N. W. 772, it was said that "the exercise of judicial functions may involve the performance of legislative or administrative duties, and the performance of administrative or ministerial duties may, in a measure, involve the exercise of judicial functions. It may be said generally that the exercise of judicial functions is to determine what the law is, and what the legal rights of parties are, with respect to a matter in controversy; and whenever an officer is clothed with that authority, and undertakes to determine those questions, he acts judicially." It is obvious that in the present case the act of the auditor was judicial. It matters not that the court cannot by a writ of certiorari cause the auditor to act in conformity with the bounty act. We can merely review his determination at this time, and, if found erroneous, another and further remedy must be discovered by the petitioner.

Having stated the sole issue made by the return, we pass to the merits of the case, and find involved the constitutionality of Laws 1899, p. 389 (c. 307), the requirements of which have been complied with in all matters of detail by the petitioner. * * * [The court held the statute to be in conflict with the state constitution and discharged the writ.]

STATE v. GODWIN ET AL.

1898. Supreme Court of North Carolina. 123 N. Car. 697.

Montgomery, J.: The defendants were justices of the peace and by virtue of their office (Code, Section 2014) were a board of supervisors and were required to look after the public roads in their townships. They were required also (Code, Section 2015) to hold stated meetings for the purpose of consulting on the condition of the roads, and, by Section 2024 of The Code, to make to the Superior Court at term time an annual report of the condition of the roads. The General Assembly of 1897 in Chapter 514 undertook to repeal the provisions of The Code, above referred to, as to Hertford County, and to impose upon others the duties required of the defendants. The defendants after the enactment of the Act of 1897, failed and refused to discharge the duties enjoined upon them under the provisions of the former law (The Code) and they were indicted on account of such failure and refusal. The Act of 1897, in its entirety, is contrary to the provisions of our State Constitution and is therefore void. * * *

The question for decision then is, is one who is a public officer under a former provision of law compelled under pain of indictment and punishment to perform the duties of the office during the time when there was on the statute books a subsequent [repealing] act unconstitutional in all its provisions? The matter is an important one both to the public and to the individual. With us, public office is a public trust and public officers are merely the agents of the people. * * * What an anomalous state of things would we have then, if a person believing himself to be a public officer, because of the discharge of the duties which he thought he owed to the public, should afterwards be indicted and punished because the courts had held the act, which created the office and prescribed its duties, to be against the provisions of the constitution and void. Such a proposition would be equivalent to declaring that the individual office holder must be wiser than the whole people represented in their general assembly. Such a proposition to us seems opposed to every idea of justice. It could not be true. The criminal law cannot be invoked to punish one who acts as a public officer—as an agent of the people—and who in the discharge of a public duty had obeyed an act of the law-making power even though the law be unconstitutional, unless the act itself had required the committal of a crime—a thought which could not be entertained for a moment. And it makes no difference that in the case before the court the defendants are indicted for a *refusal* to perform certain duties under a former law attempted to be repealed by a subsequent unconstitutional statute and not for doing positive acts under an unconstitutional law. The principle is the same in both cases. The defendants here cannot be punished under the criminal law for failing and refusing to perform the duties of an office which office and the duties pertaining to it had been sought to be repealed by a subsequent act of the legislature, afterwards declared by the courts to be unconstitutional. Until the subsequent statute was declared to be unconstitutional by competent authority, the defendants, under every idea of justice and under our theory of government had a right to presume that the law-making power had acted within the bounds of the constitution, and their highest duty was to obey. * * *

Upon the special verdict the judgment of the court below was that the defendants were not guilty, and the judgment is affirmed.[13]

Affirmed.

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[13] With the principal case compare the following cases:—

Flaucher v. Camden (1893) 56 N. J. L. 244, 82 Atl. 82:—A general statute of the state declared selling liquor without license to be a criminal offense. Another statute purported to create county boards of license commissioners in some, not all, counties of the state, with authority to issue licenses. F obtained a license from such a board and was convicted for selling without a license. Conviction sustained on the ground that the second statute violated a provision of the state constitution against special or local legislation, and that a license granted by a board organized under the provisions of that act could not be invoked for any purpose. The court relied on the formula, there can be no *de facto* officer where there is no *de jure* office. This formula was later disapproved in Lang v. Bayonne, *infra*, p. 182.

An Indiana statute of 1853 prohibited retail sale of intoxicating liquor without a license. An act of 1855 expressly repealed the act of 1853. [The validity of the act of 1855 which flatly prohibited manufacture and sale of intoxicating liquor was apparently a live controversy in the state. See Beebe v. State (1855) 6 Ind. 501, 63 Am. Dec. 391 in which parts of it were held unconstitutional, and the court divided as to its total invalidity. In O'Daily v. State (1857) 9 Ind. 494 an information for violation of the act of 1855 was directed to be quashed because a "majority" of the court "regarded" the "act of 1855 as void."] In Howe v. State (1858) 10 Ind. 423 the act of 1855 was unanimously declared "unconstitutional and void." The court added that whether the act of 1853 remained unrepealed was not before them. In Ingersoll v. State (1859) 11 Ind. 464 on appeal from a conviction for selling without license contrary to the act of 1853 a conviction was reversed. After stating that the Howe case was the first that "annulled" the Act of 1855, the court said "This law [act of 1855] went into operation, was acted under, and was not judicially annulled till about three years from the time of its going into force. Under such circumstances, it would be unjust—would be a violation of all principles of right—to hold that the act of 1853 was all this time in force, and the people incurring its penalties. It would make the law a concealed trap to catch victims." N. B.—The court does not allude to the facts above set out in brackets.

Tax collectors paid to a city a portion of a tax levy all of which would have gone to a township except for a proviso in a statute which directed this portion to be paid to the city, and the city expended the money for repair and maintenance of its streets. Subsequently the state supreme court held the proviso to be in conflict with the state constitution. The township then sued the city for the amount of the portion. Recovery was allowed. Vickers, J. for the court said: "The rule is universal that an unconstitutional law confers no right, imposes no duty and affords no protection. It is in legal contemplation as though no such

SESSUMS v. BOTTS.

1871. Supreme Court of Texas. 34 Tex. 335.

Ogden, J.—On the 9th day of November, 1866, an act of the legislature was approved, entitled, "An act to prevent judgments from becoming dormant, and to create and preserve judgment liens," and provides "that whenever final judgment shall be rendered by any court of record of this State, such judgment shall be a lien on all the real estate of the judgment debtor situate in the county where the judgment is rendered, from the date of the judgment; *provided,* that said lien shall cease and become inoperative, if execution be not issued upon such judgment within one year from the first day upon which such execution can by law be issued thereon." And on the tenth day of the same month, an act regulating the collection of debts was approved, which enacts, "that on all judgments rendered prior to the first day of January, 1867, the judgment debtor shall have twelve months thereafter within which to pay to the plaintiff, his agent or attorney, one-fourth part of said judgment, and all costs; and that no execution shall be issued thereon until the expiration of the time aforesaid." This last act was, at the January term, 1868, of this court, in the case of Jones v. McMahan, 30 Texas, 719, declared unconstitutional, and consequently void. And now we consider the only question presented by the record of this case, which requires a decision by this court is, as to the effect, if any, of this act of November 10, 1866, over judgments and judgment liens, until the same was declared unconstitutional. The judgment of Ball et al. v. L. A. Bryan was rendered on the thirtieth of November, 1866, and, without doubt, became a lien on all the real estate of Bryan situated in that county; and under the act of the ninth of November, such lien shall continue and be in force until one year from and after the first day upon which execution could by law

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law had ever been passed. (Norton v. Shelby [Co.], 118 U. S. 425, [30 L. ed. 178]) * * * the unconstitutional statute must be eliminated from all consideration." Board of Highway Commissioners v. Bloomington (1912) 253 Ill. 164, 176, 97 N. E. 280, Ann. Cas. 1913A, 471. [There is no reference whatever in the opinion to defendant's change of position. Moreover the court refused to allow the plaintiff interest because the city received the money in good faith and "the existence" of the proviso in the statute "was an apparent authority for the receipt of this money by the city." See p. 178.]

An administrator of a decedent's estate in reliance upon a statute which had not been judicially declared unconstitutional paid a sum of money to one who would have been entitled to the amount so paid as one of the next of kin had the statute been valid. The supreme court subsequently declared it invalid. Later in an action against the administrator by the rightful next of kin, it was held that they should recover the amount so paid. In affirming this judgment the supreme court relied upon the dogma of Norton v. Shelby County, quoted by Vickers, J. in the above paragraph. Boales v. Ferguson (1898) 55 Nebr. 565, 76 N. W. 18. Quaere, could the administrator recover from the erroneous payee?

issue thereon. The question in this cause, therefore, becomes narrowed down to the simple inquiry, when could an execution issue on a judgment rendered on the last day of November, 1866. The act of 1842, and which is now in force, provides, that from and after the rising of every court, it shall be the duty of the clerk to issue execution. But the act of 1866 was an attempt to repeal or amend the law of 1842, and to prohibit the issuance of execution until one year from the date of the judgment. This act passed the legislature with every formula of law and was therefore to be presumed to be a valid and binding law, until declared otherwise by competent and legitimate authority.

It is believed that any citizen of the state whose interests are affected by an act which he believes unconstitutional, may, by pursuing a legal course, test the constitutionality of a law; or, if he chooses, may wholly disregard that act as law, but in that case he acts at his peril, and should the act of which he complains be decided to be law, then he must suffer the consequences of a bad judgment or a perverted will. It is therefore deemed advisable for every good citizen to obey whatever may be promulgated by the law-making power as law, until the same shall have been passed upon by the courts of the country in a legitimate and proper manner. If this, then, is the duty of the citizen, and he obeys or submits to whatever has received the legislative sanction as law, then he should be protected in that obedience, or, at least, he should not be deemed guilty of laches, and his rights sacrificed to those who are ready to usurp the province of the judiciary and declare for themselves what is and what is not law. We are not willing to indorse the proposition, in its broadest sense, that a ministerial officer has the right or power to decide upon the constitutionality or unconstitutionality of an act passed with all the formality of law. It is the duty of such officers to execute and not to pass judgment upon the law, and we are of the opinion that the clerk of the district court should have refused to issue execution in violation of what appeared to be a valid and binding law, until the same had been declared void by the tribunal properly constituted for that purpose.

We are not willing to construe the quotation from Cooley's Constitutional Limitation[s], page 188, in the same light as the learned counsel for the plaintiff in error appears to have done. It is true that when an act has been *declared* unconstitutional, then it is as though it had never been; but we do not think that the author in the text, or the cases cited by him, intended to announce the doctrine that an unconstitutional law could be no protection to officers or citizens, before the same had been passed upon and adjudged invalid. The law of 1842 may never have been repealed, but most certainly it was not in force during the existence of the act of 1866; and, as suggested by appellant's counsel, the law of 1842, though not repealed, "may have been stripped of its power and validity for the time being, bound by the hand of usurpation, but by the assistance of this court it has been liberated and set free, to assert its dominion and majesty." The act of 1866 was declared to be unconstitutional in 1868, and thereby liberated and set free the act of 1842, which required that execution should issue within one year, not from the date of the judgment, for the year had already passed and the law during that time had not been in force, but from the decision of the court which gave it vitality. We are therefore of the opinion that at the time of the rendition of the judgment in the cause of Ball et al. v. Bryan, there was no law in force which authorized the issuance of execution until one year after the rendition of the judgment; and under the act of ninth of November, 1866, that judgment operated as a lien upon the real estate of L. A. Bryan, until one year from the time when execution might issue. This construction would cause the judgment to operate as a lien for two years from the rendition thereof, and we can see no objection, constitutional or other, to the law in this particular.

It follows that the judgment lien was preserved; and as the execution issued within a few months from the time when it could by law issue, and was levied on the land in question, upon which there was a lien to satisfy the execution, the sale was a good and valid sale, and Botts, the purchaser, received a good and legal title; and that the plaintiff, who purchased the land in question after the rendition of judgment, and after the issuance of execution, cannot be considered an innocent purchaser without notice, and therefore received no title as against the purchaser under the judgment lien, and execution thereon.

There being no error in the judgment of the court below, it is affirmed.

Affirmed.

STATE OF IOWA v. O'NEIL.

1910. Supreme Court of Iowa. 147 Iowa 513.

McClain, J.—An agreed statement of facts filed on the trial before the justice of the peace was the basis of the finding of the district court that defendant in October, 1908, solicited, accepted, and took from various persons orders for the purchase by them and sale and shipment to them of intoxicating liquors from and by a certain brewing company in Kansas City, Mo., said orders being subject to the approval of said company, and that the liquors so ordered were to be shipped directly to the persons named from the place of business of said company. Defendant's motion for judgment in his favor, which was overruled, recited that the acts charged were not criminal under the law of this state at the time of their commission, and, further, that the statute of the state making such acts criminal is in violation of the Constitution of the United States as an interference with the clause thereof relating to interstate commerce and statutes on that subject passed by Congress. The acts with which defendant was charged were in violation of the provisions of Code, section 2382, as amended by Acts 28th General Assembly, chapter 74 (Code Supp., section 2382), prohibiting any person from soliciting, taking, or accepting "any order for the purchase, sale, shipment or delivery of any (intoxicating) liquor." In the case of State v. Hanaphy, 117 Iowa, 15, followed in State v. Bernstein, 129 Iowa, 520, decided, respectively, in 1902 and 1906, this statute was held unconstitutional, as in violation of the interstate commerce clause of the federal Constitution. In 1909 this court, relying upon the decision of the Supreme Court of the United States in the case of Delamater v. South Dakota, 205 U. S. 93, decided in 1907, reached the conclusion that its previous holding that the statute was in violation of the federal Constitution was erroneous, and expressly overruled the two cases in which that conclusion had been announced, and sustained a judgment enjoining the maintenance of a place for carrying on the business of soliciting, taking, and accepting orders for the purchase, sale, and shipment of intoxicating liquors for and on behalf of a corporation located and doing business in another state as a nuisance. McCollum v. McConaughy, 141 Iowa, 172. * * * The contention for defendant is that the decision of this court sustaining the constitutionality of the statute should not be given a retroactive effect, and defendant should not be punished for acts which according to the prior decisions of the Supreme Court of this state were lawful.

It is, of course, well settled that a statute which has been held unconstitutional either *in toto* or as applied to a particular class of cases is valid and enforceable without re-enactment when the supposed constitutional objection has been removed, or has been found not to exist. That was the holding in McCollum v. McConaughy, supra, and is not now questioned. See, also, Pierce v. Pierce, 46 Ind. 86. And the conviction below was proper, unless some benefit is to be given to defendant of the fact that, when the acts were committed, the latest announced decision of this court was to the effect that the statute was unconstitutional, and therefore not enforceable. It is only by analogy, applying the rule of precedent and not of adjudication, that the decision in one case becomes in any sense the law in another case. The analogy may be so complete that the reasoning of the one case necessarily points out the conclusion to be reached in the other, and, if so, the court feels bound to bow to its previous decision, unless it is made to appear that it is so manifestly erroneous that it should be overruled. If overruled, its force as a precedent ceases, and the later decision becomes a precedent. The analogy, however, may be incomplete, and then it is for the court to determine in the subsequent case whether the reasoning of the prior case is applicable under circumstances in some of which the cases are similar, and in others dissimilar. It is not the function of a court to lay down the law for future cases, but to announce the law for the case which it is deciding. It is an important function of an appellate court to so announce its reasons for decision that they may be understood and applied with reference to subsequent cases which are likely to arise, but no court can attempt to anticipate by announcement what the law will be found to be in a case in some respects dissimilar which may subsequently arise. Therefore, as has often been said, there is no vested right in the decisions of a court, and, under the clause in the federal Constitution prohibiting any state from passing any law impairing the obligation of contracts, the Supreme Court of the United States has uniformly held that the change of decisions of a state court does not constitute the passing of a law, although the effect of such change is to impair the validity of a contract made in reliance on prior decisions. National Mut. B. & L. Ass'n v. Brahan, 193 U. S. 635; Central Land Co. v. West Virginia, 159 U. S. 103. And see Storrie v. Cortes, 90 Tex. 283; Swanson v. Ottumwa, 131 Iowa, 540; Lanier v. State, 57 Miss. 102. It is also quite clear that the change in the decisions of a court of a state does not violate the prohibition found in the same clause of the federal Constitution against the making of *ex post facto* laws.

From the conclusion that in a constitutional sense there is no vested right in reliance on decisions of the court as precedent, and that one who is brought into court for a violation of law can not sustain himself on the mere plea that in some other case which he thought to be analogous the court rendered a decision which, if applied as he thought it would be applied, would result in exculpating him from wrong, it does not necessarily follow that the court can not take into account as a controlling consideration in reaching the conclusion as to the justice of a case that the party charged with wrongful conduct relied reasonably and in good faith upon decisions of the courts in determining whether a wrong was committed. The Supreme Court of the United States, while recognizing its general obligation to follow the decisions of the courts of the state in which a contract is made in determining its validity, has held that it will not recognize a change of rule in a state made by judicial decision where the effect of such change is to render invalid contracts which according to the views previously expressed by the state courts at the time the contracts were made were valid. Gelpcke v. City of Dubuque, 1 Wall. 175; Thompson v. Lee County, 3 Wall. 331; Douglass v. Pike County, 101 U. S. 677; Center School Tp. v. State, 150 Ind. 168. In Muhlker v. New York & Harlem R. Co., 197 U. S. 544, the judges whose views on this point are expressed in the opinions filed were equally divided on the question whether one acquiring property in reliance on decisions of the courts of the state relating to his rights in an abutting street had a vested right as against a subsequent change of decision in the state courts. These cases are cited, not as indicating any constitutional duty on the part of the courts of a state to protect a litigant in rights which he in good faith supposed he had already acquired by reason of previous decisions of the same court in other cases, but for the purpose of illustrating the extent to which a court may properly go in administering the law for the purpose of effectuating justice; that is, for the purpose of rendering such decision as shall appeal to intelligent and fair-minded people as right and proper. Courts have always taken such considerations into account in the enforcement of legislative enactments. Before there was any separate equity jurisdiction, and when the term equity was used as a mere synonym of equality and justice, the courts interpreted statutes with a view to their equity, and not merely in accordance with their strict terms; so that the case might be within the equity of a statute, although not expressly covered by it, and, *vice versa,* the statute might be held not applicable in its equity, although its strict terms covered the case. The term "equity of a statute" has fallen into disuse since the establishment of a system of equity jurisprudence, but the courts have not ceased in either branch of their jurisdiction to give consideration to the general purpose of a lawmaker as furnishing a guide to interpretation. See Dr. Hammond's note in his edition of Lieber's Hermeneutics, page 283. This again is but an illustration of the effect the court will properly make to do justice in a broad sense. In criminal cases, where the life or liberty of an individual is involved on one side, and the enforcement of law in the interest of the public welfare on the other, no private right of contract or property being imperiled by liberality of construction, the courts go further than in civil cases to recognize the common judgment of humanity as to what is right and just, and they allow many exceptions to statutory definitions of what shall constitute a crime. For instance, in this state, although there is no statutory recognition of a coverture as a defense on the part of a married woman for a crime committed in the presence of her husband, we have said that the common-law exception in that respect is applicable. State v. Fitzgerald, 49 Iowa, 260; State v. Kelly, 74 Iowa, 589; State v. Harvey, 130 Iowa, 394.

And it is the general rule in all the states of the Union, even those in which the criminal law is codified, to recognize infancy and insanity as relieving from the punishment prescribed by statute for criminal offenses as they were recognized at common law, although such defenses are not allowed under any express statutory provision. The assumption is that even the statutory criminal law is to be administered in accordance with the general principles of right and justice recognized in the common-law system. 1 Bishop, New Criminal Law, section 35. In the determination of the criminality of an act even under the statutory definition, the intent is a material consideration. It is the absence of criminal intent which constitutes the basis of the defenses of infancy, insanity and coverture. Ignorance and mistake are also recognized in the same category, but here enters a question of public policy. One who is bound to obey the law ought not to be allowed to say that he was ignorant of it. He may show as a defense that he was mistaken as to a fact which, if it had been as he supposed it to be, would have rendered his act lawful, but he can not say that if the law had been as he supposed it to be, his act would have been lawful and he should not be punished. This principle of public policy has become crystallized into the maxim, "Ignorance of the law excuses no one," and as applied to the present case, it might well be said, if we followed this maxim, that defendant is not to be excused because he did not know the law, that is, did not know that the previous decisions of this court holding the statute which he was violating to be unconstitutional were wrong and the statute was in fact valid and operative. As between conflicting rights, we might well refuse to allow any impairment of so well settled a principle, and hold that parties act at their peril as to what the law shall be decided to be. But as already indicated, in a criminal case there is no such imperative obligation, for after all the punishment of crime is a matter of public concern only and we think that it would strike any reasonable and fair person as manifestly unjust that one should be adjudged criminal in having done an act not morally wrong, but only wrong because prohibited by statute, that is, an act *malum prohibitum* and not one *malum in se*, relying upon the decisions of the highest court in the state holding such statute to be wholly invalid because in excess of the power of the legislature to enact it.

In this connection it is to be noticed that the decisions of courts as to the constitutionality of a statute stand on somewhat different ground than those relating to the common law or the interpretation of statutes, as applied to particular cases. The function of determining whether a statute is invalid because in excess of the legislative power is one peculiar to our system of government, and unknown in other jurisdictions in which the common law prevails. It is true that such an adjudication is made in a particular case. Although the power to be investigated is that of the legislative department itself which can not be a party so as to be bound by any judicial decision, nevertheless the courts discuss such question when it arises, and decide the matter not only for the purpose of determining the rights of particular parties, but with reference to the effect of the decision upon the law of the state. A statute unconstitutional properly remains on the statute books as a part of the written law, but those who are bound to obey the law may, we think, reasonably take into account the decisions rendered by the courts in the exercise of their peculiar function of passing upon the constitutionality of the statutes in determining what the law of the state really is. To the ordinary mind it would smack of absurdity to say that defendant ought to have known that the statute was constitutional, and would in case he violated it be enforced against him, although the supreme court of the state had fully considered the validity of the statute as against the claim that it was unconstitutional, and had unanimously held that it was in excess of state legislative power as to its entire subject-matter, and therefore invalid. Under such circumstances, it is plain that there should be some relief to defendant from punishment, for the very purpose of punishment is defeated, if unreasonably and arbitrarily imposed. Respect for law, which is the most cogent force in prompting orderly conduct in a civilized community, is weakened, if men are punished for acts which according to the general consensus of opinion they were justified in believing to be morally right and in accordance with law. If we should sustain the conviction, we would do so in the belief that the case was one in which executive clemency ought to be exercised. But is it quite fair to throw upon the executive the responsibility of relieving from punishment on account of the very nature of the act committed which is made apparent to this court, and its nature as being innocent or guilty appears to depend upon the effect to be given to the decisions of this court? We think we would be shirking our responsibility if we should leave it to the executive to do what we believe to be manifest justice in this case, and should stigmatize the defendant with a conviction for crime when as it appears he was innocent of any real wrong. We think the real question as to the guilt of defendant is to be settled by referring to the doctrine of criminal intent, which has always been held to be of the essence of a crime. 1 Bishop, New Criminal Law, sections 205, 285-291b. And justifiable ignorance or mistake has always been taken into account in determining the criminality of the act. 4 Blackstone, Commentaries, 27; 1 Bishop, New Criminal Law, sections 292-312; Regina v. Prince, L. R. 2 C. C. 154. For reasons already pointed out, mere ignorance of law does not excuse, and even ignorance of fact which the statute expressly or impliedly makes it the duty of one acting in reference to the subject-matter regulated by the statute to know and with reference to which he is required to act at his peril will not excuse him. But even as to these strict rules there are necessary exceptions. If a mistake of fact is due to mistake of law, so that it appears there is no guilty mind, punishment should not be imposed. Rex v. Hall, 3 Carr. & P. 409 (14 E. C. L. 635); Regina v. Reed, 1 Carr. & M. 306 (41 E. C. L. 170); People v. Powell, 63 N. Y. 88;[14] People v. Husband, 36 Mich. 306; Commonwealth v. Stebbins, 8 Gray (Mass.) 492. And no matter how stringently the statute may impose the duty of knowing the facts on which the defendant has relied in a course of conduct that is prohibited, save under certain prescribed conditions, the common-law exceptions which relieve on account of lack of criminal intent due to infancy, insanity, coverture, or necessity are recognized. State v. Cutter, 36 N. J. Law, 125; The Brig William Gray (U. S. C. C.), 1 Paine 16 (Fed. Cas. No. 17, 694). These cases are cited not as directly in point for the solution of our present difficulty, but as illustrations of the fact that courts must, especially in the administration of the criminal law, make exceptions in the interest of justice and public policy to rules which it is very essential to maintain in ordinary cases. An exception to the rule that every one is required to know the law is justified, we believe, when, as to the validity of a statute on constitutional grounds, a person has relied upon the expressed decisions of the highest court in his state. We do not believe such exception to be against public interest, but rather in the furtherance of justice. This question seems not to have often arisen so as to have been considered in courts of last resort, but we have support in the conclusion we have reached in the cases of State v. Bell,[15] 136 N. C. 674, and State v. Fulton, 149 N. C. 485.

That our conclusion in this case may not be misapprehended and relied upon in support of propositions to which we have no disposition to yield consent, we desire to emphasize the following controlling conditions. This is a criminal case, and therefore involves no conflicting claims as to contractual or property rights. The defendant may be presumed to have acted with knowledge of the fact that the statute now invoked as rendering illegal an act not otherwise wrongful or immoral had been expressly held by this court in cases prosecuted under public authority to be unconstitutional because in excess of legislative power.

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[14] Powell was indicted not for doing an illegal act but for conspiring to do an illegal act. The act was illegal only by statute. He pleaded lack of knowledge of the statute. Held that "evil purpose" or "criminal intent" is an element of the crime of conspiracy and that the jury should consider the defendant's ignorance of the statute in determining whether he acted with an "evil purpose."—Ed.

[15] In the cited case Bell, who was prosecuted for violation of a valid statute, set up a defense which the state supreme court by a former *construction* of the statute had held was allowed by the statute. The trial court excluded that defense adopting a different *construction.* On appeal from a conviction the supreme court accepted the trial court's reasoning, repudiated its own former construction, but in remanding the case directed that for the purposes of this retrial the statute should be treated as having the meaning which the court now repudiated. *Cf.* State v. Fulton (1908) 149 N. Car. 485, 507, 63 S. E. 145, 152.

The judgment of the trial court is reversed.

[All six of the judges concurred in the result. It seems that only Evans and Ladd, JJ., concurred fully in the above opinion. The other three concurred in separate opinions. Deemer, C. J., expressed dissent to resting the case upon any rule or exception to a rule about criminal intent, or to holding the circumstances to be an implied exception to the statute. He said that the result could be properly rested upon either of two principles, (1) that a judicial decision involving the constitutionality of a statute should be given prospective operation only by reason of analogy with a settled rule that where reasonably possible a statute is construed to have only prospective application. (2) That to punish the defendant would violate Article I, Section 17 of the Iowa constitution, "that excessive fines shall not be imposed and cruel and unusual punishment shall not be inflicted."[16] Sherwin, J. confined his concurrence to point (1) of Deemer's opinion. Weaver, J. said that a fine of not less than $50 nor more than $100 or imprisonment not to exceed 30 days could not be considered a violation of Art. 1, Section 17, and that the only tenable ground was to hold the act of the accused not within the "purpose, reason or intent" of the statute.][17]

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[16] A decision by a state court of last resort that a state statute is in conflict with the national constitution, "is binding" said Deemer, C. J., p. 529 "not only upon the parties involved, but upon all departments of government; indeed, upon the state itself. An unconstitutional statute is absolutely void. It is, so to speak, as so much waste paper * * *. The decision is binding upon every one save the court itself." He further said that where a statute is first held unconstitutional a subsequent reversal of that decision would "vitalize or resuscitate" the statute without re-enactment by the legislature but the reversal should not be given retrospective effect against persons who had acted in reliance upon the former decision.

[17] With the principal case compare the following cases:—

Crigler v. Shepler (1909) 79 Kans. 834, 101 Pac. 619, 23 L. R. A. (N. S.) 500, in which the plaintiff was employed by defendant as a liquor salesman in Kansas and rendered services therein at a time when there was on the statute books of Kansas a "statute" which in terms made such performance illegal, but prior to the making of this contract and its performance by plaintiff the state supreme court had held the statute unconstitutional. Plaintiff sued for commissions. Held, (1) that the statute was constitutional, following then recent decisions of the United States Supreme Court upon like statutes of other states; (2) that the performance was illegal and plaintiff could not recover for the services, saying, "The former decision between other parties, holding the statute invalid, does not give the plaintiff a right to recover."

State v. Longino (1915) 109 Miss. 125, 67 So. 902, Ann. Cas. 1916E, 371, where it was held that when a *valid* state statute is first construed by the state supreme court not to make a given act criminal and later construed to do so, a person who has done the act in the interval is not criminally punishable. Accord: Odom v. State (1923) 132 Miss. 3, 95 So. 253. The doctrine of State v. Longino was approved in State v. Striggles (1926) 202 Iowa 1318, 210 N. W. 137, but it was there held not to apply where the decision relied upon was that of any court inferior to the state supreme court. The court adds, "We might say in passing, however, that had the county attorney, when he was confronted by the facts,

CHARLES H. DAUCHEY COMPANY, INC. v. JOSEPH E. FARNEY AND JOSEPH A. FARNEY.

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1918. Supreme Court of New York. 105 Misc. 470.

Complaint was based upon section 44 of the Personal Property Law (Laws of 1914, chap. 507), and alleged that the defendant Joseph E. Farney sold to the defendant Joseph A. Farney a stock of merchandise and fixtures in bulk, and alleged the defendants' non-compliance with the said statute, and demanded the appointment of the defendant Joseph A. Farney as receiver for the benefit of the plaintiff and all other creditors similarly situated.

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made a motion to dismiss the case, thus exercising his discretion, and the case had been dismissed, his action in so doing would not be subject to criticism"; and the court expressed gratification with the trial court's assessment of the minimum fine. [This case like the O'Neil case arose under a statute of the kind usually regarded as making the mere doing of a specified act an offense though it is done without an "evil mind" or "criminal intent."]

Lutwin v. State (1922) 97 N. J. L. 67, 117 Atl. 164, 166:—Statute No. 1 defined the act done by the accused to be a crime. Subsequent statute No. 2 in terms repealed No. 1 and an appellate court (not the court of last resort) held No. 2 to be constitutional and operative to accomplish the repeal. The accused thereafter did the act. Held, by the same appellate court that if (as was asserted by counsel) the court of last resort had between the time the accused did the act and the time of his indictment held No. 2 invalid and No. 1 not repealed by invalid No. 2, nevertheless the indictment should be quashed. The reason assigned was that though No. 1 defined the mere doing of the act to be a crime, requiring no intent to be proved, "there could be no presumptive intent to do a conscious wrong, for the act of wrongdoing has the sanction of law and the favorable judgment of the court at the time of the alleged criminal act. To punish one for doing an act apparently lawful at the time, because he could not foresee the possible judgment of another court, would be akin to methods applied during the times of the Inquisition."

Pierce v. Pierce (1874) 46 Ind. 86:—An Indiana statute of 1852 provided that where an intestate was survived by his widow and his mother the former should have three-fourths of the estate, the latter one-fourth. An amending act of 1853 changed this to an equal division between the widow and mother. In 1854, acts passed in the manner of the act of 1853 were held by the state supreme court to be unconstitutionally enacted. D died intestate in 1862, leaving only his widow and his mother. Relying upon the decision of the court the administrator distributed the estate in accordance with the original provision of the act of 1852. In 1867 the state supreme court overruled the decision of 1854. In 1867 the mother sued the widow and the administrator to get a full half. Judgment for the plaintiff was affirmed, on the ground that the act of 1853 had been the law of the state from the time of the enactment. The court added that it would not say what the rule would be "had the parties to whom the estate descended conveyed the same" before the reversal "and had the purchaser been the party asserting a claim." Accord: Christopher v. Mungen (1911) 61 Fla. 513, 534, 55 So. 273.

On retroactivity of judicial decisions that overrule prior decisions, in general, not involving reversals as to constitutionality of legislation, see Mason v. Nelson Cotton Co. (1908) 148 N. Car. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am. St. 635. Hoven v. McCarthy Bros. Co. (1925) 163 Minn. 339, 341-342, 204 N. W. 29; Hollaman v. El Arco Mines Co. (1910) 137 App. Div. 862, 122 N. Y. S. 852.

Ross, J. The defendant Joseph E. Farney about April 1, 1914, at Lyons Falls, N. Y., opened a retail hardware store. * * * [On January 24, 1916] Joseph E. Farney executed a bill of sale to Joseph A. Farney of his entire stock of goods, fixtures and book accounts. [Plaintiff is a judgment creditor of the seller, on a judgment obtained March 7, 1916. The court found that Joseph A. Farney, the buyer, did not comply with the Act of 1914 referred to in the complaint.] * * * So that the plaintiff's claim, and the defendant's claim as well, must rest solely upon the rights of the parties on January 24, 1916, under the act in question. * * *

A reference to the several acts of the legislature in reference to the sale of merchandise in bulk and the decisions thereunder is essential to an understanding of the questions involved.

Chapter 528 of the Laws of 1902 enacted that a sale of a stock of merchandise other than in the ordinary course of trade, in the regular and usual prosecution of the seller's business, or the sale of an entire stock of merchandise in bulk, "shall be fraudulent and void as against the creditors of the seller, unless the seller * * *" complies with a number of conditions which are specifically set forth in said act, which conditions are based upon a plan to give notice to the creditors of the seller of such proposed sale. This act was held in the case of Wright v. Hart, 182 N. Y. 330, decided October, 1905, to be unconstitutional in that it violated both the federal and state Constitution imposing arbitrary restrictions upon the liberty of contract. After the decision of the Wright case the validity of similar statutes was upheld in two cases by the United States Supreme Court. Lemieux v. Young, 211 U. S. 489, under a Connecticut statute, decided in January, 1909, and Kidd, Dater & Price Co. v. Musselman Grocery Co., 217 id. 461, under a Michigan statute, decided in May, 1910. Those decisions only determined that the laws under review were not repugnant to the Fourteenth Amendment of the federal Constitution "because wanting in due process of law and denying equal protection of the laws." And this left still undecided the correctness of the decision in Wright v. Hart as to whether there was any conflict in the act of 1902 with our state constitution. See opinion of Cardozo, J., Klein v. Maravelas, 219 N. Y. 383.

Chapter 528 of the Laws of 1902 was amended by Laws of 1904, chapter 569, which amendment act provided that such sale "will be presumed to be fraudulent and void as against the creditors of the seller." This latter provision was re-enacted by Laws of 1907, chapter 722, also Laws of 1909, chapter 45, which also repealed Laws of 1902, chapter 528. The last word of the legislature was Laws of 1914, chapter 507, being section 44 of the Personal Property Law, which substantially in this regard re-enacted Laws of 1902, chapter 528, and provided that such sale "shall be void as against the creditors of the seller," etc. Under the act last cited, the Court of Appeals in the case of Klein v. Maravelas, 219 N. Y. 383 (December, 1916) held that the act in question is a valid enactment and violates no provision of either the Federal or State Constitution and overruled the case of Wright v. Hart.

In so far as the effect of a sale of merchandise in bulk is concerned there are no essential differences in the act of 1902 and the act of 1914. See opinion Cardozo, J., in Klein v. Maravelas, 219 N. Y. 387, in which the learned judge said:

> "The present statute is similar in essentials to the one condemned in 1905. In details it may be distinguished from the earlier one, but the details are in reality trifling. We cannot without a sacrifice of candor rest our judgment upon them."

What was the law of this state in regard to the sale of merchandise in bulk after the rendition of the decision of the Court of Appeals in Wright v. Hart, in October, 1905, and until the decision of the Court of Appeals in Klein v. Maravelas in December, 1916,—had parties selling and buying merchandise in bulk during said time the right to rely on the case of Wright v. Hart, or did they take the hazard that the principle of said case might be modified or impaired by subsequent acts of the legislature of the state, or by subsequent decisions either of its Court of Appeals, or of the Supreme Court of the United States? The question in the instant case is whether a decision of our Court of Appeals, though subsequently reversed by the same court, affords until such reversal "a reliable basis for business dealings."

The claim of the defendants is that the decision of the Court of Appeals in Wright v. Hart (1905) became and henceforth was the law of this state in so far as it determined questions other than a construction of the federal Constitution until the overruling decision of Klein v. Maravelas in December, 1916, and that the defendants in making the sale in question relied upon and are protected by the decision in Wright v. Hart.

Opposing theories are presented whether the law is a complete and existing entity which is merely interpreted by the courts, which interpretation may be incorrect, or whether the law is as stated by Alexander Lincoln in a leading article in 21 Harvard Law Review (1908) page 120, on page 128:

> "The law as an abstract entity is in truth nothing more than the sum of all the sources of the law actually in existence, together with the potential changes and additions which may occur from future legislative enactments and judicial decisions."

The former theory is apparently supported by Justice Story in the case of Swift v. Tyson, 16 Pet. 1 (1842), as appears in the following quotation at page 18:

> "In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most,

> only evidence of what the laws are, and are not of themselves laws. They are often re-examined, revised and qualified by the courts themselves, whenever they are found to be either defective or ill-founded, or otherwise incorrect."

* * * The former theory was also held by no less authority than the Commentator Blackstone (1 Black. Com. *70) to the effect that a decision is only a more or less successful attempt to discover and state what the law is. See note, 29 Harvard Law Review, 80.

This theory is stated by Surrogate Fowler in Matter of Tod, 85 Misc. Rep. 298:

> "It is for this reason, among others, that the common law assumes that the last decision of a final tribunal expresses the correct rule always latent in the bosom of the common law. Thus it is that the final judgment of a court of last resort is, as it were, antedated, and in the common law system such last judgment is assumed to have been true all along. This is the established principle pursuant to which I am fortunately compelled to approach the solution of all these important matters now before me."
>
> See James C. Carter's work "Law, Its Growth, Origin & Function."

The doctrine that a decision of a court is the law itself and therefore is a continuing rule of conduct upon which trust may be placed until fair notice is given that not it but another rule shall prevail in the future receives the sanction of Sir Henry Maine. Maine Ancient Law, chap. 2. See article of Wilbur Larremore "Stare Decisis and Contractual Rights," 22 Harvard Law Review, 182. Also article of Mr. Lincoln to which reference has been made (21 Harvard Law Review, p. 129), in which he uses the following language:

> "Instead, then, of being a complete and unchangeable body or entity, law is something incomplete and imperfect, but containing a wonderful power for adaptability and growth. It is true that law in the abstract can be applied to every case, since every case must be decided. The conclusion is not, however, that law is already complete, but that law is made in order to decide the case. The system is complete because of the fact that judges can and do make law, and so the system can be applied to all possible new circumstances. Judges do not enact laws as a legislature does, nor do they act arbitrarily, but they do make laws indirectly in the course of giving their decisions, and since they must decide a case in one way or the other, they cannot avoid so doing."

* * * Harris v. Jex, 55 N. Y. 421 (1874), was an action to foreclose a mortgage given prior to 1862, the time of the passage of the Legal Tender Act by Congress. On the 1st day of March, 1870, the defendant, Jex, tendered to the plaintiff the amount apparently due in United States legal tender notes, which was refused, the plaintiff claiming that she was entitled to payment in gold or its equivalent. In December, 1869, Hepburn v. Griswold, 8 Wall. 605, the Supreme Court of the United States held the Legal Tender Act

unconstitutional as to antecedent contracts. This decision was reversed in Knox v. Lee, 12 Wall. 457, decided December, 1870. The tender made by the defendant to the plaintiff in this case was made on the 1st day of March, 1870. The court in sustaining the view of the plaintiff used the following language (page 424):

> "The plaintiff had a right to repose upon the decision of the highest judicial tribunal in the land. It was, as applied to the relations between these parties and to this case, the law, and not the mere evidence of the law. Respect for the decisions of courts is a duty inculcated by writers upon the law, and enforced by considerations of public policy. It is said by Kent (1 Com. 476): 'If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it.'"

* * * The claim of the plaintiff that it had a right to rely upon the act of 1914, the validity of which was subsequently attested by the Court of Appeals, is one which can be, and has been in this case, supported by forceful argument; but I think the weight of authority and considerations of public policy justify a finding in the language of Kent: "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it." * * *

Judgment for the defendants with costs to the defendant Joseph A. Farney.

STATE EX REL. NUVEEN v. GREER ET AL.

1924. Supreme Court of Florida. 88 Fla. 249, 257.

[In refusing to issue a mandamus at the suit of bondholders to compel the defendants, officers of a city, to levy a tax for the payment of the interest on, and ultimately the principal of, bonds issued by the city under the apparent authority of a statute which after the bonds were issued had been held to be in conflict with the state constitution:]

WHITFIELD, P. J. * * * Here the bonds are invalid and there is no duty to pay the bonds. But there would be a legal duty to pay a judgment duly obtained for the return of the money, with appropriate interest, that was received and used by the municipality.

Issuance of the bonds was not expressly forbidden and penalized and the municipality and the relator, bond holder, were not *in pari delicto*. Thomas v. City of Richmond, 12 Wall. (U. S.) 349, 20 L.

Ed. 453. Neither party was at fault in the premises. The bonds were expressly authorized by statute and were issued as required by the statute. The proceeds were received by the municipality and used for its benefit. The implied limitation that was held by the Court to make the issue of the bonds contrary to organic law, was developed by judicial interpretation after the bonds had been sold and the money had been used by the city for its purposes as expressly and specifically authorized by the statute. These circumstances clearly render the municipality liable for the amount of the money so received by it with interest. See Brill v. Washington Railway & Electric Co., 215 U. S. 527; Louisiana v. Wood, 102 U. S. 294. See 7 A. L. R. 346 and notes. * * *

The bonds having been issued contrary to law as judicially determined, it is not the legal duty of the municipal officers to levy taxes to pay the interest on or the principal of the bonds as such, or to pay the indebtedness according to the tenor of the bonds; and correlatively, the bonds being illegal, the relator has no legal right to have them paid by the process of mandamus. Payment of a judgment duly obtained for the money received by the municipality would be a legal duty of the municipal officers, which duty the relator could enforce by mandamus or other appropriate proceedings in due course of law. * * *

Where a legislative enactment authorizing a municipality to issue bonds has never been adjudged to be constitutional, and it is judicially declared to be in conflict with organic law, the constitution by its dominant force renders the enactment inoperative *ab initio*, and bonds issued thereunder are void because issued without authority of law. * * *

While a municipality may be estopped to deny that the authority to issue bonds given by a valid statute was not properly exercised, in issuing bonds to *bona fide* holders for full value (County of Jefferson v. B. C. Lewis & Sons, 20 Fla. 980), yet a municipality will not be estopped from denying the validity of a statute under which bonds were issued even to *bona fide* holders. See L. R. A. 1915A 916 Notes.

* * * When an Act of the legislature is duly held to be invalid because in conflict with express or implied provisions of the constitution, it is invalid from its enactment and not from the date of the decision adjudging its invalidity; * * * all persons are held to notice that all statutes are subject to all express and implied applicable provisions of the constitution, * * * and further that the courts have no power to control the effect of the constitution in nullifying a statute that is adjudged to be in conflict with any of the express or implied provisions of the constitution. * * *

Validity or invalidity relate to the enactment of a statute under the existing organic law and not to a subsequent date. The courts have no power to make a statute inoperative only from the date of an adjudicated invalidity, because the courts merely adjudge that a statute conflicts with organic law, and the constitution then operates to make the statute void from its enactment, the courts having no power to control the operation of the constitution. It is not material whether the courts adjudge a statute to conflict with an express provision, or with a necessarily implied provision of the constitution, or with a subtle and not readily perceived implied provision of the constitution, since if a conflict with organic law is adjudged it is equally effective to let the constitution nullify the statute whether the conflict is with express or implied provisions or whether the implied provision is patent or concealed. The constitution recognizes no distinction in judicial processes between inescapable conclusions and other permissible conclusions in interpreting the controlling law. The adjudication suffices for the operation of the constitution, and the ease or difficulty of the processes leading to the adjudication is wholly immaterial. People v. Albertson, 55 N. Y. 50; 6 R. C. L. p. 105; 25 R. C. L. 979.

Rights acquired under a statute while it is duly adjudged to be constitutional are valid legal rights that are protected by the constitution, not by judicial decision. But rights acquired under a statute that has not been adjudged valid are subject to be lost if the statute is adjudged invalid; though the statute was considered valid by eminent attorneys, public officers and others. * * *

In this case the statute was never held to be valid. It was never administered as law in the courts of the state, and it was held invalid when first challenged. The facts that the validity of the statute was assumed by the legislature in enacting it and by the municipal officers in issuing the bonds under the statute and that eminent counsel considered the statute valid, do not affect the result that flows from a judicial adjudication that the statute is invalid. When the statute in this case was held to be invalid, it was void *ab initio* and bonds issued under it are void even though in the hands of *bona fide* holders for full value. The purchaser took the bonds subject to the contingency that the statute might be duly adjudicated to be invalid, its validity not having been already adjudicated; and if the statute be held invalid the bonds are necessarily void for want of authority to issue them, even though they are in the hands of *bona fide* purchasers for value, and no principle of estoppel by recitals in the bonds or otherwise can make the municipality liable in a suit brought on the bonds. 19 R. C. L. p. 1006, § 300, Note 15. * * *

The legislature in view of organic limitations upon the subject, being without power to authorize the bond issue, the Act, Chapter 6095, Acts of 1909, purporting to validate the bonds is of course ineffectual. 12 C. J. 1091; 15 C. J. 627.

UNITED STATES v. REALTY COMPANY.

1896. Supreme Court of the United States. 163 U. S. 427.

[An act of Congress of October 1, 1890 directed to be paid from the treasury of the United States a bounty of a few cents per pound to persons who produced sugar within the United States between July 1, 1891 and July 1, 1905. In 1894 Congress repealed the above act. By another act, March 2, 1895, Congress appropriated more than five million dollars to be paid to persons who had complied with the repealed act of 1890 and had produced or should produce sugar in the United States between specified dates the latest being June 30, 1895 and had not received bounty or had been prevented from receiving it by the repeal of the act of 1890. The defendants in error sued to recover their proportion of the appropriation of 1895, and obtained judgments in the lower court.]

MR. JUSTICE PECKHAM delivered the opinion of the court. * * *
In our opinion it is not correct to say that no moral, equitable or honorable obligation can attach in favor of persons situated as were the defendants in error here, when the act of 1895 was passed. We think obligations of that nature may arise out of such circumstances. We regard the question of the unconstitutionality of the bounty provisions of the act of 1890 as entirely immaterial to the discussion here. These parties did not at that time (when manufacturing under its provisions) know that the act was unconstitutional; they could not be regarded as failing to do their whole duty because they proceeded with the manufacture of sugar in reliance upon the bounty promised by the government, under an act recognized by the officers of the government as valid, and which they were at all times executing. But it is said that if the act be unconstitutional the law imputes to these parties at all times a knowledge of its invalidity, and that it is not rendered valid by acquiescence in its provisions for any length of time even by officers of the government holding the highest places therein and who are charged with its execution and believe in its validity. Being unconstitutional, there never was a moment, it is stated, when there was any valid act, and, therefore, no equities can arise in their favor because of any acts done by them upon the faith of the act, which they were bound to know was wholly void. This reasoning does not exactly fit the case. It is not a question whether any strictly legal rights can arise out of an unconstitutional act. It is a question whether equitable considerations can attach to a claim which, among other grounds, is based upon an act that was supposed by all the officers of the government to be valid and which was repealed only when the whole taxing act of 1890 was subjected to a careful and com-

prehensive revision. There are occasions when the presumption that every man knows the law must be enforced for the safety of society itself. An individual on trial for a violation of the criminal law will not be heard to allege as a defense that he did not know the act of which he was guilty was criminal. But in such a case as this, knowledge of the invalidity of the law in advance of any authoritative declaration to that effect will not be imputed to those who are acting under its provisions, and receiving the benefits provided by its terms. These parties cannot be held bound, upon the question of equitable or moral consideration, to know what no one else actually knew, and what no one could know prior to the determination, by some judicial tribunal, that the law was unconstitutional. Although it should finally turn out that the law is invalid, and is so pronounced, yet during all the time of its operation, as has been stated, all the officers of the government united in treating it as a valid act. No court had determined to the contrary. It was a question at least admitting of argument. Under such circumstances can it be said that the plaintiffs in these suits and persons situated like them were bound to know that this law was and would be pronounced unconstitutional, and that no rights could be acquired under it, and that they would not be justified in proceeding to manufacture sugar according to its provisions? Could no equities be built up in their behalf (which the government might subsequently recognize) founded upon the belief that the act was valid, and upon the action of the officers of the government under it, because it was, or subsequently might be pronounced to be, unconstitutional?

We are of the opinion that the parties, situated as were the plaintiffs in these actions, acquired claims upon the government of an equitable, moral or honorary nature. Could Congress legally recognize and pay them although the act of 1890 as to its bounty provisions might be unconstitutional? It is true that in general an unconstitutional act of Congress is the same as if there were no act. That is regarding it in its purely legal aspect. Being in violation of the Constitution, that instrument must govern, and no one can base any legal claim as arising out of such an act. That is a very different principle, however, from that which we think governs in this case. The persons for whose benefit the appropriation contained in the act of 1895 was made are not, in the view we take, asserting the existence of a legal and valid debt against the United States which is at the same time based upon an unconstitutional act of Congress. No such inconsistent and illogical position is taken. They are asserting that by reason of the occurrences which took place before the appropriation, among which was the passage of the act of 1890, they were so placed before Congress, as to authorize that body to recognize the equities of the situation, and to pay their claims which, while they were not of a legal character, were nevertheless of so meritorious and equitable a nature as to authorize the nation through its Congress to appropriate money to pay them.

It is also true that it does not appear from the terms of the act of appropriation that the parties for whose benefit it is made had commenced the business of sugar manufacturing or enlarged their previous manufacture of sugar by reason of the bounties provided under the act of 1890. That was not necessary. There was enough in the circumstances which are before this court and which have been already in part detailed to make it a question for the decision of Congress, whether upon the whole the persons so situated were equitably entitled to its consideration and to the appropriation asked for. If Congress possessed the power in any event to recognize equities of such a nature, we think it had enough in the case before it to uphold a favorable decision thereof. It is unnecessary to hold here that Congress has power to appropriate the public money in the treasury to any purpose whatever which it may choose to say is in payment of a debt or for purposes of the general welfare. A decision of that question may be postponed until it arises.

There was enough in the case as presented to Congress upon which to base the assertion that there was a moral and honorable claim upon the public treasury which that body had the constitutional right to recognize and pay.

Under the provisions of the Constitution, (Article 1, Section 8,) Congress has power to lay and collect taxes, etc., "to pay the debts" of the United States. Having power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object. What are the debts of the United States within the meaning of this constitutional provision? It is conceded and indeed it cannot be questioned that the debts are not limited to those which are evidenced by some written obligation or to those which are otherwise of a strictly legal character. The term "debts" includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a "debt" to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. * * *

The judgments are, therefore,

Affirmed.[18]

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[18] Speaking of the above case, it was said by Collins, J. for the court in Minnesota Sugar Co. v. Iverson (1903) 91 Minn. 30, 40, 97 N. W. 454: "That case has been very severely criticised, and we are unable to find any other in which

SHEPHARD v. WHEELING.

1887. Supreme Court of West Virginia. 30 W. Va. 479.

[A West Virginia statute purported to authorize the state circuit court upon petition of "ten tax-payers" of a city to "supersede, revoke and annul" "any ordinance" "made contrary to law." Ten tax-payers of the city of Wheeling petitioned the circuit court to exercise this power against an ordinance of that city which purported to create a board of police and fire commissioners. The court directed the city and the commissioners to be summoned as defendants. They appeared and moved for a dismissal asserting that the state statute was invalid. Overruling this motion the circuit court gave judgment annulling the ordinance in part. The defendants obtained a writ of error.]

Snyder, J. * * * The fifth article of our constitution expressly declares that "the legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others." It necessarily follows, then, from this positive constitutional inhibition, that if this act, in any degree, requires the circuit court to exercise legislative powers, it is to that extent void. The constitution does not define what are legislative or what are judicial powers; but what properly belongs to the one and what to the other of these departments of the government is to be determined by reference to the established law as it existed at the time the constitution was framed. It is an elementary principle of universal application that the laws and ordinances of a city adopted by its council, within the scope of its authority, partake of the nature, and

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it has been held that the unconstitutional act of a legislative body is any justification in law for any action or nonaction. It has again and again been held that an unconstitutional statute is simply a statute in form, is not a law, and under every circumstance or condition lacks the force of law, and, further, that it is of no more saving effect to justify action taken under it than as though it had never been enacted. A moral obligation upon the part of the state must have something more substantial than legislation obnoxious to the fundamental law to rest upon—something more for a foundation or starting point than a statute which is itself immoral."

In Miller v. Dunn (1887) 72 Cal. 462, 14 Pac. 27, 1 Am. St. 67, W. did work for the state under an agreement made solely under the authority of a state statute. His claim was unenforceable because the statute was unconstitutional. The state constitution forbade the legislature to pay any claim arising against the state out of any agreement or contract made "without express authority of law." The legislature made an appropriation to pay W.'s claim. The court held the appropriation valid for the reason that the unconstitutional statute satisfied the requirement of "express authority of law." In the majority opinion by Paterson, J., it is said:—"It is unnecessary to say whether in all cases an act duly passed and approved would be 'express authority of law' within the meaning of that section. There may be statutes palpably violative of principles so plain and well understood as to be no authority or protection at all; but as to that I express no opinion."

have the same effect within the corporate limits of the city, that the same laws could have if they had been enacted by the legislature of the state in which the city is located. In the one case the legislature exercises its legislative power directly, while in the other it does so indirectly, by delegating to the city a portion of its functions; but whether the power is exercised directly by the legislature itself, or indirectly by the council of the city under a legislative grant, the result is the same, and in both instances the power exercised is legislative. The enactment of an ordinance by a city council, or the enactment of a statute by a legislature, being in each case the exercise of legislative power, the repeal of such ordinance or statute must likewise be the exercise of legislative power. It does not require any precise definition of judicial power, or any nice discrimination as to its extent and limitations to determine that the act of repealing a statute is not the exercise of judicial power. * * *

Courts determine what the rights of parties are in suits or controversies *inter partes* which come before them in the ordinary and proper course of judicial proceedings. In determining the rights of the parties to the suit, they incidentally determine the law; but the judicial function is as effectually performed by the court which expresses no formal opinion as by the court which in an opinion announces the reasons for its decision. * * *

When, in the course of determining the rights of the parties to a particular suit or controversy, the court finds it necessary to ascertain whether or not a statute is unconstitutional, the court must necessarily pass upon that question; but in doing so it does not annul or repeal the statute if it finds it in conflict with the constitution. It simply refuses to recognize it, and determines the rights of the parties just as if such statute had no existence. The court may give its reasons for ignoring or disregarding the statute, but the decision affects the parties only, and there is no judgment against the statute. The opinion or reasons of the court may operate as a precedent for the determination of other similar cases, but it does not strike the statute from the statute-book; it does not repeal, "supersede, revoke, or annul" the statute. The parties to that suit are concluded by the judgment, but no one else is bound. A new litigant may bring a new suit, based upon the very same statute, and the former decision can not be pleaded as an estoppel, but can be relied on only as a precedent. This constitutes the reason and basis of the fundamental rule that a court will never pass upon the constitutionality of a statute unless it is absolutely necessary to do so in order to decide the cause before it. * * *

In a very able opinion by Shaw, C. J., * * * that eminent judge says: "* * * *Prima facie*, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well-established principles of law in the conclusion that such act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers. To this extent only is it necessary to go in order to secure and protect the rights of all persons against the unwarranted exercise of legislative powers; and to this extent only, therefore, are courts of justice called on to interpose." Wellington v. Petitioners, etc., 16 Pick. 96. * * *

The claim of the defendants in error requires them to maintain that the ordinance must be held naught by the court for all purposes, and not merely for the purposes of this proceeding; for, unless such is the case, no one will be bound by the judgment, except, perhaps, the petitioners,—certainly, no other resident of the city would be bound. * * * The petitioners do not allege any personal grievance or special injury to themselves or their rights. * * *

The Circuit Court of Ohio county therefore erred in overruling the motion to dismiss the petition of J. B. Shephard and others, and for that reason the judgment of said court must be reversed, and said petition dismissed, with costs.[19]

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[19] Where the question raised was whether a New Jersey statute was a special and local act contrary to a restriction of the state constitution, Pitney, J., sitting alone for the Supreme Court of New Jersey, said:—"By stipulation of the parties it is made to appear that Paterson is the only city where proceedings were taken for division of wards in cities of the second class in virtue of the act of 1905, and that at the time of the approval of the act of 1906 Paterson was the only city where commissioners had been theretofore appointed by the mayor to divide the city into wards. Conceding the propriety of hesitating before deciding an act of the legislature to be unconstitutional upon a stipulation of parties, it must, at the same time, be remarked that in this litigation, as in all litigations, the interests of the parties are subject to the management and control of their attorneys and counsel respecting the production of evidence. This stipulation relates solely to matters of fact, and it is proper—and, indeed, necessary—for the court in each case to find the law that shall bind the parties litigant as applied to such facts as they produce in evidence. A decision based upon stipulated facts that results in declaring a law unconstitutional does not wipe the act from the statute books, but merely denies its efficacy to a party who has admitted the existence of a state of facts that in the opinion of the court renders the law unconstitutional." Rutten v. City of Paterson (1906). 73 N. J. L. 467, 475, 64 Atl. 573.

"These decisions [as to the effect upon state legislation of the due process of law clause of the Fourteenth Amendment] establish: (1) That the Supreme Court does not act at all upon a statute or undertake by any decree to affect it generally; that it merely declares the law applicable to the case of a particular litigant. (2) That the inquiry under the Fourteenth Amendment does not and can not embrace the general question of the validity of the statute, but it undertakes only to determine, and has only the effect of determining, whether the rights of the particular litigant are protected by the Fourteenth Amendment against the operation of that statute. In Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 289, 66 L. ed. 239 the court said: 'A statute may be

NORTON v. SHELBY COUNTY.

1886. Supreme Court of the United States. 118 U. S. 425.

[A Tennessee statute purported to alter the county government of Shelby county by substituting a board of commissioners in lieu of the existing governing board called the "County Court" which was composed of elected justices of the peace. The statute purported to confer all the powers of the County Court upon the commissioners, including its power to issue county bonds in exchange for shares in a railway company, as an aid to the construction of the road. Within a month after the enactment of the statute the justices of the peace brought suit in an inferior state court to test its validity and from a judgment against them they appealed to the state supreme court. Pending this appeal the commissioners issued the bonds in question, in conformity with the statute. On the appeal the state supreme court held the statute invalid, that the old

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invalid as applied to one state of facts and valid as applied to another. * * * Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or about to be applied to his disadvantage.' See also Yazoo & M. R. V. Co. v. Jackson Vinegar Co. (1912) 226 U. S. 218, 57 L. ed. 193; Jeffrey Mfg. Co. v. Blagg (1914) 235 U. S. 571, 576, 59 L. ed. 364." Dunn v. Fort Bend County (1926) 17 Fed. (2d) 329, 332, per Hutcheson, Dist. J.

"The constitutional validity of this statute was assailed in Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A. L. R. 1136. In a very lucid and exhaustive opinion by the late Judge Sims, every objection raised to the statute was satisfactorily answered, and the statute was upheld and enforced. The same objections and some others have been raised in the instant case. So far as the facts of the two cases are the same, the Bowman Case stands until reversed. All objections to the constitutionality of the statute are concluded by the Bowman Case, whether brought to the attention of the court in that case or not. This must be so of necessity, for if a statute is unconstitutional for any reason, it is a void statute, and 'whenever a statute is enforced by a judgment or decree of a court, it is a judicial determination that the statute is a valid enactment and is free from all constitutional objections. If unconstitutional for any reason, whether assigned or not, the statute is void.' Portsmouth v. Weiss (1926), 145 Va. 94, 133 S. E. 781. We must, therefore, regard the assignments of error on constitutional grounds as an application to the court to reconsider its holding in the Bowman Case." Miller v. State Entomologist (1926) 146 Va. 175, 180, 135 S. E. 813, 814, per Burks, J.

Iowa passed a statute containing a provision prohibiting shipment of intoxicating liquor into the state. This provision was held unconstitutional in Rhodes v. Iowa (1898) 170 U. S. 412, 42 L. ed. 1088, on the ground that such liquor was a legitimate article of interstate commerce and that under the Commerce Clause, Congress alone could "outlaw" it. Subsequently Congress enacted a statute (the Webb-Kenyon Act) "outlawing" such liquor in interstate commerce, that is, in effect, making it subject to state prohibition of shipment into the state. In Stajcar v. Dickinson (1918) 185 Iowa 49, 169 N. W. 756 the Iowa court said of the above provision of the Iowa statute, "although non-enforceable, it remained a part of the statute, and by the enactment of the so-called Webb-Kenyon Act became operative and enforceable the same as though it had not previously been declared unconstitutional or had been enacted by the legislature subsequent to the passage of the law of Congress. State v. United States Express Co., (1914) 164 Iowa 112, 145 N. W. 451; Miller Brewing Co. v. Stevens (1897) 102 Iowa 60, 71 N. W. 186."

County Court was recognized in the state constitution and could not be supplanted by the legislature. A few years later Norton brought suit on some of the bonds in a Circuit Court of the United States which gave judgment for the county. On writ of error:]

MR. JUSTICE FIELD delivered the opinion of the court. * * *

But it is contended that if the act creating the board was void, and the commissioners were not officers *de jure*, they were nevertheless officers *de facto*, and that the acts of the board as a *de facto* court are binding upon the county. This contention is met by the fact that there can be no officer, either *de jure* or *de facto*, if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions, nor did the supreme court of the state. Whenever such pretensions were considered in that court, they were declared to be without any legal foundation, and the commissioners were held to be usurpers.

The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office;

it is, in legal contemplation, as inoperative as though it had never been passed. * * *

It remains to consider whether the action of the commissioners in subscribing for stock of the Mississippi River Railroad Company and issuing the bonds, of which those in suit are a part, being originally invalid, was afterwards ratified by the county.[20] * * *

It is unnecessary to pursue this subject further. We are satisfied that none of the positions taken by the plaintiff can be sustained. The original invalidity of the acts of the commissioners has never been subsequently cured. It may be, as alleged, that the stock of the railroad company, for which they subscribed, is still held by the county. If so, the county may, by proper proceedings, be required to surrender it to the company, or to pay its value; for, independently of all restrictions upon municipal corporations, there is a rule of justice that must control them as it controls individuals. If they obtain the property of others without right, they must return it to the true owners, or pay for its value. But questions of that nature do not arise in this case. Here it is simply a question as to the validity of the bonds in suit, and as that cannot be sustained, the judgment below must be

Affirmed.

STATE OF OHIO v. GARDNER.

1896. Supreme Court of Ohio. 54 Ohio St. 24.

Bradbury, J. At the September term of the Court of Common Pleas of Summit County, Omar N. Gardner was indicted for offering a bribe to Joseph Hugill, a city commissioner of the city of Akron. The accused demurred to the indictment on the ground that the act of April 20, 1893, under which Hugill was performing the duties of his office, was unconstitutional and void. The demurrer was sustained and the defendant discharged. To this holding of the court the prosecuting attorney excepted, and, by virtue of the provisions of sections 7305, 7306, 7307 and 7308 of the Revised Statutes, has brought the question to this court for review. Two questions are presented by the record: First, whether the act of April 20, 1893, which provides a municipal government for the city of Akron, is unconstitutional or not, and second, if unconstitutional, whether its constitutionality may be assailed in the collateral way undertaken by the accused. The first question which logically arises is the latter of the two; for if the accused should not be allowed to raise the question, in the way he attempted, it follows that the constitutionality of the act which created the office was not before the court. Whether an act of the general assembly creating an office and providing a method for filling it may be collaterally attacked, is a question of the utmost importance in the practical administration of governmental affairs. Different courts have decided the question differently. Leach v. The People, 122 Ill. 420; Burt v. Winona & St. P. R. Co., 31 Minn. 472; Coyle v. Com., 104 Pa. St. 117; Mechem on Pub. Off., §§ 318, 327; Van Fleet on Collateral Attack, § 21, p. 33; Norton v. Shelby County, 118 U. S. 425; Hildreth v. McIntire, 1 J. J. Marsh 206.

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[20] For an example of ratification see Road Imp. Dist. v. Burkett (1924) 163 Ark. 578, 260 S. W. 718.

It is now before this court for the first time, and while we are not insensible to the consideration justly due to the high standing of those courts and authors we are bound to reach that conclusion which, in our judgment, is best sustained by sound reason; and that best comports with an enlightened public policy and the maintenance of public order.

If the official acts of officers acting in an office created by an unconstitutional statute should be regarded as falling within the principle that sustains the act of *de facto* officers until the statute has been held unconstitutional by competent judicial authority in a proceeding appropriate to that end, all difficulty vanishes. The opposite doctrine is based upon the assertion that there can be no *de facto* officer unless there is a *de jure* office. That is a simple and summary way to dispose of this grave question. That there can be no *de jure* officer without a *de jure* office is a proposition to which all minds will, of course, assent. But that there can [not] be a *de facto* officer without a *de jure* office is disputable if the phrase "*de facto* officer" includes one who in fact discharges the duties of a public office, recognized by the great body of the people and by virtue of a statute solemnly passed by the general assembly of the state, which may be unconstitutional. That there have been many officers who occupied and discharged the duties of offices created by laws that were afterwards held unconstitutional is a fact well known to every one. While in such occupancy innumerable official acts affecting both public and private rights may have been actually performed by them, the duration of the office may, and often does, extend through a series of years. In the case before us the act in question is one creating a municipal government for the city of Akron, and has been in force since its enactment in April, 1893. It superseded an act passed in the year 1891 for the government of that city, which latter act was subject to the same assault that was attempted to be made on the one under consideration. The existing government of the populous and thriving city of Youngstown also rests upon the act now assailed; while that of the city of Springfield depends upon an act, at least as vulnerable to the same attack as the act under consideration. The constitutionality of the governments of the cities of Springfield and Youngstown has not been assailed, even collaterally, and may continue unchallenged for many years. The officers who in these cities occupy offices created by the acts upon which the city government rests, are daily discharging duties affecting the rights of the city, and the private rights of individuals. These officers are either usurpers and trespassers, or *de facto* officers; if the latter, the rights of the public, or of individuals who have submitted to their authority, or acquiesced in its exercise, would be unaffected by a subsequent authoritative judicial declaration that the statute was unconstitutional; if they were usurpers merely every official act would be a nullity, and interminable confusion possibly follow such a decision. Were such results to follow, the courts might well pause, before declaring unconstitutional an act establishing a city government, unless its constitutionality was challenged upon the threshold of its existence.

The common law in relation to *de facto* officers had its origin in England. It was there laid upon a foundation as broad as their necessities required. Such a thing as a written constitution controlling legislative action was unknown to their jurisprudence; whatever office parliament chose to create was a *de jure* office. In the states of the American Union, however, we find written constitutions, limiting the otherwise absolute power of the people to act through the legislative branch of the government. As a consequence of this peculiar feature of our government, a statute, regularly enacted by the legislative branch thereof may, in express terms, create a public office, or it may authorize a municipal corporation to create one; an incumbent may be appointed in the mode prescribed by the statute. He may qualify, enter upon the discharge of the duties of the office, and continue to discharge those duties indefinitely—possibly for many years—during which he daily performs official acts affecting not only public rights, but private rights of the most sacred character. After all this has occurred, the constitutionality of the statute is successfully challenged, and the statute declared void, and for the first time in the history of the common law its principles must be invoked to ascertain the status of the rights of persons, and of the public, that accrued before the law was declared void.

We think that principle of public policy, declared by the English courts three centuries ago, which gave validity to the official acts of persons who intruded themselves into an office to which they had not been legally appointed, is as applicable to the conditions now presented as they were to the conditions that then confronted the English judiciary. We are not required to find a name by which officers are to be known, who have acted under a statute that has subsequently been declared unconstitutional, though we think such officers might aptly be called "*de facto* officers." They actually performed official acts authorized by a statute solemnly enacted by the law making department of the government. Such a statute is presumed to be constitutional. Cincinnati, W. & Z. R. Co. v. County of Clinton Comrs., 1 Ohio St. 77. The unbroken current of authority supports this proposition.

Courts in the practical administration of justice should regard the substance of things and deal with conditions as they actually exist. Here are grave and important official acts actually performed by virtue of an office, created under the provisions of a statute regularly enacted by that branch of the government to which the power to make law has been delegated by the constitution; there is a clearly established legal presumption of its validity. The public in its organized capacity, as well as private citizens, has acquiesced in and submitted to their authority. Such circumstances, the majority of the court are of opinion, are sufficient to give such color to their title as to make them *de facto* officers; but whether they fall within the previously existing definition of such officers or not, their official acts thus performed fall within the protection of that principle of public policy which defends them against collateral attack, and that therefore the question of the constitutionality of the statute in question was not before the court of common pleas.

Exceptions sustained. * * *[21]

LANG v. MAYOR ETC. OF THE CITY OF BAYONNE.

1907. Court of Errors and Appeals of New Jersey. 74 N. J. L. 455.

[Plaintiff had been appointed a policeman under authority given the city by legislation prior to the act of 1905. A supplement to the act of 1905 purported to create a board of ~~police com~~missioners with power to appoint and discharge for cause all members of the police force. After trial on charges before the commission it discharged the plaintiff from the force. The plaintiff petitioned the Supreme Court for a writ of mandamus to compel the mayor and chief of police to restore him on the ground that the act of 1905 was invalid. The Supreme Court denied the petition whereupon he obtained this writ of error.]

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[21] An indictment for extortion (exaction of illegal fees) charged that K was a license commissioner and by color of his office extorted. The court said such an indictment would be good against a *de facto* officer but that since the statute purporting to create the office was unconstitutional, the "inexorable legal conclusion" was that the indictment was fatally defective because it charged defendant with using for extortionate purposes an office that did not exist. Kirby v. State (1894) 57 N. J. L. 320, 31 Atl. 213.

GUMMERE, CHIEF JUSTICE. * * * At the term at which the hearing of this cause was had before the Supreme Court, that tribunal had before it for consideration and determination the case of State v. Nealon, 44 Vroom 100, which was a *quo warranto* proceeding, attacking the right of the members of the board of police commissioners of Bayonne to hold their respective offices, on the ground that the supplement of 1905, above referred to, was unconstitutional, and the conclusion reached by the Supreme Court in that case was in favor of this contention.

Notwithstanding the conclusion reached by it in the Nealon case, however, the court considered that * * * the board of police commissioners, at the time when it dismissed the relator from his position as a member of the police force, was a *de facto* body, exercising a public function under color of right, and that therefore its action in dismissing the relator could not be successfully challenged, * * *.

Plaintiff in error rests his right to a reversal of the judgment against him upon the ground that the conclusion of the Supreme Court that the board of police commissioners of Bayonne, appointed under authority of the supplement of 1905, was a *de facto* body, notwithstanding the fact that the statute is unconstitutional, is unsound in law, and * * * cites the decision of the Supreme Court in the case of Flaucher v. Camden, 27 Vroom 244, as an authority in support of his contention that this question must be answered in the negative. An examination of the opinion in the Flaucher case discloses not only that the legal question there presented for consideration is identical with that which this case presents, but that the conclusion then reached by the Supreme Court is in direct opposition to that announced in the opinion delivered by it in this case. In the earlier case the plaintiff in error was tried in the police court of the city of Camden for selling liquor without a license. His defence was that he held a license from the county board of license commissioners. Notwithstanding this fact he was convicted. On writ of error this conviction was affirmed by the Supreme Court. The ground of affirmance was that the statute creating the county board of license commissioners was unconstitutional, as had already been determined by it at the same term in a *quo warranto* proceeding brought against the members of the board (Loucks v. Bradshaw, Id. 1); that being unconstitutional, the so-called county board of license commissioners never had legal existence, and that consequently the members of the board were neither *de jure* nor *de facto* officers; the court declaring that "where the office itself is created by an unconstitutional statute there can be no incumbent either *de jure* or *de facto*," and that consequently the license was mere waste paper. The opinion in the Flaucher case is a carefully considered one, and is fully supported by the authorities cited in it * * *, notably by that of Norton v. Shelby County, 118 U. S. 425. * * * Notwithstanding that Norton v. Shelby County has been frequently cited with approval in other jurisdictions, I am unable to accept as sound the doctrine upon which it is rested, namely, that an unconstitutional law is void *ab initio* and affords no protection for acts done under its sanction. That it works injustice in its application to the citizen is apparent. The Flaucher case is a pregnant example of the truth of this assertion. The legislature had enacted a general law, making the unlicensed sales of intoxicating liquor a criminal offence, but legalizing such sales when made by a person holding a license from the proper authority. It then, by a subsequent statute, created the county board of license commissioners the proper authority to grant such licenses in the county of Camden. Flaucher applied to, and received from, this board a license to sell liquors at his saloon in the city of Camden. At that time the law creating the county board stood upon the statute book, apparently as valid, as much entitled to be respected and obeyed as the enactment which prohibited the sale of liquor without a license. And yet, notwithstanding that he scrupulously observed the law, as declared by the legislature, he was made a criminal by judicial decision, a decision which in its operation and effect was as much *ex post facto* as any statute which makes criminal an antecedent act which violated no law at the time when it was done.

The vice of the doctrine of Norton v. Shelby County, as it seems to me, is that it fails to recognize the right of the citizen, which is to accept the law as it is written, and not to be required to determine its validity. The latter is no more the function of the citizen than is the making of the law. Each of these functions has been delegated by the constitution, the one to the judicial and the other to the legislative branch of the government. And it is to be observed that the judicial function of determining the validity of statutes is confined within a very narrow scope. Courts are not vested with the general supervision of legislation. They have received no authority from the people to inspect each statute, as it comes from the hands of the legislature, and declare whether or not it infringes constitutional limitations. The function of the judicial department with respect to legislation deemed unconstitutional is not exercised *in rem*, but always in *personam*. Allison v. Corker, 38 Vroom 596. Only such statutes as affect the rights of parties to judicial proceedings are ever subjected to the scrutiny of the courts. And these are comparatively few. Of the twenty-four hundred and more acts of the legislature passed in this state during the last ten years, less than four hundred have received judicial consideration. The remaining two thousand which are upon the statute book (except those which have been repealed by the legislature) are accepted and enforced as a part of the law of the land. And this, in my judgment, is the only way in which a government such as ours can be safely administered. To require the citizen to determine for himself, at his peril, to what extent, if at all, the legislature has overstepped the boundaries defined by the constitution in passing this mass of statutes would be to place upon him an intolerable burden, one which it would be absolutely impossible for him to bear —a duty infinitely beyond his ability to perform. In my opinion the provisions of a solemn act of the legislature, so long as it has not received judicial condemnation, are as binding upon the citizen as is the judgment of a court rendered against him so long as it remains unreversed. * * * So necessary to the successful carrying on of a republican form of government is the principle * * *, that a statute which creates an office and provides an officer to perform its duties must have the force of law until condemned as unconstitutional by the courts, and that in the meantime the officer so provided is an officer *de facto*, that it is impliedly recognized and acted on, almost universally (so far as my examination has disclosed), in the case of municipal corporations which have been created by unconstitutional laws. Such corporations are declared to be *de facto* corporations. Dill. Mun. Corp., § 43a; Burt v. Winona, &c., Railroad Co., 31 Minn. 472, and cases cited. And not only so, but courts refuse to permit the legality of their existence to be called into question, except by the state itself, through its attorney-general, and hold that, so long as the state does not see fit to interfere and terminate the existence thereof by direct proceeding brought by the attorney-general, a municipal corporation which has been created by an unconstitutional statute may exercise upon the citizen, through its officers, the powers conferred upon it by the statute as fully and completely as if it was created by a law valid in every particular.[22]

And yet, if it be true that there cannot be such a thing as a *de facto* officer unless there be a *de jure* office, on what theory can the acts of such officers be recognized as valid? How can it be true that a law of this character, the validity of which no one but the attorney-general can challenge, and which is permitted to be enforced to the fullest extent against the public, "confers no rights, imposes no duties, affords no protection, creates no office," and "is, in legal contemplation, as inoperative as if it had never been passed?" It may be said that, strictly speaking, the law does not recognize a municipality so created as an existing corporation; that it does not recognize the acts of its pretended officers as valid; but that it merely refuses to permit the right of such officers to exercise their functions to be challenged in order that a government which exists in fact may not be overthrown until another is provided. But this, it seems to me, is a mere verbal distinction. The fact remains that the acts of the incumbents of such so-called officers [offices] are as potent, so far as the public is concerned, as are the acts of any *de jure* officer who performs the duties of a legally existing office.

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[22] For the various grounds upon which courts almost always reach this result see ch. 5 of Constantineau, Public Officers and the De Facto Doctrine (1910). See also, Charles W. Tooke, De Facto Municipal Corporations under Unconstitutional Statutes (1928) 37 Yale L. J. 935-954.

In my judgment, the same public policy which requires obedience from the citizen to the provisions of a public statute which creates a municipality, and provides for its government, even though unconstitutional, so long as it has not received judicial condemnation, equally justifies his obedience to every other law which the legislature has seen fit to enact until such law has been judicially declared to be invalid.

I conclude that an officer appointed under authority of a statute to fill an office created by the statute is at least a *de facto* officer, and that acts done by him antecedent to a judicial declaration that the statute is unconstitutional are valid, so far as they involve the interests of the public and of third persons; and the doctrine promulgated by the Supreme Court in Flaucher v. Camden rests upon an unsound basis and should not be followed.

The judgment under review must be affirmed for the reason stated in the opinion delivered in the court below, namely, that the board of police commissioners of Bayonne, at the time of its dismissal of the plaintiff in error from the municipal police force, was a *de facto* body and its action, therefore, valid as against him.[23]

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[23] A note in (1907) 15 L. R. A. (N. S.) 94-107 digests many cases on both sides of the conflict between the principal case and Norton v. Shelby County and discloses such a tendency to distinguish and qualify that a preponderance of authority does not appear. Moreover the note does not distinguish the character of the legal relations that were defeated or sustained by the adoption or rejection of the formula of Norton v. Shelby County. Compare the divers problems of the four cases herein printed with each other and with the issues in Ex parte Snyder (1876) 64 Mo. 58 (the invalid statute purported to create a court and a person convicted by that court was on habeas corpus discharged by the supreme court which recited the formula, no *de facto* officer where no *de jure* office); in State v. Pooler (1909) 105 Maine 224, 71 Atl. 119, 24 L. R. A. (N. S.) 408, 134 Am. St. 543 (a conviction was sustained over an exception to the indictment that a special prosecuting attorney represented the state in the grand jury room and swore in the witnesses, although the court conceded that the statute which purported to create the office of special prosecutor was unconstitutional), and in King Lumber Co. v. Crow (1908) 155 Ala. 504, 46 So. 646, 130 Am. St. 65. (Separate acknowledgment by a wife of assent to a mortgage on the homestead was necessary to bind her interest and a wife acknowledged before the "judge of the inferior court of Woodlawn," it was held in a bill to quiet title brought by a successor of the mortgagee that the acknowledgment was void because the statute which purported to create the court had not passed the legislature in the

MEAGHER v. COUNTY OF STOREY.

1869. Supreme Court of Nevada. 5 Nev. 244.

By the Court, Lewis, C. J. Plaintiff, who was the only qualified and acting Recorder for the City of Virginia, performed certain duties as a committing magistrate, imposed upon him by an act of the legislature, entitled "An Act concerning the Courts of Justice of this State and Judicial Officers," (Stats. 1864-5, 116) and now brings this action to recover the sum of five hundred and eighty dollars, claimed to be due for the services so imposed upon and performed by him. The law imposing these duties fixes no compensation for their performance, but the same fees are claimed by plaintiff that are allowed to committing magistrates for the like services.

Whilst not disputing the correctness of the charges thus made, the defendant contends that the law authorizing the plaintiff to perform the services is unconstitutional and void, and consequently that no compensation can be received. * * *

[The court held that the statute was in conflict with the state constitution; that the latter provided that the judicial power of the state should be vested in "a Supreme Court, District Courts, and Justices of the Peace," except that the legislature might "also establish courts for municipal purposes only, in incorporated cities and towns," whereas the statute attempted to confer upon the city recorder the authority of a committing magistrate as to violations of the general criminal laws of the state.]

Such being the case, it follows that he can derive no advantage from such law, for an unconstitutional law is no law at all. It is, so far as he is concerned, as if it had never been adopted by the legislature.

The plaintiff then had no legal authority to perform the services for which this action is brought, and without it, his services must be held to be simply gratuitous, for which no compensation can be recovered; for the right to the salary or compensation of an office depends upon the title to such office, and cannot be recovered by one who is simply an officer *de facto*. (Stratton v. Oulton, 28 Cal. 44.) * * *

Counsel is doubtless correct in the position that the plaintiff is an officer *de facto*, and that as such his acts are valid. They are valid, however, only as to third persons and the public. This is a rule founded upon considerations of public interest. (Mallett v. Uncle Sam S. M. Co., 1 Nev. 188.) But the public interest does not

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manner required by the state constitution,—that the *de facto* officer doctrine could not apply). See Ch. 4 of the treatise cited in the preceding note and consult it generally upon the numerous aspects of the law of *de facto* officers.

require that the officer acting without authority should reap benefit from his position. The considerations which support and validate the acts of an officer *de facto* do not go so far as to require the payment of fees to such officer for services so performed. No court has ever gone farther in this direction than to hold that acts performed by public officers are valid as to the public; they have not held that they themselves may in a direct proceeding of this kind recover any benefits from them.

The People v. Morris, (3 Denio, 382) referred to is not a parallel case, for the legislature made provision for the payment of Lynch after the unauthorized services were performed, which, the court held, it had the right to do. Hence, the question of the legality or illegality of Lynch's services could not regularly be raised in that case. His payment was provided for, notwithstanding the services were unauthorized when performed. Such is not the case here. The plaintiff is suing to recover the services rendered under a void law, with no subsequent act of the legislature authorizing his payment for services so rendered; and thus he is left with nothing but an unconstitutional law upon which to rest his claim for the money sought to be recovered.

The judgment, which was in his favor, must be reversed; and it is so ordered.

WHITMAN, J., did not participate in the foregoing decision.[24]

EX PARTE SIEBOLD.

1879. Supreme Court of the United States. 100 U. S. 371.

PETITION for writ of *habeas corpus*.[25]

MR. JUSTICE BRADLEY delivered the opinion of the court. * * *

At the November Term of the Circuit Court of the United States for the District of Maryland, an indictment against each of the petitioners was found in said court, for offences alleged to have been committed by them respectively at their respective precincts whilst being such judges of election; upon which indictments they were severally tried, convicted, and sentenced by said court to fine and imprisonment. They now apply to this court for a writ of *habeas corpus* to be relieved from imprisonment. * * * The records of the several indictments and proceedings thereon were annexed to the respective original petitions, and are before us. These indictments were framed partly under section 5515 and partly under section 5522 of the Revised Statutes of the United States; and the principal questions raised by the application are, whether those sections, and certain sections of the title of the Revised Statutes relating to the elective franchise, which they are intended to enforce, are within the constitutional power of Congress to enact. If they are not, then it is contended that the circuit court has no jurisdiction of the cases, and that the convictions and sentences of imprisonment of the several petitioners were illegal and void.

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[24] And see Gustafson v. McPherson (1912) 88 Kans. 335, 128 Pac. 186, where however the invalid statute which purported to create the office also seems to have contained the sole provision for compensation, and was held totally invalid.

Where there is a *de jure* office, it has almost but not quite always been held that a *de facto* incumbent has no right to payment of the emoluments as against the paying authority; it has been held that the *de facto* officer may retain as against the paying authority any emoluments received, but not against his *de jure* rival if he has one. In Behan v. Davis (1892) 3 Ariz. 399, 31 Pac. 521 sub-nom. Behan v. Board of Prison Comrs., there was a *de jure* office, but no *de jure* rival, the *de facto* incumbent was held entitled to the emoluments as against the paying authority because the public had had the benefit of his services. See Gordon Stoner (1912) Recovery of Salary by De Facto Officer, 10 Mich. L. Rev. 178-186, 291-299 for discussion and citation pro and con. Is the principal case essentially distinguishable?

[25] SCOPE NOTE: Students should consult the usual sources for the law of habeas corpus in general. The cases here printed are intended to raise only the extent

The jurisdiction of this court to hear the case is the first point to be examined. The question is whether a party imprisoned under a sentence of a United States court, upon conviction of a crime created by and indictable under an unconstitutional act of Congress, may be discharged from imprisonment by this court on *habeas corpus,* although it has no appellate jurisdiction by writ of error over the judgment. It is objected that the case is one of original and not appellate jurisdiction, and, therefore, not within the juris-

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to which the writ of habeas corpus may be used to test the constitutionality of a statute *which defines the offense* with which the accused is charged. From this question distinguish the following cases:—

Where a convict sentenced to imprisonment in a reformatory is by resolution of the board of managers, acting under the authority of a "statute," transferred to a prison he may by application for writ of habeas corpus obtain consideration of the validity of the statute. People v. Mallary (1902) 195 Ill. 582, 63 N. E. 508, 88 Am. St. 212.

Writ allowed to determine validity of the statute that purported to establish the court which sentenced the petitioner to imprisonment. Ex parte Settle (1913) 114 Va. 715, 77 S. E. 496. Contra: In re Parrish (1921) 214 Mich. 24, 182 N. W. 46 (and see In re Norton (1902) 64 Kans. 842, 68 Pac. 639, 91 Am. St. 255).

The petitioner was discharged where an invalid statute was the sole authority for the kind of proceeding used. State ex rel. Larkin v. Ryan (1888) 70 Wis. 676; and in Ex parte Bornee (1915) 76 W. Va. 360, 85 S. E. 529, L. R. A. 1915F, 1093, where petitioner was held for second trial after verdict of acquittal, the writ was allowed to determine whether a statute purporting to authorize such second trial violated the immunity from double jeopardy given by the state constitution.

In the cases distinguished in this note the courts say that the statute goes clearly to the jurisdiction of the officers or tribunal, and that habeas corpus lies where there is an unjurisdictional proceeding.

Confinement is always a prerequisite to the writ. "The uncontradicted return to the writ shows that the petitioner has not been in the sheriff's custody since he gave bond for his appearance. Indeed, he does not appear to be under any restraint except a moral restraint, from which he can not be relieved by habeas corpus. * * * Therefore the proceeding is dismissed at the cost of the petitioner." Burch, J. in In re Sills (1911) 84 Kans. 660, 662, 114 Pac. 856.

diction of this court. But we are clearly of opinion that it is appellate in its character. It requires us to revise the act of the circuit court in making the warrants of commitment upon the convictions referred to. This, according to all the decisions, is an exercise of appellate power. Ex parte Burford, 3 Cranch, 448; Ex parte Bollman and Swartwout, 4 id. 100, 101; Ex parte Yerger, 8 Wall. 98.

That this court is authorized to exercise appellate jurisdiction by *habeas corpus* directly is a position sustained by abundant authority. It has general power to issue the writ, subject to the constitutional limitations of its jurisdiction, which are, that it can only exercise original jurisdiction in cases affecting ambassadors, public ministers and consuls, and cases in which a state is a party; but has appellate jurisdiction in all other cases of federal cognizance, "with such exceptions and under such regulations as Congress shall make." Having this general power to issue the writ, the court may issue it in the exercise of original jurisdiction where it has original jurisdiction; and may issue it in the exercise of appellate jurisdiction where it has such jurisdiction, which is in all cases not prohibited by law except those in which it has original jurisdiction only. Ex parte Bollman and Swartwout, *supra*; Ex parte Watkins, 3 Pet. 202, 7 id. 568; Ex parte Wells, 18 How. 307, 328; Ableman v. Booth, 21 id. 506; Ex parte Yerger, 8 Wall. 85.

There are other *limitations of the jurisdiction*, however, arising from the nature and objects of the writ itself, as defined by the common law, from which its name and incidents are derived. It cannot be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence, upon a return to a *habeas corpus,* that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings, unless, perhaps, where the court has cognizance by writ of error or appeal to review the judgment. In such a case, if the error be apparent and the imprisonment unjust, the appellate court may, perhaps, in its discretion, give immediate relief on *habeas corpus,* and thus save the party the delay and expense of a writ of error. Bac. Abr., Hab. Corp., B. 13; Bethel's Case, Salk. 348; 5 Mod. 19. But the general rule is, that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by *habeas corpus.*

The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.

This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of Ex parte Lange (18 Wall. 163) and Ex parte Parks, 93 U. S. 18. In the former case, we held that the judgment was void, and released the petitioner accordingly; in the latter, we held that the judgment, whether erroneous or not, was not void, because the court had jurisdiction of the cause; and we refused to interfere. * * *

We are clearly of opinion that the question raised in the cases before us is proper for consideration on *habeas corpus*. The validity of the judgments is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having authority to award the writ. We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so, because, if the laws are unconstitutional and void, the circuit court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws.

We proceed, therefore, to examine the cases on their merits. [Upon extended consideration the court concluded that the questioned acts of Congress were valid and denied the petition.][26]

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[26] The Supreme Court has also decided that federal courts have power to determine upon a petition for habeas corpus whether a person then in the custody of state officers, even of state courts, is held in violation of the Constitution, laws or treaties of the United States and, if so found, power to discharge him. Ex parte Royall (1886), 117 U. S. 241, 29 L. ed. 868. But the recent decisions of the Supreme Court strongly emphasize a rule of restraint imposed upon itself and the lower federal courts in the exercise of these powers, and a like restraint in cases like the principal one where the petitioner is in the custody of federal authorities. Thus where the petitioner was in federal custody it was said: "The writ of *habeas corpus* is not intended to serve the office of a writ of error even after verdict, and, for still stronger reasons, it is not available to a defendant before trial, except in rare and exceptional cases as pointed out in Ex parte Royall, 117 U. S. 241, 29 L. ed. 868. This is an effort to nullify that rule and to depart from the regular course of criminal proceedings by securing from this court, in advance, a decision on an issue of law which the defendant can raise in the district court, with the right, if convicted, to a writ of error on any ruling adverse to his contention. That the orderly course of a trial must be pursued and the usual remedies exhausted, even where the petitioner attacks on *habeas corpus* the constitutionality of the statute under which he was indicted, was decided in Glasgow v. Moyer, 225 U. S. 420, 56 L. ed. 1147. That and other similar decisions have so definitely

EX PARTE LUCAS.

1901. Supreme Court of Missouri. 160 Mo. 218.

MARSHALL, J.—This is a proceeding by habeas corpus, to test the legality of the imprisonment of the petitioner by Samuel Chiles, marshal of Jackson county, under an information filed in the criminal court of Jackson county by the prosecuting attorney of that county, charging him with practicing the occupation of barber without having procured a certificate of authority so to do from the State Board of Examiners for barbers, contrary to the provisions of chapter 78, Revised Statutes 1899, being "An Act to establish a board of examiners and to regulate the occupation of a barber, in this State, and to prevent the spreading of contagious disease," approved May 5, 1899. Laws 1899, p. 44.

The petitioner has not yet been tried on that information, but pending the trial, he applied to one of the judges of this court, and obtained the writ of habeas corpus. The petitioner asserts that the Act of 1899 is unconstitutional and void, and therefore there is no law or authority warranting his arrest, detention or prosecution, and hence he is entitled to have his liberty restored to him by this great writ of right, which the constitution of this state (sec. 26, art. 2) declares shall never be suspended. The act of 1899 is claimed

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established the general principle as to leave no room for further discussion. Riggins v. United States, 199 U. S. 547, 50 L. ed. 303." Johnson v. Hoy (1913) 227 U. S. 245, 247, 57 L. ed. 497.

Likewise where petitioner is in *state custody*, "the rule has been firmly established by repeated decisions of this court that the power conferred on a federal court to issue a writ of *habeas corpus* to inquire into the cause of the detention of any person asserting that he is being held in custody by the authority of a state court in violation of the constitution, laws or treaties of the United States, is not unqualified, but is to be exerted in the exercise of a sound discretion. The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist." United States, ex rel. Kennedy v. Tyler (1925) 269 U. S. 17, 70 L. ed. 138. Three instances of "rare cases" are cited in the case just quoted from, and see Ex parte Royall, supra, for the doctrine of restrained use. But whether exceptional grounds have always been required see Minnesota v. Barber (1890) 136 U. S. 313, 34 L. ed. 455. For the general principles underlying the recent attitude of the Supreme Court see Knewel v. Egan (1925) 268 U. S. 442, 445-446, 69 L. ed. 1036. Compare, In Matter of Gregory (1911) 219 U. S. 210, 55 L. ed. 184, where it seems to have been assumed that in order to determine whether a court had jurisdiction of a statutory offense it was first necessary to determine whether the statute which purported to make the act of the accused an offense was valid.

Where petitioner seeks relief from state custody on the ground that it violates only the state constitution the federal courts have no power. Carfer v. Caldwell (1906) 200 U. S. 293, 50 L. ed. 488; Andrews v. Swartz (1895) 156 U. S. 272, 39 L. ed. 422. On the diversity of citizenship puzzle in this connection see 29 C. J. 130.

State courts have no power to discharge persons held in federal custody. Tarble's Case (1871) 13 Wall. (U. S.) 397, 20 L. ed. 597; Ableman v. Booth (1858) 21 How. (U. S.) 506, 16 L. ed. 169.

to be in conflict with section 53, article 4, section 1, article 6, section 3, article 10, section 4, article 2, section 30, article 2, section 43, article 4, section 5, article 9, section 28, article 4, the whole of article 3 of the constitution of Missouri, and with the Fourteenth Amendment to the Constitution of the United States, and with Section 2, Article 4, of the federal Constitution.

If the Act offends against so many provisions of the organic law of the United States and of the State of Missouri, the petitioner is suffering a grievous wrong by being arrested, cast into prison, compelled to stand trial and employ counsel to defend him, simply because he has offended against its provisions when the act itself is a greater offender against the law than he is against the act. * * *

In my judgment the right of the petitioner to raise the question by habeas corpus is settled by the cases of Ex parte Smith,[27] 135 Mo. 223, and Ex parte Neet, 157 Mo. 527.

[Burgess, Sherwood and Gant, J. J. concurred with Marshal, J. and this majority of the court passed upon the impugned statute, held it valid, and decided to remand the prisoner for trial. Robinson, Bruce and Valliant, J. J., concurred in remanding the prisoner for reasons given in the following separate opinion by Valliant, J. A long separate opinion by Sherwood, J. in opposition to the opinion of Valliant, J. is omitted.]

Valliant, J.—The conclusion reached by the majority of the court is that the prisoner be remanded for trial, and in that conclusion I concur, but for the following reasons only:

The original purpose of the writ of habeas corpus, as its office was described and defined under the act of 31 Charles II, in which form, substantially, it has come down to us, was to give effect to that provision of the thirty-ninth section of the Great Charter of King John, which declared that no individual in the realm should be deprived of his liberty unless his right to the same had been declared forfeited "by the judgment of his peers or the law of the land." Although it was an ancient common law writ, and although the right to personal liberty was clearly enough defined in the Great Charter, yet such was the opposition of the kings to the enforcement of the right and their influence with the crown judges, the remedy was often denied and the right disregarded. Blackstone says: "And yet early in the reign of Charles I, the court of King's bench, relying on some arbitrary precedents (and those perhaps misunderstood) determined that they could not upon an habeas corpus either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by special command of the King, or by the lords of the privy council. * * * These pitiful evasions gave rise to the statute of 16 Car. 1, c. 10, sec. 8, whereby it is enacted that, if any person be committed by the king himself in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, without any delay upon any pretense whatsoever, a writ of habeas corpus," etc. Then after pointing out the new shifts and devices that were resorted to by the crown judges to render the writ impotent, the great law-writer adds: "But whoever will attentively consider English history, may observe, that the flagrant abuse of any power, by the crown or its ministers, has always been productive of a struggle, which either discovers the exercise of power [to be] contrary to law, or (if legal) restrains it for the future. This was the case in the present instance (the Jenks case). The oppression of an obscure individual gave birth to the famous habeas corpus act, 31 Car. 2, c. 2," etc. Blackstone's Com., bk. 3, *pp. 134-5.

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[27] The reason assigned in the cited case is: "And if it be true, as must be true, that an unconstitutional law *is no law*, then its constitutionality is open to attack at any stage of the proceedings and even after conviction and judgment; and this upon the ground that no *crime* is shown and therefore the trial court had no jurisdiction; because its criminal jurisdiction extends only to such matters as the *law* declares to be *criminal*, and if there is no law making such declaration, or, what is tantamount thereto, if that law is unconstitutional, then the court which tries a party for such an *assumed* offense, transcends its jurisdiction and he is consequently entitled to his discharge, just the same as if the nonjurisdiction of such court should, in any other manner, be made apparent." Sherwood, J., p. 229.

Reference to the origin and purpose of this writ is here made to recall to our minds that its office was to afford a man who was imprisoned otherwise than on the judgment of a court, a hearing before a competent court or judge, to the end that the legality of his commitment might be inquired into, and if unlawful that he might be discharged from custody even though the king himself had ordered his imprisonment. Although the conditions that surround us to-day have materially changed from those that our ancestors contended with at that period of English history, yet in essential principle there is no difference in the office of the writ of habeas corpus now from what it was then. We have now no kings or privy councils, but we have men in executive authority who sometimes do imprison people without legal right, and who sometimes from overzeal and sometimes from bad motives are induced to use their power to the oppression of the citizen and would confine him in silence and without judicial inquiry, if they were not subject to the writ of habeas corpus. Therefore the writ is not only preserved in our system of jurisprudence, but ranks perhaps as the most important in influence, as it certainly is the most famous in history, of all writs known to the English common law.

But where a man is taken into custody under a warrant from a court competent to try him for the offense charged and competent to decide whether or not the act charged is an offense against the law and the court is proceeding in due course with the case, or where it has proceeded to judgment and has adjudged the accused guilty and pronounced the sentence of the law upon him, it can not be said in the language of Magna Charta that he is deprived of his liberty without having been adjudged to have forfeited it "by the judgment of his peers or the law of the land," and therefore the writ of habeas corpus has no place in his case.

If the prisoner is held in custody under process awaiting trial or under commitment awaiting the action of the grand jury, and bail has been refused him, the habeas corpus act [of Missouri] expressly provides that he may be brought before a court or judge under this writ and admitted to bail to await his trial, or the action of the grand jury, if it is a bailable case. R. S. 1899, secs. 3568-3581.

But except for the purpose of admitting to bail, the writ of habeas corpus was not designed and should not be issued to interfere with the due procedure in a court of competent jurisdiction. This is the doctrine announced by this court in its earlier decisions and is the only doctrine consistent with the original purpose of the writ and with the spirit of the habeas corpus act in our statutes and under our state judiciary system, although reason exists for a different view under the federal judiciary system. * * *

Under the judiciary system of this state, any one tried and condemned as for a crime may have the proceedings in his trial reviewed on appeal or writ of error, in which he may have relief not only against the errors and irregularities, if any, of the trial court, but if he raises the question of the constitutionality of the statute under which he was convicted he may have the judgment of the highest court in the state on that question. And if the point he desires reviewed goes to the jurisdiction of the trial court, the record may be brought here on certiorari and quashed. If therefore under our system any one is left to pine in prison because of error or irregularity in his trial, or invalidity of the law under which he was convicted, or lack of jurisdiction in the court that condemned him, it is only because he has omitted to avail himself of one of the several remedies the law affords him. There is absolutely no occasion in such case to invoke the remedy by habeas corpus, and it would be a misuse of that writ to so extend it. * * *

Although it is said that an unconstitutional law is no law at all, and therefore a conviction under such a law is void, yet whilst that is true in a certain sense, it is inaccurate if by this it is intended to say that the judgment is *coram non judice*. If the court had authority to pronounce the judgment provided the law was constitutional, it had jurisdiction to decide whether or not it was constitutional, and if it decided erroneously the error did not go to the jurisdiction of the court.[28] In a decision of the United States

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[28] "The test of jurisdiction is not right decision, but the right to enter upon the inquiry and make some decision." Sanborn, Cir. J. for the court in Quagon

Supreme Court, cited in State ex rel. v. Dobson, supra, [135 Mo. 1] Chief Justice Marshall said: "The question whether an offense was or was not committed, that is, whether the indictment did or did not show that an offense had been committed, was a question which that court was competent to decide. If its judgment was erroneous * * * still it is a judgment, and until reversed can not be disregarded." Ex parte Watkins, 3 Pet. 193, 1. c. 203, 206.

It is in failing to observe the distinction there indicated that has misled some courts in this country to giving sanction to the use if [of] this writ in setting at naught the judgment of a court of competent jurisdiction or interfering with its due process to discharge a prisoner upon the ground that the legislative act under which the prisoner was condemned or is being held for trial is, in the opinion of the magistrate granting the writ, unconstitutional.

A text-writer of ability, formerly Chief Justice of the Supreme Court of Wisconsin, commenting on this point says: "Those who have pretended to treat the subject, as some have, by merely collecting such general expressions, have tended to confuse rather than demonstrate and make plain. They make no distinction between errors of law and errors which are jurisdictional. * * * It is evident that these distinctions must be observed, or else an intelligent treatment of the subject is not made." 2 Bailey on Jurisdiction, note to sec. 409. * * *

The learned judge (Sherwood, J.) who wrote the opinion in Ex parte Smith, referred to the decision of the Supreme Court of the United States in Ex parte Siebold, 100 U. S. 371, and to the text of Church on Habeas Corpus, wherein are collected references to decisions in other states following the Supreme Court of the United States in the Siebold case. But a reading of the opinion in that case shows that although it is founded in reason as applicable to

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v. Biddle (1925) 5 Fed. (2d) 608, 610.

"But after judgment and commitment in a criminal action by an inferior court having jurisdiction of the offense charged, we think that habeas corpus is not the proper mode of procedure to bring the cause into this court [state court of last resort] for review upon alleged errors of law * * *. If the validity of a statute is brought in question in an inferior court on the trial of a cause, that question must finally be determined in the same mode as other legal questions arising on the trial of causes in such court—that is, by proceedings in error or appeal" * * *. Ex parte Fisher (1877) 6 Nebr. 309-311.

"But the argument is, that the ordinance was passed without authority of law, and was null and void. Whether it was or not, was a legitimate subject of inquiry by the [police] magistrate in the same manner as any other question which might be presented for his adjudication. And being determined by him, adverse to the position of the prisoner, his remedy was by appeal, or writ of error, and not by habeas corpus. It is not a case where a court has acted without having jurisdiction. On the contrary, the most that can be claimed is, that the magistrate *erred* in deciding that the ordinance was in force [valid], and that the city had the power and authority to provide for the punishment of the offense. * * * The petitioner has a perfect, well-defined, and complete remedy, in the regular and usual method of appeal." Platt v. Harrison (1858) 6 Iowa 79, 81, 71 Am. Dec. 389.

the federal judiciary, the doctrine announced is in discord with our state judiciary system. The Supreme Court of the United States was there defining its own authority, not under the habeas corpus, as an original writ, but as using the writ in its capacity of an appellate and supervisory court. Because in the case before it there was no appeal from and no writ of error to the U. S. Circuit Court by which the judgment under which the prisoner had been convicted could be reviewed, and no other method prescribed by law by which the validity of the act of Congress under which the conviction was had could be tested in the Supreme Court, that court said it would, under its appellate jurisdiction, review the judgment to that extent on habeas corpus. * * *

EX PARTE LOCKHART.

1923. Criminal Court of Appeals of Oklahoma. 25 Okla. Cr. 429.

Doyle, J. This is a petition for writ of habeas corpus for the discharge of James Lockhart, from the penitentiary at McAlester, where it is alleged that he is unlawfully and illegally restrained of his liberty by the warden, J. H. Townsend; that the cause of said restraint is a commitment issued by the district court of Canadian county, James I. Phelps, judge, on a charge of setting up a distillery for the purpose of manufacturing corn liquor, which judgment was rendered upon a plea of guilty, entered by defendant on the 2d day of June, 1923, wherein he was sentenced to be confined in the penitentiary at McAlester for the term of one year, and that he pay the costs; and alleging that said imprisonment is illegal because the act approved February 5, 1923, c. 1, Sess. Laws 1923, making it a felony to set up a distillery for the purpose of manufacturing distilled spirits was held unconstitutional and void, as determined by the decision of this court [Sept. 22, 1923] in the case of In re D. E. Smith, 218 Pac. 708, not yet [officially] reported.

The Attorney General concedes that the writ should issue, and that the petitioner is entitled to be discharged.

In the case of Ex parte Smith, supra, the statute on which this prosecution is based was held unconstitutional[29] and void.

It follows that petitioner is unlawfully imprisoned and restrained of his liberty by the respondent, and that he is entitled to be discharged from the imprisonment of which he complains. He is, therefore, by the judgment of this court, discharged therefrom.

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[29] Because inconsistent with provisions of the State constitution, on the same subject.

MATSON, P. J., and BESSEY, J., concur.[30]

NOTE

Where a person is held by state officers for trial in a state court on a charge of violating a state statute and applies to a state court or state judge for a writ of habeas corpus claiming as the ground for its issuance that the statute conflicts with the state or the national Constitution, it is held in many states that the writ should issue and the questioned validity be determined and the accused discharged without trial if the statute is found to be unconstitutional. In re McCoy (1909) 10 Cal App. 116, 101 Pac. 419; In re Morgan (1899) 26 Colo. 328, 415, 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. 269 (without any discussion); State v. Lewis (1908) 55 Fla. 570, 46 So. 630; Ex parte Harrison (1908) 212 Mo. 88, 110 S. W. 709, 16 L. R. A. (N. S.) 950, 126 Am. St. 557, 15 Ann. Cas. 1; Ex parte Lerner (1920) 281 Mo. 18, 218 S. W. 331; Ex parte Schatz (1925) 307 Mo. 67, 269 S. W. 383; Ex parte Thomason (1884) 16 Nebr. 238, 20 N. W. 312; In re application of S. H. McMonies (1906) 75 Nebr. 702; People ex rel. Moskowitz v. Jenkins (1911) 202 N. Y. 53, 94 N. E. 1065, 35 L. R. A. (N. S.) 1079 (but see People ex rel. Doyle v. Atwell (1921) 232 N. Y. 96, 133 N. E. 364; People ex rel. Bryant v. Sheriff (1924) 123 Misc. 859, 206 N. Y. S. 533; In re Gribben (1897) 5 Okla. 379, 47 Pac. 1074; Ex parte Hollman (1908) 79 S. Car. 9, 60 S. E. 19; Ex parte Rodriguez (1873) 39 Tex. 705 (an extraordinary case where counsel charged that there had been an arrest on false charges of violation of a statute for the sole purpose of qualifying a victim to test the statute by habeas corpus petition, and see the remarks by Chipman, P. J. in In re McCoy (1909) 10 Cal. App. 116, 119, 101 Pac. 419); Ex parte Oates (1922) 91 Tex. Cr. 79, 238 S. W. 930 (admitted to be settled practice but the contrary "might be the better practice").

In other States the courts refuse to allow this summary raising and segregation of the issue of constitutionality. In re Gray (1902) 64 Kans. 850, 68 Pac. 658; In re Sills (1911) 84 Kans. 660, 114 Pac. 856; and see In re Hamilton (1909) 56 Wash. 405, 105 Pac. 1046.

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[30] Compare, In re Jarvis (1903) 66 Kans. 329, 71 Pac. 576 (expressly confining the decision to instances where the time for appeal had lapsed but not requiring any special excuse for neglect to appeal) and Manning v. Biddle (1926) 14 Fed. (2d) 518 (a person undergoing prison sentence was discharged upon habeas corpus because there was no other remedy, although the defect was that the trial court had construed the indictment to charge an offense where in the judgment of the court of appeals it clearly did not, and the latter admitted that the error was such as the accused might have had corrected upon writ of error.)

Suppose a corporation has been convicted and sentenced *to pay a fine* for violation of a state statute which the state court of last resort has several times held valid and the corporation takes no appeal. Subsequently but before the fine is paid the Supreme Court of the United States, in other litigation holds the statute invalid. May the corporation obtain an injunction to restrain collection of the fine? See International Harvester Co. v. Commonwealth (1916) 170 Ky. 41, 46, 185 S. W. 102. If the fine has been paid can the corporation recover it?

A statute purported to exempt a kind of property from taxation. An assessor attempted to assess T's property of that kind for the year 1919 and on appeal to a court T got judgment that the property was exempt. From this judgment there was no appeal. In 1921 in litigation between others the state court of last resort held the statute invalid because in conflict with the state constitution. In assessing taxes for the next year the assessor undertook to assess T's property. He appealed to a court setting up that the former judgment he had obtained against the assessor was *res judicata.* Should the court so hold? Or should the court hold the former judgment void? Could the state collect back taxes for the year 1919? See the analogous case of Security Savings Bank v. Connell (1924) 198 Iowa 564, 200 N. W. 8.

In the last cited Kansas case the petition was filed after the trial court had denied a motion to quash and had ruled that the challenged statute was valid. The Supreme Court said:— "Under these circumstances the proceeding here is virtually an appeal from an order denying a motion to quash pending the trial. The writ of habeas corpus is not designed to perform any such function. The petitioner should first exhaust his ordinary remedies. Although the [trial] court has held the statute to be constitutional on a motion to quash, the ruling is not final, and it will not be assumed that ultimately an unwarranted judgment will be pronounced."

A person imprisoned after judgment of conviction in a state tribunal on a charge of violating a state statute is not entitled to writ of habeas corpus from a state court or judge to determine the constitutionality of the statute. Ex parte Bizzell (1895) 112 Ala. 210, 21 So. 371; People ex rel. Miller v. District Court (1905) 33 Colo. 328, 80 Pac. 888; People ex rel. Atty-Gen. v. District Court (1899) 26 Colo. 380, 58 Pac. 591 (even to determine the constitutionality of a statute which was the source of jurisdiction which the trial court purported to exercise); Blackstone v. Nelson (1921) 151 Ga. 706, 108 S. E. 114 (especially where the issue was raised at trial and ruled against and no exception taken); People v. Jonas (1898) 173 Ill. 316, 50 N. E. 1051; Platt v. Harrison (1858) 6 Iowa 79, 71 Am. Dec. 389; Koepke v. Hill (1901) 157 Ind. 172, 60 N. E. 1039, 87 Am. St. 161; In re Underwood (1875) 30 Mich. 502; In re Maguire (1897) 114 Mich. 80, 72 N. W. 15; In re Allen (1915) 91 Ohio St. 315, 110 N. E. 535; Ex parte Fisher (1877) 6 Nebr. 309; Ex parte Hammar (1925) 134 Wash. 51, 234 Pac. 1018. Some courts base this result upon specific state statutory restriction of the writ. State v. Dunn (1912) 159 N. Car. 470, 74 S. E. 1014. But in Servonitz v. State (1907) 133 Wis. 231, 233, 113 N. W. 277, 126 Am. St. 955, holding that the court should issue the writ in the case here supposed, it is said that if the Wisconsin habeas corpus act properly construed purported to prevent, that act would be invalid as an attempt to deprive the court of its "common-law power."

But by the following decisions he is allowed after judgment to raise that issue by habeas corpus: Harper v. Galloway (1909) 58 Fla. 255, 51 So. 226, 26 L. R. A. (N. S.) 794, 19 Ann. Cas. 235; Pounds v. Darling (1918) 75 Fla. 125, 77 So. 666; (3) Liberis v. Harper (1925) 89 Fla. 477, 104 So. 853; Herrick v. Smith (1854) 1 Gray (Mass.) 1, 49; Commonwealth v. Huntley (1892) 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839 (Supreme Court has power but "this mode of raising questions in criminal cases is open to some objection"); Ex parte Karnstrom (1923) 297 Mo. 384, 249 S. W. 595; Taft v. Shaw (1920) 284 Mo. 531, 225 S. W. 457 ("This rule has been finally settled in this state. * * * If a law or ordinance is invalid the trial court is without jurisdiction for the prosecution of the alleged violation of law. There can be no violation of something which does not exist, and an unconstitutional law or ordinance is as if it had never existed"); People ex rel. Nechameus v. Warden of City Prison (1895) 144 N. Y. 529, 39 N. E. 686 (allowed without comment); In re Unger (1908) 22 Okla. 755; Wangsness v. McAlpine (1924) 47 S. Dak. 472, 199 N. W. 478.

Is any light shed on this subject by such expressions as "an unconstitutional statute is not law", "void judgment" or "want of jurisdiction"? Do these expressions even rationalize the result? See the struggle for light in the editorial note in 39 L. R. A. 449. Is the question whether the writ should issue from a higher court *before trial* merely a question of the expediency and "justice" to the accused of a segregation and more immediate final decision of the issue of validity? And whether the writ should be allowed after judgment of conviction, should that turn upon the relative merits of review by appeal or writ of error as compared with review by writ of habeas corpus? In such case does saying that the writ is issued in exercise of *original* jurisdiction make it so? Is it in essence a mode of appeal? Further there is the question, where the issue has not been raised at the trial or the time for review by appeal or writ of error has elapsed, whether such neglects should bar relief?

"If the courts should say that constitutional rights are too important to be cut off by wrong decisions, and that decisions which deny such rights will therefore be held void, even on collateral attack, because of the serious consequences involved, it would merely express the actual attitude of the courts; but they do not say this." Editorial note 39 L. R. A. 449, 454.

"The effect of granting writs in cases of this kind would be to allow defendants in all convictions under ordinances or statutes the validity of which might be questioned to come directly to this court [state supreme court] by a proceeding in habeas corpus instead of appealing or prosecuting writs of error, as the law [habeas corpus statute of Illinois] contemplates." People v. Jonas (1898) 173 Ill. 316, 320, 50 N. E. 1051.

"Why should the liberty of a citizen be taken from him and he be put to the expense and ignominy of a criminal prosecution upon a complaint having no warrant of law to support it? A void law is no law and a prosecution under it is a prosecution without the authority of law." Chipman, P. J., in Ex parte Zany (1912) 20 Cal. App. 360, 371, 129 Pac. 295.

"To hold that one who is being deprived of his liberty for a long term of years by virtue of a sentence beyond the jurisdiction of the court which rendered it has deprived himself of his right to relief by writ of habeas corpus because through ignorance, poverty, or neglect he failed to challenge that judgment by writ of error until it was too late is to rob the writ of the very purpose of its existence, the purpose to afford speedy and inexpensive relief from unlawful imprisonment to those otherwise remediless. * * * And here is the true distinction between the cases in which the writ of habeas corpus may and those in which it may not issue. If the judgment or sentence challenged is without the jurisdiction of the court and void, the writ may issue. If it is erroneous, but within the jurisdiction of the court which rendered it, the writ may not issue." Sanborn, Cir. J. in Stevens v. McClaughry (1913) 207 Fed. 18, 28-29, 51 L. R. A. (N. S.) 390 (holding, where the trial court had given a sentence of 5 years on one count for stealing some articles and a further 5 years on another count for stealing other articles, all articles being stolen in one continuous theft, that the sentence as to the second period of 5 years was *beyond the jurisdiction* since in its (Court of Appeals) understanding only a single sentence could be inflicted in such case and that the prisoner having served the first 5 years should be discharged). Quaere, was this an error as to jurisdiction?

For various uses and some abuses of the writ, see Charles B. Elder, What shall be done with the Writ of Habeas Corpus? (1912) 7 Ill. Law Rev. 1-14.

WELLER v. PEOPLE OF THE STATE OF NEW YORK.

1925. Supreme Court of the United States. 268 U. S. 319.

Error to a judgment of the Court of Special Sessions of the City of New York adjudging the plaintiff in error guilty of reselling theater tickets without a license, entered after successive affirmances by the Supreme Court, Appellate Division, and the Court of Appeals.

Mr. Justice McReynolds delivered the opinion of the Court.

Chapter 590, New York Laws 1922, added eight sections, 167-174, to the General Business Law of the State. * * * Section 168 directs: "No person, firm or corporation shall resell or engage in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held without having first procured a license therefor from the comptroller." And § 173 declares every violation of the inhibition shall be a misdemeanor.

By an information in the Court of Special Sessions, New York City, the District Attorney accused plaintiff in error of engaging in the business of reselling theatre tickets without the license required by law. The evidence showed he was engaged in that business, and it was conceded he had never taken out a license or complied with Chapter 590. His defense rested upon the claim that the statute is repugnant to the Fourteenth Amendment. The trial court adjudged him guilty and imposed a fine of twenty-five dollars. This was affirmed by the Appellate Division and by the Court of Appeals. 207 App. Div. 337; 237 N. Y. 316. In an extended opinion the latter court upheld the challenged enactment, but said nothing of the possibility of sustaining the license provisions if those relating to resale prices were invalid.

Counsel for plaintiff in error now insists that the two provisions are inseparable; that those which undertake to establish resale prices are clearly invalid; and, consequently, the whole Act must fall. On the contrary, counsel for the people maintain that the power of the State to require such licenses is clear and that we need not determine the validity of the price restrictions.

It is not and, we think, it cannot seriously be urged that the State lacked power to require licenses of those engaging in the business of reselling theatre tickets. The conviction and sentence were for failure to observe that requirement. In the absence of an authoritative announcement of another view by some court of the state we shall hold this provision severable and valid. Brazee v. Michigan, 241 U. S. 340. The statute itself declares (§ 174): "In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of the remaining provisions of the article." If § 172, which restricts resale prices were eliminated, a workable plan would still remain. See Dorchy v. Kansas, 264 U. S. 286.

The judgment of the court below is *affirmed*.[31]

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[31] On the doctrine applicable where a statute contains no saving or separability provision such as § 174 of the statute above quoted consider the following:

"It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven to thirty-seven, inclusive, which relate to the subject which has been under discussion; and as to them we think the rule laid down by Chief Justice Shaw in Warren v. Charlestown, 2 Gray, 84, is applicable, that if the different parts 'are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.' Or, as the point is put by Mr. Justice Matthews in Poindexter v. Greenhow, 114 U. S. 270, 304: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact.'" Fuller, C. J., in Pollock v. Farmers' Loan and Trust Co. (1895) 158 U. S. 601, 635-636, 39 L. ed. 1108.

"In this state, we have gone far in subdividing statutes, and sustaining them so far as valid (Dollar Co. v. Canadian C. & F. Co., 220 N. Y. 270, 278, and cases there cited; People v. Beakes Dairy Co., 222 N. Y. 416, 432; People ex rel. Penn Gas Co. v. Saxe, 229 N. Y. 446). The tendency is, I think, a wholesome one. Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment (Loeb v. Columbia Township Trustees, 179 U. S. 472). The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity has been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots." Cardozo, J., in People ex rel. Alpha Portland Cement Co. v. Knapp (1920) 230 N. Y. 48, 60, 129 N. E. 202.

A statute prohibiting "any person, corporation or association of persons" to do a stated act *may be* held valid in its application to corporations although it is invalid as to natural persons. Berea College v. Kentucky (1908) 211 U. S. 45, 53 L. ed. 81. A national statute which states that it applies both to acts done in states and the same kind of acts done in territories was held valid as to the latter though invalid as to the former. El Paso & N. E. R. Co. v. Gutierrez (1909) 215 U. S. 87, 54 L. ed. 106. Compare Butts v. Merchants & Miners Transp. Co. (1913) 230 U. S. 126, 57 L. ed. 1422.

Whether an express declaration in a statute that its valid parts are intended to stand separately notwithstanding some are found invalid changes the result see the notes in (1927) 40 Harv. L. Rev. 626-630, (1927) 25 Mich. L. Rev. 523-527.

The Supreme Court of the United States in considering a section of a Kansas statute, a large part of which it had in a former decision held invalid said:—"Whether § 19 is so interwoven with the system held invalid that the section cannot stand alone, is a question of interpretation and of legislative intent. Compare Butts v. Merchants Transportation Co., 230 U. S. 126. Section 28 of the act, [a separability provision] (which resembles that discussed in Hill v. Wallace, 259 U. S. 44, 70, 71) provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command.

"The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this court. Gatewood v. North Carolina, 203 U. S. 531, 543; Guinn v. United States, 238 U. S. 347, 366; Schneider Granite Co. v. Gast Realty Co., 245 U. S. 288, 290. In cases coming from the lower federal courts, such questions of severability, if there is no controlling state decision, must be determined by this court. Compare Myers v. Anderson, 238 U. S. 368, 381; Louisville & Nashville R. R. Co. v. Garrett, 231 U. S. 298, 311. In cases coming from the state courts, this court, in the absence of a controlling state decision, may, in passing upon the claim under the federal law, decide, also, the question of severability. But it is not obliged to do so. The situation may be such as to make it appropriate to leave the determination of the question to the state court. We think that course should be followed in this case. * * * In order that the state court may pass upon this question, its judgment in this case * * * should be vacated." Brandeis, J., Dorchy v. Kansas (1924) 264 U. S. 286, 290-291, 68 L. ed. 686.

CHAPTER II.

THE NATIONAL STATE AND ITS GOVERNMENTAL ORGANIZATION.

25

Section 1.—General Concepts.

CHISHOLM, EXECUTOR v. GEORGIA.

1793. Supreme Court of the United States. 2 Dall. 419.

[This was an original action brought in the Supreme Court against the State of Georgia by "Alexander Chisholm, a ~~citizen of~~ the State of South Carolina, and executor of Robert Farquar, deceased, of the same State."][1]

"Wilson, *Justice.* This is a case of uncommon magnitude. One of the parties to it is a STATE; certainly respectable, claiming to be *sovereign.* The question to be determined is, whether ~~this State~~, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the *United States?* This question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less *radical* than this—"do the people of the *United States* form a NATION?" * * *

To the Constitution of the *United States* the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who *ordained* and *established* that Constitution. They *might* have announced themselves "SOVEREIGN" people of the *United States*: But serenely conscious of the *fact,* they avoided the *ostentatious declaration.* * * *

By a State I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an *artificial* person. It has its affairs and its interests: It has its rules: It has its rights: And it has its obligations. It may acquire property distinct from that of its members: It may incur debts to be discharged out of the public stock, not out of the private fortunes of individuals. It may be bound by contracts; and for damages arising from the breach of those contracts. In all our contemplations, however, concerning this feigned and artificial person, we should never forget, that, in truth and nature, those, who think and speak, and act, are *men*. * * *

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[1] No facts are reported by Dallas. The above is taken from a pamphlet report of the case, containing the opinions in full in accord with the report in Dallas, which was printed in Boston in 1793 at the order of the senate of the State of Massachusetts, and is certified as true by Samuel Bayard, Clerk of the United States Supreme Court under date of April 12, 1793. Additional supposed facts are given from contemporary newspaper reports in 1 Warren, Supreme Court in United States History (1922) 93, and foot-note.

As a Judge of this Court, I know, and can decide upon the knowledge, that the citizens of *Georgia*, when they acted upon the large scale of the *Union*, as a part of the "People of the *United States*," did *not* surrender the Supreme or sovereign Power to that State; but, *as to the purposes of the Union*, retained it to themselves. *As to the purposes of the Union*, therefore, *Georgia is* NOT *a sovereign State*. If the judicial decision of this case forms *one* of *those* purposes; the *allegation*, that *Georgia* is a sovereign State, is unsupported by the *fact*. * * *

With the strictest propriety, therefore, *classical* and *political*, our national scene opens with the most magnificent object, which the nation could present. "The PEOPLE of the *United States*" are the first personages introduced. Who were those people? They were the citizens of thirteen States, each of which had a separate Constitution and Government, and all of which were connected together by articles of confederation. To the purposes of public strength and felicity, that confederacy was totally inadequate. A requisition on the several States terminated its *Legislative* authority: *Executive* or *Judicial* authority it had none. In order, therefore, to form a more perfect union, *to establish justice*, to ensure domestic tranquility, to provide for common defence, and to secure the blessings of liberty, *those people*, among whom were the people of *Georgia*, ordained and established the present Constitution. By that Constitution Legislative power is vested, Executive power is vested, *Judicial* power is vested.

The question now opens fairly to our view, *could* the *people* of those States, among whom were those of *Georgia*, bind those *States*, and *Georgia* among the others, by the Legislative, Executive and Judicial power so vested? If the principles, on which I have founded myself are just and true; this question must unavoidably receive an affirmative answer. If those *States* were the *work* of those *people*; those people, and, that I may apply the case closely, the people of *Georgia*, in particular, could alter, as they pleased, their former work: To any given degree, they could *diminish* as well as enlarge it. *Any* or *all* of the former State-powers they could *extinguish* or *transfer*. The inference, which necessarily results, is, that the Constitution ordained and established by *those* people; and, still closely to apply the case, in particular by the people of *Georgia, could* vest jurisdiction or judicial power over those States and over the State of *Georgia* in particular.

The next question under this head, is—*Has* the Constitution done so? Did those people mean to exercise this, their undoubted power? These questions may be resolved, either by fair and conclusive deductions, or by direct and explicit declarations. In order, ultimately, to discover, whether the people of the *United States* intended to bind those States by the *Judicial* power vested by the national Constitution, a previous enquiry will naturally be: Did those *people* intend to bind those *states* by the *Legislative* power vested by that Constitution? The articles of confederation, it is well known, did not operate upon individual *citizens*; but operated only upon *states*. This defect was remedied by the national Constitution, which, *as all allow,* has an operation on individual citizens. But if an opinion, which some seem to entertain, be just: the defect remedied, on one side, was balanced by a defect introduced on the other: For they seem to think, that the present Constitution operates only on individual citizens, and not on States. This opinion, however, appears to be altogether unfounded. * * *

Note

Did the people of the *United States* intend to bind the several States by the *Executive* power of the national Government? The affirmative answer to the former question directs, unavoidably, an affirmative answer to this. * * * Nothing could be more natural than to *intend* that this Legislative power should be enforced by powers Executive and *Judicial.* * * *

Whoever considers, in a combined and comprehensive view, the *general texture* of the Constitution, will be satisfied, that the people of the *United States* intended to form themselves into a nation for *national purposes.* They instituted, for *such* purposes, a national Government, complete in all its parts, with powers Legislative, Executive and Judiciary; and, in all those powers, extending over the whole nation. Is it congruous, that, with regard to *such* purposes, any man or body of men, any person natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national Government? Would not such claims, crowned with success, be repugnant to our very existence as a nation? When so many trains of deduction, coming from different quarters, converge and unite, at last, in the same point; we may safely conclude, as the *legitimate result* of this Constitution, that the State of *Georgia* is amenable to the jurisdiction of this Court.

But, in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, beyond all doubt, by the *direct* and *explicit declaration* of the Constitution itself. "The judicial power of the *United States* shall extend, to controversies between *two* States." *Two*

States are supposed to have a controversy between them: This controversy is supposed to be brought before those vested with the judicial power of the *United States*: Can the most consummate degree of professional ingenuity devise a mode by which this "controversy between two States" can be brought before a Court of law; and yet neither of those States be a Defendant? "The judicial power of the United States shall extend to controversies, between a *state* and *citizens* of *another* State." * * * Could this strict and appropriated [sic] language, describe, with more precise accuracy, the cause now depending before the tribunal? * * *

JAY, CHIEF JUSTICE. The question we are now to decide has been accurately stated, viz. Is a State suable by individual citizens of another State?

It is said, that *Georgia* refuses to appear and answer to the Plaintiff in this action, because she is a *sovereign* State, and therefore not *liable* to such actions. In order to ascertain the merits of this objection, let us enquire, 1st. In what sense *Georgia* is a sovereign State. 2d. Whether suability is incompatible with such sovereignty. 3d. Whether the Constitution (to which *Georgia* is a party) authorises such an action against her.

1st. * * * The Revolution, or rather the Declaration of Independence, found the people *already* united for general purposes, and at the same time providing for their more domestic concerns by State conventions, and other temporary arrangements. From the crown of *Great Britain*, the sovereignty of their country passed to the people of it; * * * on whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and considerations; the people nevertheless continued to consider themselves, in a national point of view, as one people; and they continued without interruption to manage their national concerns accordingly; afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the States, the basis of a general Government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity, established the present Constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plentitude of it, they declared with becoming dignity, "We the *people* of the *United States*," "do ordain and establish this Constitution." Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform. Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the *United States* is likewise a compact made by the people of the *United States* to govern themselves as to general objects, in a certain manner. By this great compact however, many prerogatives were transferred to the national Government, such as those of making war and peace, contracting alliances, coining money, &c. &c.

If then it be true, that the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State, in the people of each State, it may be useful to compare these sovereignties, with those in *Europe,* that we may thence be enabled to judge, whether all the prerogatives which are allowed to the latter, are so essential to the former. * * *

2d. The second object of enquiry now presents itself, viz. whether suability is compatible with State sovereignty. * * * It is agreed, that one free citizen may sue another; the obvious dictates of justice, and the purposes of society demanding it. It is agreed, that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases one citizen may sue forty thousand; for where a corporation is sued, all the members of it are *actually* sued, though not *personally,* sued. In this city [Philadelphia] there are forty odd thousand free citizens, all of whom may be collectively sued by any individual citizen. In the State of *Delaware,* there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them should not prosecute them? Can the difference between forty odd thousand, and fifty odd thousand make any distinction as to right? * * *

Prior to the date of the Constitution, the people had not any national tribunal to which they could resort for justice; the distribution of justice was then confined to State judicatories, in whose institution and organization the people of the other States had no participation, and over whom they had not the least controul. There was then no general Court of appellate jurisdiction, by whom the errors of State Courts, affecting either the nation at large or the citizens of any other State, could be revised and corrected. * * *

Let us now turn to the Constitution. The people therein declare, that their design in establishing it, comprehended *six* objects. 1st. To form a more perfect union. 2d. To establish justice. * * *

It may be asked, what is the precise sense and latitude in which the words *"to establish justice,"* as here used, are to be understood? The answer to this question will result from the provisions made in the Constitution on this head. They are specified in the 2d. section of the 3d. article, where is ordained, that the judicial power of the *United States* shall extend to ten descriptions of cases, * * *. 7th. To controversies between two or more States;

because domestic tranquility requires, that the contentions of States should be peaceably terminated by a common judicatory; and, because, in a free country justice ought not to depend on the *will* of either of the litigants. 8th. To controversies between a State and citizens of another State; because in case a State (that is all the citizens of it) has demands against some citizens of another State, it is better that she should prosecute their demands in a national Court, than in a Court of the State to which those citizens belong; the danger of irritation and criminations arising from apprehensions and suspicions of partiality, being thereby obviated. Because, in cases where some citizens of one State have demands against all the citizens of another State, the cause of liberty and the rights of men forbid, that the latter should be the sole Judges of the justice due to the latter; and true Republican Government requires that free and equal citizens should have free, fair, and equal justice.

[Justices BLAIR and CUSHING delivered concurring opinions. Justice IREDELL dissented. He thought the court should not take jurisdiction because of what he considered a lack of legislation prescribing procedure in such a case, that the constitutional question was not before the court but that almost *obiter* he might say that the rule of the "old law" that a "sovereign" cannot be sued without its consent should be considered as abrogated by "nothing but express words, or an insurmountable implication" neither of which he thought were found in the Constitution. It seems that Justice JOHNSON did not sit.]

The following order was made:—BY THE COURT. *It is ordered,* that the Plaintiff in this cause do file his declaration on or before the first day of *March* next.

Ordered, that certified copies of the said declaration be served on the Governor and Attorney General of the State of *Georgia,* on or before the first day of *June* next.

Ordered, that unless the said State shall either in due form appear, or shew cause to the contrary in this Court, by the first day of next Term, judgment by default shall be entered against the said State.[2]

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[2] The decision was widely commented upon in the press of the day with some strong approbation but more marked disapprobation. "While this opposition to the court's decision was to some extent based on divergencies of political theories as to state sovereignty, the real source of the attack on the *Chisholm Case* was the very concrete fear of the 'numerous prosecutions that will immediately issue from the various claims of refugees, Tories, etc., that will introduce such a series of litigation as will throw every state in the Union into the greatest confusion.' In the crucial condition of the finances of most of the states at that time, only disaster was to be expected if suits could be successfully maintained by holders of state issues of paper and other credits, or by Loyalist refugees to recover property confiscated or sequestered by the States; and that this was no theoretical danger was shown by the immediate institution of such suits against the states in [of?] South Carolina, Georgia, Virginia and

"Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts." Matthews, J., in Yick Wo v. Hopkins (1886) 118 U. S. 356, 370, 30 L. ed. 220.

"While undoubtedly the United States as a nation has all the powers which inhere in any nation, Congress is not authorized in all things to act for the nation, and too little effect has been given to the Tenth Article of the amendments to the Constitution, that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' The powers the people have given to the general government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the people and can be exercised only by them, or upon further grant from them." Brewer, J., concurring in United States ex rel. Turner v. Williams (1904) 194 U. S. 279, 295-296, 48 L. ed. 979.

"But before proceeding further, it is proper we should say, that eminent judges of the Supreme Court of the United States have asserted that a state, so far as not restrained by the constitution of the United States, has the same 'unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation;' New York v. Miln, 11 Peters 102; License Cases, 5 How. 504; and that we admit the doctrine for the purposes of this case, in the application which they gave it, viz., that the state, in its sovereign capacity, possesses this power; not that the legislature, under our state constitution, possesses it. The doctrine asserted is, that the state, in its sovereign capacity, possesses such power, which, by a constitution, she is capable of conferring, if she pleases, upon her legislature; not that she has conferred it." Beebe v. State (1855) 6 Ind. 501, 509, 63 Am. Dec. 391.

Massachusetts. * * * After the decision rendered by the Court and the default entered at the February Term of 1793, judgment for the plaintiff was entered and a writ of inquiry of damages awarded at the February Term in 1794. The writ, however, was never sued out or executed." 1 Warren, *supra*, 99-100.

The following year a resolution proposing what became the Eleventh Amendment passed both houses of Congress. By January 8, 1798, it had been ratified by the necessary number of states. It was construed as terminating all suits of the kind then pending as well as preventing future ones. Hollingsworth v. Virginia (1798) 3 Dall. (U. S.) 378, 1 L. ed. 644. Consider how suits against State officers have partially undermined the Amendment.

"The people of the United States resident within any state are subject to two governments: one state, and the other national; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a state, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the state by the breach of peace, in the assault. So, too, if one passes counterfeited coin of the United States within a state, it may be an offence against the United States and the state: the United States, because it discredits the coin; and the state, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. * * *

"The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the states or the people." Waite, C. J., in United States v. Cruikshank (1875) 92 U. S. 542, 550, 551, 23 L. ed. 588.

"The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence. The states disunited might continue to exist. Without the states in union there could be no such political body as the United States.

"Both the states and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the states. But in many articles of the Constitution the necessary existence of the states, and, within their proper spheres, the independent authority of the states, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in the Federalist, thus: 'The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes.'" Chase, C. J., in Lane County v. Oregon (1868) 7 Wall. (U. S.) 71, 76, 19 L. ed. 101.

"Under the Articles of Confederation each state retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the states were much restricted, still, all powers not delegated to the United States, nor prohibited to the states, are reserved to the states respectively, or to the people. * * * Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government." Chase, C. J., in Texas v. White (1868) 7 Wall. (U. S.) 700, 725, 19 L. ed. 227.

"That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate." Marshall, C. J., in Cohens v. Virginia (1821) 6 Wheat. (U. S.) 264, 413-414, 5 L. ed. 257.

Section 2.—National Fundamental Legislation.

NATIONAL PROHIBITION CASES.

26

1920. Supreme Court of the United States. 253 U. S. 350.

The seven cases here given one name for convenient reference involved ~~the validity~~ of the Eighteenth Amendment and of certain general features of the National ~~Prohibition Act~~ designed for its enforcement. [They were all su~~its to enjoin enforcement~~ of the Volstead Act brought ~~against~~ officers of the United States, suit No. 29 by the State of Rhode Island, No. 30 by the State of New Jersey and Nos. 696, 752, 788, 794, 837 by various individuals and corporations.]

Mr. Rice, for the State of Rhode Island, in No. 29, Original, confined his argument to the validity of the Amendment. Various objections were stated, the one chiefly elaborated being that the Amendment is an invasion of the sovereignty of the complaining state and her people, not contemplated by the amending clause of the Constitution. The amending power, it was contended, is not a substantive power but a precautionary safeguard inserted incidentally to insure the ends set forth in that instrument against errors and oversights committed in its formation. Amendments, as the term indeed implies, are to be limited to the correction of such errors.

The doctrine that any and every change may be introduced in guise of amendment is a novelty subversive of fundamental principles. It would bring about a constitutional revolution, converting the sovereignty of the people into a sovereignty of officials. It would permit the boundary between federal and state authority, established by the Constitution, to be shifted at will, * * *.

In the case of this so-called amendment, the representatives of the people of the United States have attempted, not to amend the Constitution of the United States, but to amend the constitution of every state in the union. If the amending function is construed as coextensive with absolute sovereignty, then the basis of our political system is no longer the right of the people of a state to make and alter their constitution, for their political institutions are at the mercy of others and may be changed against their will. * * *

Mr. Levy Mayer and *Mr. William Marshall Bullitt* for the appellant in No. 752:

The power of "amendment" contained in Art. V does not authorize the invasion of the sovereign powers expressly reserved to the states and the people by the Ninth and Tenth Amendments, except with the consent of *all* the states. If it be argued that the expression of one exception in Art. V negatives the possibility of others to be implied, the answer is to be found in the contrary principle of construction applied by this court to Art. I, § 7, in Hollingsworth v. Virginia, 3 Dall. 378, that the existence of one exception to a power does not make the power unlimited in all other respects, but that there may be other qualifications or exceptions not expressed literally.

If amendment under Art. V were unlimited, three-fourths of the legislatures would have it in their power to establish a state religion and prohibit free exercise of other religious beliefs; to quarter a standing army in the houses of citizens; to do away with trial by jury and republican form of government; to repeal the provision for a president; and to abolish this court and with it the whole judicial power vested by the Constitution. * * *

Mr. Root for the appellant in No. 788:

I. The substantive and operative part of the so-called Eighteenth Amendment is contained in its first section. This provision does not relate to the powers or organization of government, as does an ordinary constitutional provision. On the contrary, it is itself an exercise of the legislative power of government, and a direct act of legislation regulating the conduct of life of the individual. The first question before the court is, therefore, whether Article V of the Constitution authorizes any amendment which in substance and effect is merely a police regulation or statute.

There is plainly a distinction in this respect between the so-called amendment as adopted and as it would be if it had conferred *power* upon Congress to prohibit the use of intoxicating liquors. An amendment in the latter form would, it is true, be precisely as irrepealable as the one here in question, but the conduct of individual life thereunder would at all times be within the control of representatives of the majority of the people. Congress would then have the power to prohibit intoxicants or not, completely or qualifiedly, as it from time to time deemed best; and if the majority of the people then desired prohibition, Congress could respond to their wish; and if, on the other hand, the majority thereafter became persuaded that extreme prohibition was no longer necessary, in that respect also Congress could effectuate the will of the people. In every free government the direct regulation of the lives of the people by legislation should at all times be in the hands of the majority, however the powers of government may be distributed and allocated. * * *

Article V of the Constitution should not be construed to confer unlimited legislative power upon the amending authorities. * * *

It does not advance the discussion to urge that *the people* can adopt any amendment to the Constitution they see fit. No doubt an amendment of any sort could be adopted by the same means as were employed in the adoption of the Constitution itself. In that manner alone do or can *the people* themselves act. But the amending authorities provided for in Article V of the Constitution, as clearly appears from the debates in the Constitutional Convention, are only *agents* of the people and not the people themselves. They must, therefore, act within the authority conferred in Article V, and that authority does not embrace the right under color of amendment to adopt mere sumptuary laws which are not constitutional amendments in truth or essence. The people could by appropriate proceedings amend the Constitution so as to impair such vital rights as freedom of religion, but it is inconceivable that any such unlimited power has been delegated to the amending agents, who may represent but a minority of the people. The census discloses that there are three-fourths of the states of the Union whose total population amounts to less than forty-five per cent. of the people of the United States, and two-thirds of a quorum of both houses of Congress may, therefore, likewise represent only a minority of the population.

Ratification by state legislatures does not as matter of fact provide an opportunity for the people to express their will regarding the proposed Eighteenth Amendment as the calling of conventions might have done. Thus, for example, the Missouri legislature ratified it, notwithstanding an express provision of the Missouri constitution (Art. II, § 3) forbidding them so to do, and in Ohio ratification by the legislature was subsequently rejected by the people at the polls, while in other states the people have been denied all right to have the question of ratification referred to them for approval. * * *

The so-called Eighteenth Amendment *directly* invades the police powers of the states and *directly* encroaches upon their right of local self-government. If this amendment be valid, then any amendment which directly impairs the police powers of the states and absolutely withdraws from them their right to local self-government in any important particular, heretofore indisputably a matter of internal concern, must likewise be valid. In other words, if the so-called Eighteenth Amendment be lawful, then the states are not in truth indestructible. It must be manifest that the precedent necessarily erected by a holding that the Eighteenth Amendment is constitutional, would authorize the complete subversion of our dual and federal system of government. It is submitted that the authority conferred in Article V to amend the Constitution carries no power to destroy its federal principle in a most fundamental aspect.

Mr. Justice Van Devanter [after quoting the text of the amendment clause of the Constitution, Article V, and the Eighteenth Amendment] announced the conclusions of the court.

We here are concerned with seven cases involving the validity of that Amendment and of certain general features of the National Prohibition Law, known as the Volstead Act, c. 83, 41 Stat. 305, which was adopted to enforce the Amendment. The relief sought in each case is an injunction against the execution of that act. Two of the cases—Nos. 29 and 30, Original,—were brought in this court, and the others in district courts. Nos. 696, 752, 788 and 837 are here on appeals from decrees refusing injunctions, and No. 794 from a decree granting an injunction. The cases have been elaborately argued at the bar and in printed briefs; and the arguments have been attentively considered, with the result that we reach and announce the following conclusions on the questions involved:

1. The adoption by both houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. None of the resolutions whereby prior amendments were proposed contained such a declaration.

2. The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent. Missouri Pacific Ry. Co. v. Kansas, 248 U. S. 276.

3. The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it. Hawke v. Smith, ante, 221.

4. The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by Article V of the Constitution.

5. That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.

6. The first section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state

legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits. * * *[1]

Giving effect to these conclusions, we dispose of the cases as follows:

In Nos. 29 and 30, Original, the bills are dismissed.
In No. 794 the decree [granting injunction] is reversed.
In Nos. 696, 752, 788 and 837 the decrees [refusing to grant injunctions] are affirmed.

✓

HAWKE v. SMITH, SECRETARY OF STATE OF OHIO (NO. 1).

27

1920. Supreme Court of the United States. 253 U. S. 221.

MR. JUSTICE DAY delivered the opinion of the court.

Plaintiff in error (plaintiff below) filed a petition for an injunction in the Court of Common Pleas of Franklin County, Ohio, seeking to enjoin the Secretary of State of Ohio from spending the public money in preparing and printing forms of ballot for submission of a referendum to the electors of that state on the question of the ratification which the general assembly had made of the proposed Eighteenth Amendment to the federal Constitution. A demurrer to the petition was sustained in the Court of Common Pleas. Its judgment was affirmed by the Court of Appeals of Franklin County, which judgment was affirmed by the Supreme Court of Ohio, and the case was brought here. * * *

The senate and house of representatives of the State of Ohio adopted a resolution ratifying the proposed Amendment by the general assembly of the State of Ohio, and ordered that certified copies of the joint resolution of ratification be forwarded by the governor to the secretary of state at Washington and to the presiding officer of each house of Congress. This resolution was adopted on January 7, 1919; on January 27, 1919, the governor of Ohio complied with the resolution. On January 29, 1919, the secretary of state of the United States proclaimed the ratification of the Amendment, naming thirty-six states as having ratified the same, among them the State of Ohio.

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[1] Conclusions 7 to 11 dealing with interpretation of the Amendment and holding valid the Volstead Act passed by Congress to enforce the Amendment are omitted. White, C. J., delivered a separate concurring opinion but not explanatory of the reasons for conclusions 1 to 6. McReynolds, J., confined his concurrence to the judgments. McKenna, J., dissented as to one of the omitted conclusions, but concurred in those above printed, remarking, "The court declares conclusions only, without giving any reasons for them. The instance may be wise—establishing a precedent now, hereafter wisely to be imitated. It will undoubtedly decrease the literature of the court if it does not increase lucidity." Clarke, J., concurred in the above six conclusions and dissented from three of the omitted ones. It has been left to periodical writers to supply reasons. See W. F. Dodd, Amending the Federal Constitution, (1921) 30 Yale Law Jour. 321-354; D. O. McGovney, Is the Eighteenth Amendment Void Because of its Contents? (1920) 20 Col. Law Rev. 499-518 (published prior to the above decision). Note the discussion of sovereignty and the distinction between sovereignty and governmental organs, in the latter essay. Do the grounds assigned for decision in Hawke v. Smith, Dillon v. Gloss, and Leser v. Garnett supply reasons for the conclusions announced in the Prohibition Cases?

The question for our consideration is: Whether the provision of the Ohio constitution, adopted at the general election, November, 1918, extending the referendum to the ratification by the general assembly of proposed amendments to the federal Constitution is in conflict with Article V of the Constitution of the United States. The Amendment of 1918 provides: "The people also reserve to themselves the legislative power of the referendum on the action of the general assembly ratifying any proposed amendment to the Constitution to the United States." [Article V of the federal Constitution is here quoted.]

The Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the people of the United States. McCulloch v. Maryland, 4 Wheat. 316, 402. The states surrendered to the general government the powers specifically conferred upon the Nation, and the Constitution and the laws of the United States are the supreme law of the land.

The framers of the Constitution realized that it might in the progress of time and the development of new conditions require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the Fifth Article.

This article makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the legislatures of two-thirds of the states; thus securing deliberation and consideration before any change can be proposed. The proposed change can only become effective by the ratification of the legislatures of three-fourths of the states, or by conventions in a like number of states. The method of ratification is left to the choice of Congress. Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people.

The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the legislatures of three-fourths of the states, or conventions in a like number of states. Dodge v. Woolsey, 18

How. 331, 348. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

All of the amendments to the Constitution have been submitted with a requirement for legislative ratification; by this method all of them have been adopted.

The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by "*Legislatures*"? ✓ ? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning. Article I, § 2, prescribes the qualifications of electors of congressmen as those "requisite for electors of the most numerous branch of the state legislature." Article I, § 3, provided that senators shall be chosen in each state by the legislature thereof, and this was the method of choosing senators until the adoption of the Seventeenth Amendment which made provision for the election of senators by vote of the people, the electors to have the qualifications requisite for electors of the most numerous branch of the state legislature. That Congress and the states understood that this election by the people was entirely distinct from legislative action is shown by the provision of the amendment giving the legislature of any state the power to authorize the executive to make temporary appointments until the people shall fill the vacancies by election. It was never suggested, so far as we are aware, that the purpose of making the office of senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment. In Article IV the United States is required to protect every state against domestic violence upon application of the legislature, or of the executive when the legislature cannot be convened. Article VI requires the members of the several legislatures to be bound by oath, or affirmation, to support the Constitution of the United States. By Article I, § 8, Congress is given exclusive jurisdiction over all places purchased by the consent of the legislature of the state in which the same shall be. Article IV, § 3, provides that no new states shall be carved out of old states without the consent of the legislatures of the states concerned.

There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the states. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the house of representatives were required to be chosen by the people of the several states. Article I, § 2.

The Constitution of Ohio in its present form, although making provision for a referendum, vests the legislative power primarily in a general assembly consisting of a senate and house of representatives. Article II, § 1, provides:

"The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives, but the people shall reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided."

The argument to support the power of the State to require the approval by the people of the state of the ratification of amendments to the federal Constitution through the medium of a referendum rests upon the proposition that the federal Constitution requires ratification by the legislative action of the states through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this—ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.

At an early day this court settled that the submission of a constitutional amendment did not require the action of the president. The question arose over the adoption of the Eleventh Amendment. Hollingsworth v. Virginia, 3 Dall. 378. In that case it was contended that the amendment had not been proposed in the manner provided in the Constitution as an inspection of the original roll showed that it had never been submitted to the president for his approval in accordance with Article I, § 7, of the Constitution. The attorney general answered that the case of amendments is a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of the Constitution investing the president with a qualified negative on the acts and resolutions of Congress. In a foot-note to this argument of the attorney general, Justice Chase said: "There can, surely, be no necessity to answer that argument. The negative of the president applies only to the ordinary cases of legislation: He has nothing to do with the proposition or adoption of amendments to the constitution." The court by a unanimous judgment held that the amendment was constitutionally adopted.

It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the federal Constitution has its source in the federal Constitution. The act of ratification by the state derives its authority from the federal Constitution to which the state and its people have alike assented.

This view of the provision for amendment is confirmed in the history of its adoption found in 2 Watson on the Constitution, 1301 *et seq.* Any other view might lead to endless confusion in the manner of ratification of federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several states. * * *

It follows that the court erred in holding that the state had authority to require the submission of the ratification to a referendum under the state constitution, and its judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

DILLON v. GLOSS, DEPUTY COLLECTOR OF UNITED STATES INTERNAL REVENUE.

28

1921. Supreme Court of the United States. 256 U. S. 368.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court. This is an appeal from an order denying a petition for a writ of *habeas corpus*. 262 Fed. Rep. 563. The petitioner was in custody under § 26 of Title II of the National Prohibition Act, c. 85, 41 Stat. 305, on a charge of transporting intoxicating liquor in violation of § 3 of that title, and by his petition sought to be discharged on several grounds, all but two of which were abandoned after the decision in National Prohibition Cases, 253 U. S. 350. The remaining grounds are, first, that the Eighteenth Amendment to the Constitution, to enforce which Title II of the act was adopted, is invalid because the congressional resolution, 40 Stat. 1050, proposing the Amendment, declared that it should be inoperative unless ratified within seven years; and, secondly, that, in any event, the provisions of the act which the petitioner was charged with violating, and under which he was arrested, had not gone into effect at the time of the asserted violation nor at the time of the arrest.

The power to amend the Constitution and the mode of exerting it are dealt with in Article V. * * *

It will be seen that this article says nothing about the time within which ratification may be had—neither that it shall be unlimited nor that it shall be fixed by Congress. What then is the reasonable inference or implication? Is it that ratification may be had at any time, as within a few years, a century or even a longer period; or that it must be had within some reasonable period which Congress is left free to define? Neither the debates in the federal convention which framed the Constitution nor those in the state conventions which ratified it shed any light on the question.

The proposal for the Eighteenth Amendment is the first in which a definite period for ratification was fixed. Theretofore twenty-one amendments had been proposed by Congress and seventeen of these had been ratified by the legislatures of three-fourths of the states,—some within a single year after their proposal and all within four years. Each of the remaining four had been ratified in some of the states, but not in a sufficient number. Eighty years after the partial ratification of one an effort was made to complete its ratification and the legislature of Ohio passed a joint resolution to that end, after which the effort was abandoned. Two, after ratification in one less than the required number of states, had lain dormant for a century. The other, proposed March 2, 1861, declared: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any state, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said state." Its principal purpose was to protect slavery and at the time of its proposal and partial ratification it was a subject of absorbing interest, but after the adoption of the Thirteenth Amendment it was generally forgotten. Whether an amendment proposed without fixing any time for ratification, and which after favorable action in less than the required number of states had lain dormant for many years, could be resurrected and its ratification completed had been mooted on several occasions, but was still an open question.

These were the circumstances in the light of which Congress in proposing the Eighteenth Amendment fixed seven years as the period for ratification. Whether this could be done was questioned at the time and debated at length, but the prevailing view in both houses was that some limitation was intended and that seven years was a reasonable period.

That the Constitution contains no express provision on the subject is not in itself controlling; for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed. An examination of Article V discloses that it was intended to invest Congress with a wide range of power in proposing amendments. Passing a provision long since expired,[2] it subjects this power to only two restrictions: One that the proposal shall have the approval of two-thirds of both houses, and the other excluding any amendment which will deprive any state, without its consent, of its equal suffrage in the senate.[3] A further mode of proposal—as yet never invoked—is provided, which is, that on the application of two-thirds of the states, Congress shall call a convention for the purpose. When proposed in either mode amendments to be effective must be ratified by the legislatures, or by conventions, in three-fourths of the states, "as the one or the other mode of ratification may be proposed by the Congress." Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several states and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the states shall be taken as a decisive expression of the people's will and be binding on all.[4]

We do not find anything in the Article which suggests that an amendment once proposed is open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson[5] "that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress." That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the states many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more states to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal.

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[2] Article V, as before shown, contained a provision that "No amendment which shall be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article." One of the clauses named covered the migration and importation of slaves and the other deals with direct taxes. [This and the next three footnotes are Justice Van Devanter's.]

[3] When the federal convention adopted Article V a motion to include another restriction forbidding any amendment whereby a state, without its consent, would "be affected in its internal police" was decisively voted down. The vote was: yeas 3—Connecticut, New Jersey, Delaware; nays 8—New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia. Elliot's Debates, vol. 5, pp. 551, 552.

[4] See Martin v. Hunter's Lessee, 1 Wheat. 304, 324-325; McCulloch v. Maryland, 4 Wheat. 316, 402-404; Cohens v. Virginia, 6 Wheat. 264, 413-414; Dodge v. Woolsey, 18 How. 331, 347-348; Hawke v. Smith, 253 U. S. 221; Story on the Constitution, 5th ed., §§ 362-363, 463-465.

Yes ✓

✓ Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt. As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article V is no exception to the rule. Whether a definite period for ratification shall be fixed so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified.

The provisions of the act which the petitioner was charged with violating and under which he was arrested (Title II, §§ 3, 26) were by the terms of the act (Title III, § 21) to be in force from and after the date when the Eighteenth Amendment should go into effect, and the latter by its own terms was to go into effect one year after being ratified. Its ratification, of which we take judicial notice, was consummated January 16, 1919. That the Secretary of State did not proclaim its ratification until January 29, 1919, is not material, for the date of its consummation, and not that on which it is proclaimed, controls. It follows that the provisions of the act with which the petitioner is concerned went into effect January 16, 1920. His alleged offense and his arrest were on the following day; so his claim that those provisions had not gone into effect at the time is not well grounded.

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[5] Jameson on Constitutional Conventions, 4th ed., § 585.

Final order affirmed.

LESER v. GARNETT.

1922. Supreme Court of United States. 258 U. S. 130.

Mr. Justice Brandeis delivered the opinion of the court.

On October 12, 1920, Cecilia Streett Waters and Mary D. Randolph, citizens of Maryland, applied for and were granted registration as qualified voters in Baltimore City. To have their names stricken from the list Oscar Leser and others brought this suit in the court of Common Pleas. The only ground of disqualification alleged was that the applicants for registration were women, whereas the constitution of Maryland limits the suffrage to men. Ratification of the proposed Amendment to the federal Constitution, now known as the Nineteenth, 41 Stat. 362, had been proclaimed on August 26, 1920, 41 Stat. 1823, pursuant to Rev. Stat., § 205. The legislature of Maryland had refused to ratify it. The petitioners contended, on several grounds, that the Amendment had not become part of the federal Constitution. * * *

The first contention is that the power of amendment conferred by the federal Constitution and sought to be exercised does not extend to this Amendment, because of its character. The argument is that so great an addition to the electorate, if made without the state's consent, destroys its autonomy as a political body. This Amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the Fifteenth is valid, although rejected by six states including Maryland, has been recognized and acted on for half a century. See United States v. Reese, 92 U. S. 214; Neal v. Delaware, 103 U. S. 370; Guinn v. United States, 238 U. S. 347; Myers v. Anderson, 238 U. S. 368. The suggestion that the Fifteenth was incorporated in the Constitution, not in accordance with law, but practically as a war measure which has been validated by acquiescence, cannot be entertained.

The second contention is that in the constitutions of several of the thirty-six states named in the proclamation of the secretary of state there are provisions which render inoperative the alleged ratifications by their legislatures. The argument is that by reason of these specific provisions the legislatures were without power to ratify. But the function of a state legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state. Hawke v. Smith, No. 1, 253 U. S. 221; Hawke v. Smith, No. 2, 253 U. S. 231; National Prohibition Cases, 253 U. S. 350, 386.

The remaining contention is that the ratifying resolutions of Tennessee and of West Virginia are inoperative, because adopted in violation of the rules of legislative procedure prevailing in the respective states. The question raised may have been rendered immaterial by the fact that since the proclamation the legislatures of two other states—Connecticut and Vermont—have adopted resolutions of ratification. But a broader answer should be given to the contention. The proclamation by the secretary certified that from official documents on file in the Department of State it appeared that the proposed Amendment was ratified by the legislatures of thirty-six states, and that it "has become valid to all intents and purposes as a part of the Constitution of the United States." As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the secretary, duly authenticated, that they had done so was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts. The rule declared in Field v. Clark, 143 U. S. 649, 669-673, is applicable here. See also Harwood v. Wentworth, 162 U. S. 547, 562.

Affirmed.

Section 3.—Sole and Dual Government.

29

EL PASO & NORTHEASTERN RY. CO. v. GUTIERREZ, ADMINISTRATRIX.

1909. Supreme Court of the United States. 215 U. S. 87.

[Action for damages for death of plaintiff's intestate alleged to have been caused by the wrongful act of the defendant railway company while the intestate was engaged in its service in the Territory of New Mexico. The issue below was whether the plaintiff's rights were governed by a statute of the Territory or by an Act of Congress, the so-called Employers' Liability Act of June 11, 1906, c. 3073, 34 Stat. 232. The defendant's chief contention was that the Employers' Liability Act was unconstitutional. It relied upon the Employers' Liability Cases (1908) 207 U. S. 463 where the Supreme Court had so held. The case was tried under the latter statute with verdict and judgment for the plaintiff. After intermediate appeals a writ of error was prosecuted to the Supreme Court.]

Mr. Justice Day. * * * In view of the plenary power of Congress under the Constitution over the Territories of the United States, subject only to certain limitations and prohibitions not necessary to notice now, there can be no doubt that an act of Congress undertaking to regulate commerce in the District of Columbia and the Territories of the United States would necessarily supersede the territorial law regulating the same subject.

Is the Federal Employers' Liability Act of June 11, 1906, unconstitutional so far as it relates to common carriers engaged in trade or commerce in the Territories of the United States? It has been suggested that this question is foreclosed by a decision of this court in the Employers' Liability Cases,[1] 207 U. S. 463. In that case this court held that, conceding the power of Congress to regulate the relations of employer and employe engaged in interstate commerce, the act of June 11, 1906, c. 3073, 34 Stat. 232, was unconstitutional in this, that in its provisions regulating interstate commerce Congress exceeded its constitutional authority in undertaking to make employers responsible, not only to employes when engaged in interstate commerce, but to any of its employes, whether engaged in interstate commerce or in commerce wholly within a State.[2] That the unconstitutionality of the act, so far as it relates to the District of Columbia and the Territories, was not determined is evident from a consideration of the opinion of the court in the case. In answering the suggestion that the words "any employe" in the statute should be so read as to mean only employes engaged in interstate commerce, Mr. Justice White, delivering the opinion of the court, said:

"But this would require us to write into the statute words of limitation and restriction not found in it. But if we could bring ourselves to modify the statute by writing in the words suggested the result would be to restrict the operation of the act as to the District of Columbia and the Territories. We say this because immediately preceding the provision of the act concerning carriers engaged in commerce between the States and Territories is a clause making it applicable to 'every common carrier engaged in trade or commerce in the District of Columbia or in any Territory of the United States.' It follows, therefore, that common carriers in such Territories, even although not engaged in interstate commerce, are by the act made liable to 'any' of their employes, as therein defined. The legislative power of Congress over the District of Columbia and the Territories being plenary and not depending upon the interstate commerce clause, it results that the provision as to the District of Columbia and the Territories, if standing alone, could not be questioned. Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested; that is, by causing the act to read 'any employe when engaged in interstate commerce,' we would restrict the act as to the District of Columbia and the Territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save and to save in order to destroy." 207 U. S. 500.

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[1] In one of those cases the employee when hurt was working for the railroad in the State of Nevada (Brooks v. Southern Pac. Co., 148 Fed. 986, 996) and in the other, in the State of Tennessee (Howard v. Illinois Cent. R. Co., 148 Fed. 997).

[2] In Illinois Cent. R. Co. v. Behrens (1914) 233 U. S. 473, 477, 58 L. ed. 1051, it is said that the Act of 1906 was pronounced invalid in the Employers' Liability Cases because it attempted to regulate the liability of every carrier in interstate commerce for any injury to any employee "even though his employment had no connection whatever with interstate commerce."

A perusal of this portion of the opinion makes it evident that it was not intended to hold the act unconstitutional in so far as it related to the District of Columbia and the Territories, for it is there suggested that to interpolate in the act the qualifying words contended for would destroy the act in respect to the District of Columbia and the Territories by limiting its operation in a field where Congress had plenary power, and did not depend for its authority upon the interstate commerce clause of the Constitution. The act in question is set forth in full in a note to Employers' Liability Cases, 207 U. S. 463, 490. We are concerned in the present case with its first section only. This section reads:

"That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employes, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents or employes, or by reason of any defect or any insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works."

A perusal of this section makes it evident that Congress is here dealing, first, with trade or commerce in the District of Columbia and the Territories; and, second, with interstate commerce, commerce with foreign nations, and between the Territories and the States. As we have already indicated, its power to deal with trade or commerce in the District of Columbia and the Territories does not depend upon the authority of the interstate commerce clause of the Constitution. Upon the other hand, the regulation sought to be enacted as to commerce between the States and with foreign nations depends upon the authority of Congress granted to it by the Constitution to regulate commerce among the States and with foreign nations. As to the latter class, Congress was dealing with a liability ordinarily governed by state statutes, or controlled by the common law as administered in the several states. The federal power of regulation [of commerce] within the states is limited to the right of Congress to control transactions of interstate commerce; it has no authority to regulate commerce wholly of a domestic character. It was because Congress had exceeded its authority in attempting to regulate the second class of commerce named in the statute that this court was constrained to hold the act unconstitutional. The act undertook to fix the liability as to "any employe," whether engaged in interstate commerce or not, and, in the terms of the act, had so interwoven and blended the regulation of liability within the authority of Congress with that which was not that the whole act was held invalid in this respect.

* * *

Coming to consider the statute in the light of the accepted rules of construction, we are of opinion that the provisions with reference to interstate commerce, which were declared unconstitutional for the reasons stated, are entirely separable from and in nowise dependent upon the provisions of the act regulating commerce within the District of Columbia and the Territories. * * *

[The judgment for the plaintiff was affirmed.][3]

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[3] To meet the defect in the Act of 1906 pointed out in the first Employers' Liability Cases (1908) 207 U. S. 463, 52 L. ed. 297, Congress enacted a second Employers' Liability Act, April 22, 1908, 35 Stat. 65, ch. 149. In respect to employers engaged in interstate commerce the second statute is restricted to apply to the legal relations between such employers and such of their employees as are at the time of injury themselves engaged in interstate commerce. This act was held valid in Second Employers' Liability Cases (1912) 223 U. S. 1, 56 L. ed. 327. In a transportation of goods from a point in one state to a point in another state, one of the clearest examples of interstate commerce, *all* of the persons directly engaged do *all* their acts of transportation in one of the states or in the other. They are acting within states but are subject to the legislative power of Congress so far as their acts constitute interstate commerce. The same carrier has other employees not engaged in such transportation or in any other act of interstate commerce but wholly in intrastate commerce or in acts that are not commerce at all (examples, employed in re-arranging machinery in railroad machine shop, Shanks v. Delaware, L. & W. R. Co. (1916) 239 U. S. 556, 60 L. ed. 436, or employed in a coal mine worked by the railway company, Dela-

NATIONAL BANK v. COUNTY OF YANKTON.

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1879. Supreme Court of the United States. 101 U. S. 129.

Error to the Supreme Court of Dakota Territory.

The facts are stated in the opinion of the court.

Mr. Chief Justice Waite delivered the opinion of the court.

By section 4 of the act to provide a temporary government for the Territory of Dakota, no one session of the legislative assembly shall exceed forty days (12 Stat. 239), and in 1869 Congress declared that the sessions of all territorial legislative assemblies should be biennial. 15 id. 300. The members of the legislative assembly of Dakota met on the 5th of December, 1870, and continued in regular session on all days, except Sundays, until Jan. 13, 1871, when they adjourned without day. The day of adjournment was called on the journals the fortieth day of the session, although there had been but thirty-five days of actual session for the transaction of business. On the 18th of April, 1871, the members of the legislature elected the preceding fall again assembled at the call of the acting governor of the Territory. After organizing themselves as a legislative assembly and proceeding to legislate for the Territory, they passed, among other acts, one entitled "An Act to enable organized counties and townships to vote aid to any railroad, and to provide for the payment of the same." Under this act the voters of Yankton

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ware, L. & W. R. Co. v. Yurkonis (1915) 238 U. S. 439, 59 L. ed. 1397, or employees constructing a tunnel, Raymond v. Chicago, M. & St. P. R. Co. (1917) 243 U. S. 43, 61 L. ed. 583).

The character of the legal relations determined by these statutes, as between the persons embraced, is shown by the statement of Moody, J.:—"The common law allowed no recovery against the employer for the neglect of a fellow-servant engaged in a common employment; by the statute the employer is held responsible for the negligence of any of its officers, agents or employes, even though the guilty person is a fellow-servant of him who is injured or killed. The common law denied to one who by his negligence had contributed to his own injury the right to a remedy for the neglect of another which had been a concurring cause; by the statute the negligent sufferer may recover if his negligence be slight, and that of the employer gross in comparison, though the contributing negligence must be taken into account in reduction of the damages. The common law, as adjudged by this court, permitted the employe to enter into a contract renouncing his right to damages in case he incurred injuries in the course of his employment; the statute forbids such a contract. Thus four doctrines of the common law restrictive of the employes' rights are supplanted by others more favorable to him." Employers' Liability Cases (1908) 207 U. S. 463, 536-537, 52 L. ed. 297. Can Congress validly regulate likewise the legal relations of hotel keepers and their employees, in hotels located in Territories? In states? If a Territorial legislature should do so, where would you look to determine whether the statute was within its power? If a state legislature should do so, where would you look? What are the respective sources of the local autonomy of the inhabitants of a city, of a Territory, of a state?

Would an act of Congress be valid which specified the sole grounds for divorce between persons residing in those portions of the national territory called Territories? In those called states?

County, on the 2d of September, 1871, voted to donate the Dakota Southern Railroad Company $200,000 in the bonds of the county. All the proceedings under which this vote was taken were conducted strictly according to the requirements of the law.

On the twenty-seventh day of May, 1872, the following act of Congress was approved and went into effect. 17 id. 162. [This act expressly "disapproved and annulled" the above Territorial statute, but provided that the annulling act should not invalidate votes of aid or subscriptions to the Dakota Southern Railroad Company, the organization of which it expressly declared valid, with a proviso that the company should issue paid-up certificates of stock to the counties equal in par value to the amount of their subscriptions.].

After the passage of this act, the bonds voted were delivered by the county commissioners to the railroad company, and stock in the company for an equal amount was issued to the county. The First National Bank of Brunswick, Maine, the *bona fide* holder and owner pl. of ten of these bonds, amounting in the aggregate to $10,000, brought this suit against the county to recover three instalments of interest. The defence was that there was no law authorizing the issue of the bonds, and, as a consequence, that the county was not bound for the payment of either principal or interest. Upon the trial of the cause, the facts were found substantially as already stated, and a judgment was rendered by the District Court of the ct. Territory in favor of the county. This judgment was afterwards affirmed by the Supreme Court, and thereupon the bank brought the case here by writ of error.

We do not consider it necessary to decide whether the governor of Dakota had authority to call an extra session of the legislative assembly, nor whether a law passed at such a session or after the limited term of forty days had expired would be valid, because, as we think, the act of May 27, 1872, is equivalent to a direct grant of power by Congress to the county to issue the bonds in dispute. It is certainly now too late to doubt the power of Congress to govern the Territories. There have been some differences of opinion as to the particular clause of the Constitution from which the power is derived, but that it exists has always been conceded. * * * All territory within the jurisdiction of the United States not included in any state must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective states, and Congress may legislate for them as a state does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government.[4] It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

In the organic act of Dakota there was not an express reservation of power in Congress to amend the act of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the states.

Turning, then, to the particular act of Congress now under consideration, we find that the attention of that body was in some way brought to the fact that the legislative assembly of Dakota had, on the 21st of April, 1871, passed an act to enable organized counties and townships to vote aid to railroads. In addition to this, it was known that the Dakota Southern Railroad Company had been organized as a corporation under certain acts of the territorial legislative assembly, and that votes had been taken under the aid act in some of the counties and townships granting aid to or authorizing subscriptions of stock in this corporation. It is clear that Congress disapproved the policy of the aid act, and was unwilling to have it go into general operation; but to the extent it could be made available for the construction and completion of the main stem of the Dakota Southern Railroad the contrary is distinctly manifested. The act as a whole was "disapproved and annulled," but in substance re-enacted by Congress "for the purpose of validating any vote of aid or subscription" to that company, but "for no other purpose whatever." A careful examination of the statute leaves no doubt in our minds on this subject. To make it sure that the organization of the company was complete, the "Dakota Southern Railroad Company, as organized under and in conformity to the acts of the legislative assembly of said Territory," was "recognized and declared to be a legal and valid corporation." It is then in terms enacted that the provisions of the aid act, "so far as the same authorize, and for the purpose of validating any vote of aid and subscriptions to said company, for the construction, completion and equipment of the main stem of said railroad, * * * are hereby declared to be and remain in full force." And again: "that said Dakota Southern Railroad Company shall issue to the respective counties and townships voting aid to said railroad, paid-up certificates of stock in the same in amounts equal to the sums voted by the respective counties and townships." In the light of these distinct and positive declarations and enactments of Congress, it is impossible to bring our minds to any other conclusion than that, when the bonds now in controversy were put out, there existed full and complete legislative authority to bind the people of the county for their payment. No complaint is made of any irregularity in the proceedings under the law. The question in the case is one of power only. As we think, the vote of the people of the county was "validated" by Congress, and express authority given to issue the bonds for the purposes originally intended. The only change which Congress saw fit to make was to require the company to give stock in return for the donation as voted.

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[4] "The act of Congress creating the Territory of Oregon, and establishing a government for it, passed on the 14th of August, 1848, vested the legislative power and authority of the Territory in an Assembly, consisting of two boards, a Council and a House of Representatives. (9 Stat. 323, c. 177, § 4. It declared, § 6, that the legislative power of the Territory should "extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," but that no law should be passed interfering with the primary disposal of the soil; that no tax should be imposed upon the property of the United States; that the property of non-residents should not be taxed higher than the property of residents; and that all the laws passed by the Assembly should be submitted to Congress, and if disapproved should be null and of no effect. It also contained various provisions against the creation of institutions for banking purposes, or with authority to put into circulation notes or bills, and against pledging the faith of the people of the Territory to any loan." Field, J., in Maynard v. Hill (1888) 125 U. S. 190, 203, 31 L. ed. 654.

The judgment of the Supreme Court of the Territory will be reversed, and the cause remanded with instructions to reverse the judgment of the District Court and direct a judgment for the plaintiff on the facts found for such amount as shall appear to be due on the coupons sued for; and it is

So ordered.

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METROPOLITAN RAILROAD COMPANY v. DISTRICT OF COLUMBIA.

1889. United States Supreme Court. 132 U. S. 1.

[On writ of error to review a judgment of the Supreme Court of the District of Columbia, in a suit brought by the District against the railway company to recover sums of money spent by the District in making certain repairs to streets which it was the duty of the railway company to make under its charter from Congress. The railway company pleaded the statute of limitations. Defendant demurred. The trial court over-ruled this demurrer and gave judgment on a verdict for the plaintiff.]

Mr. Justice Bradley delivered the opinion of the court. * * *

This general review of the form of government which prevailed in the District of Columbia and city of Washington prior to 1871 is sufficient to show that it was strictly municipal in its character; and that the government of the United States, except so far as the protection of its own public buildings and property was concerned, took no part in the local government, any more than any state government interferes with the municipal administration of its cities. The officers of the departments, even the President himself, exercised no local authority in city affairs. It is true, in consequence of the large property interests of the United States in Washington, in the public parks and buildings, the government always made some contribution to the finances of the city; but the residue was raised by taxing the inhabitants of the city and District, just as the inhabitants of all municipal bodies are taxed.

In 1871 an important modification was made in the form of the District government; a legislature was established, with all the apparatus of a distinct government. * * * A governor and legislature were created; also a board of public works; the latter to consist of the governor as its president, and four other persons, to be appointed by the President and Senate. * * *

This constitution lasted until June 20th, 1874, when an act was passed entitled "An act for the government of the District of Columbia, and for other purposes." 18 Stat. 116, ch. 337. By this act the government established by the act of 1871 was abolished, and the President, by and with the advice and consent of the Senate, was authorized to appoint a commission, consisting of three persons, to exercise the power and authority then vested in the governor and board of public works, except as afterwards limited by the act. By a subsequent act, approved June 11th, 1878, 20 Stat. 102, c. 180, it was enacted that the District of Columbia should "*remain and continue a municipal corporation*," as provided in § 2 of the Revised Statutes relating to said District, and the appointment of commissioners was provided for, to have and to exercise similar powers given to the commissioners appointed under the act of 1874. All rights of action and suits for and against the District were expressly preserved *in statu quo*.

Under these different changes the administration of the affairs of the District of Columbia and city of Washington has gone on in much the same way, except a change in the depositaries of power, and in the extent and number of powers conferred upon them. Legislative powers have now ceased, and the municipal government is confined to mere administration. The identity of corporate existence is continued, and all actions and suits for and against the District are preserved unaffected by the changes that have occurred.

In view of these laws, the counsel of the plaintiff contend that the government of the District of Columbia is a department of the United States government, and that the corporation is a mere name, and not a person in the sense of the law, distinct from the government itself. We cannot assent to this view. It is contrary to the express language of the statutes. That language is that the District shall "remain and continue a municipal corporation," with all rights of action and suits for and against it. If it were a department of the government, how could it be sued? Can the Treasury Department be sued? or any other department? We are of opinion that the corporate capacity and corporate liabilities of the District of Columbia remain as before, and that its character as a mere municipal corporation has not been changed. The mode of appointing its officers does not abrogate its character as a municipal body politic. We do not suppose that it is necessary to a municipal government, or to municipal responsibility, that the officers should be elected by the people. Local self-government is undoubtedly desirable where there are not forcible reasons against its exercise. But it is not required by any inexorable principle. All municipal governments are but agencies of the superior power of the state or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior legislature sees fit to confer upon them. The form of those agencies and the mode of appointing officials to execute them are matters of legislative discretion. * * *

One argument of the plaintiff's counsel in this connection is, that the District of Columbia is a separate state or sovereignty according to the definition of writers on public law, being a distinct political society. This position is assented to by Chief Justice Marshall, speaking for this court, in the case of Hepburn v. Ellzey, 2 Cranch, 445, 452, where the question was whether a citizen of the District could sue in the circuit courts of the United States as a citizen of a state. The court did not deny that the District of Columbia is a state in the sense of being a distinct political community; but held that, the word "State" in the Constitution, where it extends the judicial power to cases between citizens of the several "States," refers to the States of the Union. It is undoubtedly true that the District of Columbia, is a separate political community in a certain sense, and in that sense may be called a state; but the sovereign power of this qualified state is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress. The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District corporation, do not make those bodies sovereign. Crimes committed in the District are not crimes against the District, but against the United States. Therefore, whilst the District may, in a sense, be called a state, it is such in a very qualified sense. No more than this was meant by Chief Justice Taney, when, in the Bank of Alexandria v. Dyer, 14 Pet. 141, 146, he spoke of the District of Columbia as being formed, by the acts of Congress, into one separate political community, and of the two counties composing it (Washington and Alexandria) as resembling different counties in the same State; by reason whereof it was held that parties residing in one county could not be said to be "beyond the seas," or in a different jurisdiction, in reference to the other county, though the two counties were subject to different laws.

We are clearly of opinion that the plaintiff is a municipal corporation, having a right to sue and be sued, and subject to the ordinary rules that govern the law of procedure between private persons. * * *

It is scarcely necessary to discuss further the question of the applicability of the statute of limitations to a purely municipal corporation when it is embraced within the general terms of the law. It was expressly decided to be applicable in the cases of Kennebunkport v. Smith, 22 Maine, 445; Cincinnati v. First Presbyterian Church, 8 Ohio, 298; Cincinnati v. Evans, 5 Ohio St. 594; St. Charles County v. Powell, 22 Missouri, 525; Armstrong v. Dalton, 4 Devereux, (Law,) 568; and other cases cited in the notes to Wood on Limitations, § 53; and to 2 Dillon on Municipal Corporations, § 668, 3d ed. Judge Dillon, in the section last cited, accurately says: "The doctrine is well understood, that to the sovereign power the maxim, 'nullum tempus occurrit regi,' applies, and that the United States and the several states are not, without express words, bound by statutes of limitation. Although municipal corporations are considered as public agencies, exercising, in behalf of the state, public duties, there are many cases which hold that such corporations are not exempt from the operation of limitation statutes, but that such statutes, at least as respects all real and personal actions, run in favor of and against these corporations in the same manner and to the same extent as against natural persons."* * *

The judgment must be reversed, and the cause remanded, with directions to enter judgment for the defendant on the demurrer to the pleas of the statute of limitations; and it is so ordered.[5]

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[5] "Finally it is earnestly contended that the act is void because it subjects the residents of the District to taxation without representation. Residents of the District lack the suffrage and have politically no voice in the expenditure of the money raised by taxation. Money so raised is paid into the Treasury of the United States, where it is held not as a separate fund for the District, but subject to the disposal of Congress, like other revenues raised by Federal taxation. The objection that the tax is void because of these facts is fundamental and

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COYLE v. SMITH, SECRETARY OF STATE OF STATE OF OKLAHOMA.

1911. Supreme Court of the United States. 221 U. S. 559.

[An Act of Congress of June 16, 1903, entitled, "An act to enable the people of Oklahoma and the Indian Territory to form a constitution and state government and be admitted into the Union on an equal footing with the original states" required that the capital of said State of Oklahoma should be temporarily located at Guthrie and should not be moved prior to 1913, and that in the interval the state should not appropriate any public money to erect buildings for capital purposes. The act also required that a constitutional convention held in the state should "by ordinance irrevocable, accept the terms and conditions of the act." A convention did so. In 1910 the legislature of the state passed a statute removing the capital from Guthrie to Oklahoma City and made appropriation for the erection of capital buildings. Another statute gave the Supreme Court of Oklahoma original jurisdiction of a taxpayer's bill to test the validity of the capital-removal statute. To review the judgment of that court sustaining the statute this writ of error was sued out.]

Mr. Justice Lurton delivered the opinion of the court. * * *

The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress

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comprehensive. It is not limited in application to the tax on intangibles, but goes to the validity of all taxation of residents of the District. If sound, it would seem to apply not only to taxes levied upon residents of the District for the support of the government of the District, but also to those taxes which are levied upon them for the support generally of the government of the United States. It is sufficient to say that the objection is not sound. There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation. And the cases are many in which laws levying taxes for the support of the government of the District have been enforced during the period in which its residents have been without the right of suffrage." Brandeis, J., in Heald v. District of Columbia (1922) 259 U. S. 114, 124, 66 L. ed. 852, and see Marshall, C. J., in Loughborough v. Blake (1820) 5 Wheat. (U. S.) 317, 324, 5 L. ed. 98.

"Now, as a general proposition, it is clear that as a result of the relation which Porto Rico occupies to the United States all the local law of that island has its ultimate sanction in the lawful exercise by Congress of its legislative authority. So also, as Congress has provided that the local law, 'not inconsistent or in conflict with the statutory laws of the United States,' shall remain in force 'until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States,' it must follow that the local law of real property prevailing in the island is controlling until changed, as provided by Congress, * * * all the local law of Porto Rico is within the legislative control of Congress." White, J., in Romeu v. Todd (1907) 206 U. S. 358, 368-369, 370, 51 L. ed. 1093.

would not be for a moment entertained. The question then comes to this: Can a state be placed upon a plane of inequality with its sister states in the union if the Congress chooses to impose conditions which so operate, at the time of its admission? The argument is, that while Congress may not deprive a state of any power which it *possesses*, it may, as a condition to the admission of a new state, constitutionally restrict its authority, to the extent at least, of suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional power of admitting new states to this union, and the constitutional duty of guaranteeing to "every state in this union a republican form of government." The position of counsel for the appellants is substantially this: That the power of Congress to admit new states and to determine whether or not its fundamental law is republican in form, are political powers, and as such, uncontrollable by the courts. That Congress may in the exercise of such power impose terms and conditions upon the admission of the proposed new state, which, if accepted, will be obligatory, although they operate to deprive the state of powers which it would otherwise possess, and, therefore, not admitted upon "an equal footing with the original states."

The power of Congress in respect to the admission of new states is found in the third section of the fourth Article of the Constitution. That provision is that, "new States may be admitted by the Congress into this Union." The only expressed restriction upon this power is that no new state shall be formed within the jurisdiction of any other state, nor by the junction of two or more states, or parts of states, without the consent of such states, as well as of the Congress.

But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a "power to admit states."

The definition of "a state" is found in the powers possessed by the original states which adopted the Constitution, a definition emphasized by the terms employed in all subsequent acts of Congress admitting new states into the Union. The first two states admitted into the Union were the States of Vermont and Kentucky, one as of March 4, 1791, and the other as of June 1, 1792. No terms or conditions were exacted from either. Each act declares that the state is admitted "as a new and *entire member* of the United States of America." 1 Stat. 189, 191. Emphatic and significant as is the phrase admitted as "an entire member," even stronger was the declaration upon the admission in 1796 of Tennessee, as the third new state, it being declared to be "one of the United States of America," "on an equal footing with the original states in all respects whatsoever," phraseology which has ever since been substantially followed in admission acts, concluding with the Oklahoma act, which declares that Oklahoma shall be admitted "on an equal footing with the original states."

The power is to admit "new States into *this* Union."

"This Union" was and is a union of states, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the union, through the power of Congress to admit new states, might come to be a union of States unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the union; and, second, that such new states might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission. * * *

We come now to the question as to whether there is anything in the decisions of this court which sanctions the claims that Congress may by the imposition of conditions in an enabling act deprive a new state of any of those attributes essential to its equality in dignity and power with other states. In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the state; second, between compacts or affirmative legislation intended to operate *in futuro*, which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers of such new states in respect of matters which would otherwise be exclusively within the sphere of state power.

As to requirements in such enabling acts as relate only to the contents of the constitution for the proposed new state, little need to be said. The constitutional provision concerning the admission of new states is not a mandate, but a power to be exercised with discretion. From this alone it would follow that Congress may require, under penalty of denying admission, that the organic laws of a new state at the time of admission shall be such as to meet its approval. A constitution thus supervised by Congress would, after all, be a constitution of a state, and as such subject to alteration and amendment by the state after admission. Its force would be that of a state constitution, and not that of an act of Congress.

* * *

It may well happen that Congress should embrace in an enactment introducing a new state into the union legislation intended as a regulation of commerce among the states, .or with Indian tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agréement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the state's legislative power in respect of any matter which was not plainly within the regulating power of Congress. Williamette Bridge Co. v. Hatch, 125 U. S. 1, 9. Pollard's Lessee v. Hagan, supra [3 How. 212].

No such question is presented here. The legislation in the Oklahoma enabling act relating to the location of the capital of the state, if construed as forbidding a removal by the state after its admission as a state, is referable to no power granted to Congress over the subject, and if it is to be upheld at all, it must be implied from the power to admit new states. If power to impose such a restriction upon the general and undelegated power of a state be conceded as implied from the power to admit a new state, where is the line to be drawn against restrictions imposed upon new states. The insistence finds no support in the decisions of this court. * * *

Has Oklahoma been admitted upon an equal footing with the original states? If she has, she by virtue of her jurisdictional sovereignty as such a state may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot. * * *[6]

The constitutional equality of the states is essential to the harmonious operation of the scheme upon which the republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.

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[6] As a matter both of concepts and of expressions, what is meant in this paragraph by "she," "her jurisdictional sovereignty," "state," and "her own people"? Does the case hold that the residents of Oklahoma have the same scope of local autonomy as have the residents of New York, any attempt of Congress to establish differences being inoperative? Do the residents of a Territory necessarily gain or lose in the extent of their control of local affairs by "admission into the Union"? In what respect does their political condition change upon "admission"? What is the "Union"? How does it differ from the "United States"? In how many and what senses is the expression "United States" used in the Constitution? Chief Justice Marshall pointed out one very common usage, "Does this term designate the whole, or any particular portion of the American empire? * * * It is the name given to our great republic which is composed of States and Territories. The District of Columbia or the territory west of the Missouri is not less within the United States than Maryland or Pennsylvania." Loughborough v. Blake (1820) 5 Wheat. (U. S.) 317, 319, 5 L. ed. 98.

Judgment affirmed.

Mr. Justice McKenna and Mr. Justice Holmes dissent.

KOHL et al. v. UNITED STATES.

33

1875. Supreme Court of the United States. 91 U. S. 367.

Error to the Circuit Court of the United States for the Southern District of Ohio.

This was a proceeding instituted by the United States to appropriate a parcel of land in the city of Cincinnati as a site for a post-office and other public uses.

The plaintiffs in error owned a perpetual leasehold estate in a portion of the property sought to be appropriated. They moved to dismiss the proceeding on the ground of want of jurisdiction; which motion was overruled. * * * Judgment was rendered in favor of the United States. * * *

Mr. Justice Strong delivered the opinion of the court.

It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the states for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the states. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a state prohibiting a sale to the federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a state, or even upon that of a private citizen. This cannot be. No one doubts the existence in the state governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vattel, c. 20, 34; Bynk., lib. 2, c. 15; Kent's Com. 338-340; Cooley on Const. Lim. 584 *et seq.* But it is no more necessary for the exercise of the powers of a state government than it is for the exercise of the conceded powers of the federal government. That government is as sovereign within its sphere as the states are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the states over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

But, if the right of eminent domain exists in the federal government, it is a right which may be exercised within the states, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In Ableman v. Booth, 21 How. 523, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post-offices and to create courts within the states was conferred upon the federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken? * * *

It is true, this power of the federal government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. In some instances, the states, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the states. Such was the ruling in Gilmer v. Lime Point, 18 Cal. 229, where lands were condemned by a proceeding in a state court and under a state law for a United States fortification. A similar decision was made in Burt v. The Merchants' Ins. Co., 106 Mass. 356, where land was taken under a state law as a site for a post-office and subtreasury building. Neither of these cases denies the right of the federal government to have lands in the states condemned for its uses under its own power and by its own actions. The question was, whether the state could take lands for any other public use than that of the state. In Trombley v. Humphrey, 23 Mich. 471, a different doctrine was asserted, founded, we think, upon better reason. The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a state. Nor can any state prescribe the manner in which it must be exercised. The consent of a state can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

It may, therefore, fairly be concluded that the proceeding in the case we have in hand was a proceeding by the United States government in its own right, and by virtue of its own eminent domain. The act of Congress of March 2, 1872, 17 Stat. 39, gave authority to the Secretary of the Treasurer to purchase a central and suitable site in the city of Cincinnati, Ohio, for the erection of a building for the accommodation of the United States courts, custom-house, United States depository, post-office, internal-revenue and pension offices, at a cost not exceeding $300,000; and a proviso to the act declared that no money should be expended in the purchase until the State of Ohio should cede its jurisdiction over the site, and relinquish to the United States the right to tax the property. The authority here given was to purchase. If that were all, it might be doubted whether the right of eminent domain was intended to be invoked. It is true, the words "to purchase" might be construed as including the power to acquire by condemnation; for, technically, purchase includes all modes of acquisition other than that of descent. But generally, in statutes as in common use, the word is employed in a sense not technical, only as meaning acquisition by contract between the parties, without governmental interference. That Congress intended more than this is evident, however, in view of the subsequent and amendatory act passed June 10, 1872, which made an appropriation "for the purchase at private sale or by condemnation of the ground for a site" for the building.

These provisions, connected as they are, manifest a clear intention to confer upon the Secretary of the Treasury power to acquire the grounds needed by the exercise of the national right of eminent domain, or by private purchase, at his discretion. Why speak of condemnation at all, if Congress had not in view an exercise of the right of eminent domain, and did not intend to confer upon the secretary the right to invoke it?

But it is contended on behalf of the plaintiffs in error that the Circuit Court had no jurisdiction of the proceeding. There is nothing in the acts of 1872, it is true, that directs the process by which the contemplated condemnation should be effected, or which expressly authorizes a proceeding in the Circuit Court to secure it. Doubtless Congress might have provided a mode of taking the land, and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the Circuit Court; but this, we think, was not necessary. The investment of the Secretary of the Treasury with power to obtain the land by condemnation, without prescribing the mode of exercising the power, gave him also the power to obtain it by any means that were competent to adjudge a condemnation. The Judiciary Act of 1789 conferred upon the circuit courts of the ~~United States~~ jurisdiction of all suits at common law or in ~~equity~~, when the United States, or any officer thereof, suing under the authority of any act of Congress, are plaintiffs. If, then, a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the Circuit Court. That it is a "suit" admits of no question. * * *

The judgment of the Circuit Court is affirmed.

34

JOHNSON v. STATE OF MARYLAND.

1920. Supreme Court of the United States. 254 U. S. 51.

This was a prosecution based on § 143 of Art. 56 of the Code of Public General Laws of Maryland, as amended by c. 85, Acts of 1918. The opinion states the case.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was an employee of the Post Office Department of the United States and while driving a government motor truck in the transportation of mail over a post road from Mt. Airy, Maryland, to Washington, was arrested in Maryland, and was tried, convicted and fined for so driving without having obtained a license from the state. He saved his constitutional rights by motion to quash, by special pleas which were overruled upon demurrer and by motion in arrest of judgment. The facts were admitted and the naked question is whether the state has power to require such an employee to obtain a license by submitting to an examination concerning his competence and paying three dollars, before performing his official duty in obedience to superior command.

The cases upon the regulation of interstate commerce can not be relied upon as furnishing an answer. They deal with the conduct of private persons in matters in which the states as well as the general government have an interest and which would be wholly under the control of the states but for the supervening destination and the ultimate purpose of the acts. Here the question is whether the state can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since McCulloch v. Maryland, 4 Wheat. 316. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the states to touch, in that way at least, the instrumentalities of the United States; 4 Wheat. 429, 430; and that is the law today. Farmers & Mechanics Savings Bank v. Minnesota, 232 U. S. 516, 525, 526. A little later the scope of the proposition as then understood was indicated in Osborn v. Bank of the United States, 9 Wheat. 738, 867. "Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative." In more recent days the principle was applied when the governor of a soldiers' home was convicted for disregard of a state law concerning the use of oleomargarine, while furnishing it to the inmates of the home as part of their rations. It was said that the federal officer was not "subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by federal authority." Ohio v. Thomas, 173 U. S. 276, 283. It seems to us that the foregoing decisions establish the law governing this case.

Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in United States v. Hart, Pet. C. C. 390. 5 Ops. Atty. Gen. 554. It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might effect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. Commonwealth v. Closson, 229 Massachusetts, 329. This might stand on much the same footing as liability under the common law of a state to a person injured by the driver's negligence. But even the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States. In re Neagle, 135 U. S. 1.

It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed. Keim v. United States, 177 U. S. 290, 293.

Judgment reversed.[7]

Mr. Justice Pitney and Mr. Justice McReynolds dissent.

THE COLLECTOR v. DAY.

35

1870. Supreme Court of the United States. 11 Wall. 113.

Error to the Circuit Court for the District of Massachusetts; the case being thus: * * *

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[7] "The most important agents of the federal government are its officers, but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the state. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the federal government are only exempted from state legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the states. The salary of a federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the state which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death." Miller, J., in National Bank v. Commonwealth (1869) 9 Wall. (U. S.) 353, 361-362, 19 L. ed. 701.

Congress by certain statutes passed in 1864, '5, '6, and '7, enacted that

> "There shall be levied, collected, and paid annually upon the gains, profits, and income of every person residing in the United States, * * * whether derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment or vocation, carried on in the United States or elsewhere, or from any other source whatever, a tax of 5 per centum on the amount so derived, over $1000."

Under these statutes, one Buffington, collector of the internal revenue of the United States for the district, assessed the sum of $61.50 upon the salary, in the years 1866 and 1867, of J. M. Day, as judge of the Court of Probate and Insolvency for the County of Barnstable, State of Massachusetts. The salary was fixed by law, and payable out of the treasury of the state. Day paid the tax under protest, and brought the action below to recover it. The case was submitted to the court below on an agreed statement of facts, upon which judgment was rendered for the plaintiff. * * *

MR. JUSTICE NELSON delivered the opinion of the court.

The case presented the question whether or not it is competent for congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a state?

In Dobbins v. The Commissioner of Erie County, 16 Pet. 435, it was decided that it was not competent for the legislature of a state to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation or otherwise by the states, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt.

The cases of McCulloch v. Maryland, 4 Wheat. 615, and Weston v. Charleston, 2 Pet. 449, were referred to as settling the principle that governed the case, namely, "that the state governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers."

The soundness of this principle is happily illustrated by the Chief Justice in McCulloch v. Maryland. "If the states," he observes, "may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government." "This," he observes, "was not intended by the American people. They did not design to make their government dependent on the states." p. 432. Again, "That the power of taxing it (the bank) by the states may be exercised so far as to destroy it, is too obvious to be denied." ib. p. 427. And, in Weston v. The City of Charleston, he observes: "If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it which the will of each state and corporation may prescribe." 2 Pet. 466.

It is conceded in the case of McCulloch v. Maryland, that the power of taxation by the states was not abridged by the grant of a similar power to the government of the Union; that it was retained by the states, and that the power is to be concurrently exercised by the two governments; and also that there is no express constitutional prohibition upon the states against taxing the means or instrumentalities of the general government. But, it was held, and, we agree properly held, to be prohibited by necessary implication; otherwise, the states might impose taxation to an extent that would impair, if not wholly defeat, the operations of the federal authorities when acting in their appropriate sphere.

These views, we think, abundantly establish the soundness of the decision of the case of Dobbins v. The Commissioners of Erie, which determined that the states were prohibited, upon a proper construction of the Constitution, from taxing the salary or emoluments of an officer of the government of the United States. And we shall now proceed to show that upon the same construction of that instrument, and for like reasons, that government is prohibited from taxing the salary of the judicial officer of a state.

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the state governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the States respectively, or, to the people." The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

The general government, and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the states within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the states. * * *

Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the states. * * * Such being the separate and independent condition of the states in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. * * *

The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power "to lay and collect taxes" enables the general government to tax the salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the states? * * *

It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government.

Judgment Affirmed.

MR. JUSTICE BRADLEY, dissenting.

I dissent from the opinion of the court in this case, because, it seems to me that the general government has the same power of taxing the income of officers of the state governments as it has of taxing that of its own officers. It is the common government of all alike; and every citizen is presumed to trust his own government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the state government. I cannot accede to the doctrine that the general government is to be regarded as in any sense foreign or antagonistic to the state governments, their officers, or people; nor can I agree that a presumption can be admitted that the general government will act in a manner hostile to the existence or functions of the state governments, which are constituent parts of the system or body politic forming the basis on which the general government is founded. The taxation by the state governments of the instruments employed by the general government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of a government in which other states and their citizens are equally interested with the state which imposes the taxation. In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult of control. Where are we to stop in enumerating the functions of the state governments which will be interfered with by federal taxation? If a state incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from federal taxation? How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as any one can be to any interference by the general government with the just powers of the state governments. But no concession of any of the just powers of the general government can easily be recalled. I, therefore, consider it my duty to at least record my dissent when such concession appears to be made. An extended discussion of the subject would answer no useful purpose.[8]

TARBLE'S CASE.

1871. Supreme Court of the United States. 13 Wall. 397.

Error to the Supreme Court of Wisconsin.

This was a proceeding on *habeas corpus* for the discharge of one

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[8] Further working out of the doctrine of this case is postponed to the Chapter on Taxation. Its holding has never been disturbed.

Edward Tarble, held in the custody of a recruiting officer of the United States as an enlisted soldier, on the alleged ground that he was a minor, under the age of eighteen years at the time of his enlistment, and that he enlisted without the consent of his father.

The writ was issued on the 10th of August, 1869, by a court commissioner of Dane County, Wisconsin, an officer authorized by the laws of that state to issue the writ of *habeas corpus* upon the petition of parties imprisoned or restrained of their liberty, or of persons on their behalf. * * *

The commissioner, after argument, held that the prisoner was illegally imprisoned and detained by Lieutenant Stone, and commanded that officer forthwith to discharge him from custody.

Afterwards, in September of the same year, that officer applied to the supreme court of the state for a *certiorari,* setting forth in his application the proceedings before the commissioner and his ruling thereon. * * *

Upon these proceedings the case was duly argued before the supreme court, and in April, 1870, that tribunal pronounced its judgment, affirming the order of the commissioner discharging the prisoner. This judgment was now before this court for examination on writ of error prosecuted by the United States. * * *.

Mr. Justice Field, after stating the case, delivered the opinion of the court. * * *

It is in the consideration of this distinct and independent character of the government of the United States, from that of the government of the several states, that the solution of the question presented in this case, and in similar cases, must be found. There are within the territorial limits of each state two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each state stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land, and the judges of every state are bound thereby, "anything in the constitution or laws of any state to the contrary notwithstanding." Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy until judicial decision by the national tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments. "The Constitution," as said by Mr. Chief Justice Taney, "was not framed merely to guard the states against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this end it was deemed necessary, when the Constitution was framed, that many of the rights of sovereignty which the states then possessed should be ceded to the general government; and that in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a state, or from state authorities." And the judicial power conferred extends to all cases arising under the Constitution, and thus embraces every legislative act of Congress, whether passed in pursuance of it, or in disregard of its provisions. The Constitution is under the view of the tribunals of the United States when any act of Congress is brought before them for consideration.

Now, among the powers assigned to the national government, is the power "to raise and support armies," and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any state authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment. No interference with the execution of this power of the national government in the formation, organization, and government of its armies by any state officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. * * * It is manifest that the powers of the national government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty.

It is true similar embarrassment might sometimes be occasioned, though in a less degree, by the exercise of the authority to issue the writ possessed by judicial officers of the United States, but the ability to provide a speedy remedy for any inconvenience following from this source would always exist with the national legislature.

State judges and state courts, authorized by laws of their states to issue writs of *habeas corpus,* have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the state; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders, under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretence of having such authority.

This right to inquire by process of *habeas corpus,* and the duty of the officer to make a return, "grows necessarily," says Mr. Chief Justice Taney, "out of the complex character of our government and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its power, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under state authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress." * * *

Judgment reversed.

PONZI v. FESSENDEN.

36

1922. Supreme Court of the United States. 258 U. S. 254.

[For violation of a federal statute Ponzi had been convicted in the United States District Court and sentenced to five years' imprisonment in a Massachusetts penitentiary. Before his term expired the Superior Court of Massachusetts issued a writ of habeas corpus directing the warden to bring Ponzi before that court to answer to an indictment for violation of state law. The warden made return that he held Ponzi in pursuance of process of the United States and prayed that the writ be dismissed. The Attorney General of the United States then directed the warden to comply with the writ. He did so. Ponzi refused to plead. A plea of not guilty was entered. Thereupon Ponzi applied to a United States District Court for habeas corpus. His petition was denied. He appealed to the United States Circuit Court of Appeals which certified a question to the Supreme Court, in effect whether in this manner the state court could acquire jurisdiction over Ponzi to try him.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfil their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that. He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial. He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it. In re Andrews, 236 Fed. 300; United States v. Marrin, 227 Fed. 314. Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it.

One accused of crime, of course, can not be in two places at the same time. He is entitled to be present at every stage of the trial of himself in each jurisdiction with full opportunity for defense. Frank v. Mangum, 237 U. S. 309, 341; Lewis v. United States, 146 U. S. 370. If that is accorded him, he can not complain. The fact that he may have committed two crimes gives him no immunity from prosecution of either.

The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purpose. The principle is stated by Mr. Justice Matthews in Covell v. Heyman, 111 U. S. 176, as follows:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty."

The Heyman Case concerned property, but the same principle applies to jurisdiction over persons as is shown by the great judgment of Chief Justice Taney in Ableman v. Booth, 21 How. 506, quoted from, and relied upon, in Covell v. Heyman.

In the case at bar, the Federal District Court first took custody of Ponzi. He pleaded guilty, was sentenced to imprisonment and was detained under United States authority to suffer the punishment imposed. Until the end of his term and his discharge, no state court could assume control of his body without the consent of the United States. Under statutes permitting it, he might have been taken under the writ of habeas corpus to give evidence in a federal court, or to be tried there if in the same district, § 753, Rev. Stats., or be removed by order of a federal court to be tried in another district, § 1014, Rev. Stats., without violating the order of commitment made by the sentencing court. Ex parte Bollman, 4 Cranch, 75, 98; Ex parte Lamar, 274 Fed. 160, 164. This is with the authority of the same sovereign which committed him.

There is no express authority authorizing the transfer of a federal prisoner to a state court for such purposes. Yet we have no doubt that it exists and is to be exercised with the consent of the attorney general. In that officer, the power and discretion to practice the comity in such matters between the federal and state courts is vested. The attorney general is the head of the Department of Justice. Rev. Stats., § 346. He is the hand of the president in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offences, be faithfully executed. [References to statutes conferring powers on the attorney general with regard to supervision and regulation of the custody of federal prisoners are omitted.]

But it is argued that when the prisoner is produced in the Superior Court, he is still in the custody and jurisdiction of the United States, and that the state court can not try one not within its jurisdiction. This is a refinement which if entertained would merely obstruct justice. The prisoner when produced in the Superior Court in compliance with its writ is personally present. He has full opportunity to make his defense exactly as if he were brought before the court by its own officer. State v. Wilson, 38 Conn. 126, 136. The trial court is given all the jurisdiction needed to try and hear him by the consent of the United States, which only insists on his being kept safely from escape or from danger under the eye and control of its officer. This arrangement of comity between the two governments works in no way to the prejudice of the prisoner or of either sovereignty.

The question must be answered in the affirmative.

Section 4.—Powers of Congress in the Dual Government Area.

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M'CULLOCH v. THE STATE OF MARYLAND ET AL.

1819. Supreme Court of the United States. 4 Wheat. 316.

[Congress by act[1] of April 10, 1816 incorporated "the subscribers to the Bank of the United States" and pursuant to its charter the corporation established a branch bank in Baltimore which issued bank notes, accepted private deposits, discounted promissory notes and carried on all the usual transactions of a local bank operated for the profit of its shareholders. On February 11, 1818 the general assembly of Maryland enacted a statute to impose a tax on all banks or branches thereof in the State of Maryland not chartered by it. This was an action of debt brought on behalf of the state in the county court of Baltimore County against M'Culloch as cashier of the branch bank to recover a penalty for carrying on the branch without paying the tax. The case came to the Supreme Court on writ of error to the Court of Appeals of Maryland.]

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[1] The act of Congress authorized a capital of $35,000,000, 350,000 shares of $100 each, 70,000 shares to be taken by the United States and 280,000 by private subscribers, the latter payable partly in gold and silver coin and partly in United States securities. The subscribers were incorporated for a period of 20 years. Twenty of the 25 directors were to be elected annually by the shareholders and 5 to be appointed from among the shareholders by the president of the United States by and with the advice and consent of the senate, the directors to elect the president of the bank. "No loan shall be made" to the government "to an amount exceeding $500,000." Shares of stock were declared freely transferable. It was made obligatory upon the directors to establish a branch

Webster and *Pinkney*, for the plaintiff in error.

Hopkinson, *Jones*, and *Martin*, for the defendant.

The *Attorney-General* was also heard for the plaintiff, by reason of the interest of the United States.

MARSHALL, C. J., delivered the opinion of the court.

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the union; and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the union and of its members, as marked in that Constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made.

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in any state in which 2,000 shares were subscribed for, upon application by the legislature of that state, but the directors were authorized to establish branches wherever they wished without any request. The bank might issue notes in denominations not less than $5, which should be receivable for all payments to the United States unless Congress should later otherwise direct. Statements of the financial condition of the bank were to be furnished to the head of the Treasury Department as often as he might require, and the latter might inspect the bank (not including customers' accounts). The only special provisions for use to be made of the bank in the fiscal affairs of the government were (1) that the "said corporation shall give the necessary facilities for transferring the public funds from place to place, within the United States or the territories thereof, and for distributing the same in payment of the public creditors, without charging commissions or claiming allowance on account of difference of exchange" and (2) that deposits of the money of the United States should be made in the bank and its branches unless the Secretary of the Treasury should direct otherwise, in which case he should report his action to the Congress. In consideration of the payment of $1,500,000 to the United States in three instalments, the act pledged the faith of the United States to establish no other bank during the chartered period. The government also specifically reserved a privilege of inspection by committees of Congress and by judicial proceedings to forfeit the charter for violations.

On the Supreme Court of the United States has the Constitution of our country devolved this important duty.

The first question made in the cause is, has Congress power to incorporate a bank?

It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted, if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first Congress elected under the present Constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert, that a measure adopted under these circumstances, was a bold and plain usurpation, to which the Constitution gave no countenance.

These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the Constitution.

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the Constitution was, indeed, elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each state, by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

It has been said, that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the Confederation, the state sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the Constitution or laws of any State, to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment, had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

How is this?

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty: if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America,

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the powers of sovereignty are divided between the government of the union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some state constitutions were formed before, some since that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the Constitution, and on the states the whole residuum of power, would it have been asserted that the government of the Union was not sovereign with respect to those objects which were intrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in

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the government of the United States, or in any department [or officer] thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained, whether Congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress, which is to consist of a Senate and House of Representatives. Each house may determine the rule of its proceedings; and it is declared that every bill which shall have passed both houses, shall, before it becomes a law, be presented to the president of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of Congress. Could it be necessary to say, that a legislature should exercise legislative powers, in the shape of legislation? After allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention, that an express power to make laws was necessary to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the Bar, from the 10th section of the 1st article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary" by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in Congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty, is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted—that of fidelity to the Constitution—is prescribed, and no other can be required. Yet, he would be charged with insanity who should contend, that the legislature might not superadd to the oath directed by the Constitution, such other oath of office as its wisdom might suggest.

So, with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the Constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The several powers of Congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is, indeed, essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the Constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word "necessary" must be abandoned in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law, why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?

In ascertaining the sense in which the word "necessary" is used in this clause of the Constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun.

As little can it be required to prove, that in the absence of this clause, Congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the State of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:—

1. The clause is placed among the powers of Congress, not among the limitations on those powers.

2. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the Constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and after deep reflection, impress on the mind another, they would rather have disguised the grant of power, than its limitation. If then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these: "In carrying into execution the foregoing powers, and all others," &c., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bawble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government, from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

The propriety of this remark would seem to be generally acknowledged by the universal acquiescence in the construction which has been uniformly put on the 3d section of the 4th article of the Constitution. The power to "make all needful rules and regulations respecting the territory or other property belonging to the United States," is not more comprehensive, than the power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, Congress justifying the measure by its necessity, transcended, perhaps, its powers to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an Act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

After this declaration, it can scarcely be necessary to say, that the existence of state banks can have no possible influence on the question. No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to state banks, and Congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the Act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches, and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the court that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:—

2. Whether the State of Maryland may, without violating the Constitution, tax that branch? * * *

We are unanimously of opinion, that the law passed by the Legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void. * * *

JACOB RUPPERT, A CORPORATION v. CAFFEY, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

1920. Supreme Court of the United States. 251 U. S. 264.

[Holding valid the act of Congress of Nov. 21, 1918, known as the War-Time Prohibition Act, which prohibited the manufacture from grains, cereals, fruit or other food product any beer, wine, or other intoxicating malt or vinous liquor for beverage purposes and the sale thereof, until the termination of demobilization; and so much of the Volstead Act (Act of Oct. 28, 1919) as declared that the words beer, wine, etc., in the above act should be construed to mean such beverages as contain one-half of one per cent. or more of alcohol by volume. (Note that the 18th Amendment did not become operative until January 16, 1920. Dillon v. Gloss, *supra,* p. 221, and that the Volstead Act except the interpretive clause just stated did not become effective until the latter date.)]

Mr. Justice Brandeis delivered the opinion of the court. * * *

But it is insisted that this legislation is nevertheless void as against the plaintiff, because Congress could not, even under its full war powers, prohibit the manufacture and sale of non-intoxicants. * * *

If the war power of Congress to effectively prohibit the manufacture and sale of intoxicating liquors in order to promote the nation's efficiency in men, munitions and supplies is as full and complete as the police power of the states to effectively enforce such prohibition in order to promote the health, safety and morals of the community, it is clear that this provision of the Volstead Act is valid, and has rendered immaterial the question whether plaintiff's beer is intoxicating. For the legislation and decisions of the highest courts of nearly all the states establish that it is deemed impossible to effectively enforce either prohibitory laws or other laws merely regulating the manufacture and sale of intoxicating liquors, if liability or inclusion within the law is made to depend upon the issuable fact whether or not a particular liquor made or sold as a beverage is intoxicating. * * * A test often used to determine whether a beverage is to be deemed intoxicating within the meaning of the liquor law is whether it contains one-half of one per cent. of alcohol by volume. A survey of the liquor laws of the states reveals that * * * in eighteen states it is the presence of as much as or more than one-half of one per cent. of alcohol; in six states, one per cent. of alcohol; in one state, the presence of the "alcoholic principle"; and in one state, two per cent. of alcohol.[2] * * *

Purity Extract Co. v. Lynch, 226 U. S. 192, determined that state legislation of this character is valid and set forth with clearness the constitutional ground upon which it rests: "When a state exerting its recognized authority undertakes to express what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government." * * *

That the federal government would, in attempting to enforce a prohibitory law, be confronted with difficulties similar to those encountered by the states is obvious; and both this experience of the states and the need of the federal government of legislation defining intoxicating liquors as was done in the Volstead Act were clearly set forth in the reports of the House Committee on the Judiciary * * *. It is therefore clear both that Congress might reasonably have considered some legislative definition of intoxicating liquor to be essential to effective enforcement of prohibition and also that the definition provided by the Volstead Act was not an arbitrary one.

Plaintiff's argument is equivalent to saying that the war power of Congress to prohibit the manufacture and sale of intoxicating liquors does not extend to the adoption of such means to this end as in its judgment are necessary to the effective administration of the law. The contention appears to be, that since the power to prohibit the manufacture and sale of intoxicating liquors is not expressly granted to Congress, but is a power implied under § 8 of Article I of the Constitution, which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" powers expressly enumerated, the power to prohibit non-intoxicants would be merely an incident of the power to prohibit intoxicants; and that it cannot be held to exist, because one implied power may not be grafted upon another implied power. This argument is a mere matter of words. The police power of a state over the liquor traffic is not limited to the power to prohibit the sale of intoxicating liquors supported by a separate implied power to prohibit kindred non-intoxicating liquors so far as necessary to make the prohibition of intoxicants effective; it is a single broad power to make such laws, by way of prohibition, as may be required to effectively suppress the traffic in intoxicating liquors. Likewise the implied war power over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors but will effectually prevent their sale. Furthermore, as stated in Hamilton v. Kentucky Distilleries & Warehouse Co., ante, 156, while discussing the implied power to prohibit the sale of intoxicating liquors: "When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power * * *."

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[2] Numerous references by Justice Brandeis to state statutes and state judicial decisions in the margins of the official report are here omitted.

The distinction sought to be made by plaintiff between the scope or incidents of an express power and those of an implied power has no basis in reason or authority. Thus, the Constitution confers upon Congress the express power "to establish post offices and post roads" (Article I, § 8, clause 7). From this is implied the power to acquire land for post offices in the several states, Battle v. United States, 209 U. S. 36; and as an incident of this implied power to acquire land, the further power is implied to take it by right of eminent domain. Kohl v. United States, 91 U. S. 367. Likewise, the Constitution confers by clause 3 the express power "to regulate commerce * * * among the several States"; but there is implied for this purpose also the power to grant to individuals franchises to construct and operate railroads from state to state. California v. Pacific R. R. Co., 127 U. S. 1, 39. Incidental to this implied power to construct or authorize the construction of a railroad—is the further implied power to regulate the relations of the railroad with its employees, Second Employers' Liability Cases, 223 U. S. 1, 47; to require safety appliances upon cars, even when used in intrastate commerce, Southern Ry. Co. v. United States, 222 U. S. 20; and to regulate freight rates even to the extent of affecting intrastate rates, American Express Co. v. Caldwell, 244 U. S. 617. Whether it be for purposes of national defense, or for the purpose of establishing post offices and post roads or for the purpose of regulating commerce among the several states Congress has the power "to make all laws which shall be necessary and proper for carrying into execution" the duty so reposed in the federal government. While this is a government of enumerated powers it has full attributes of sovereignty within the limits of those powers. In re Debs, 158 U. S. 564. Some confusion of thought might perhaps have been avoided, if, instead of distinguishing between powers by the terms express and implied, the terms specific and general had been used. For the power conferred by clause 18 of § 8 "to make all laws which shall be necessary and proper for carrying into execution" powers specifically enumerated is also an express power. Since Congress has power to increase war efficiency by prohibiting the liquor traffic, no reason appears why it should be denied the power to make its prohibition effective. * * *

Decree affirmed.

MR. JUSTICE MCREYNOLDS, with whom concurred MR. JUSTICE DAY, and MR. JUSTICE VAN DEVANTER, dissenting. * * *

The federal government has only those powers granted by the Constitution. The Eighteenth Amendment not having become effective, it has no general power to prohibit the manufacture or sale of liquors. But by positive grant Congress has been empowered: "To declare war," "to raise and support armies," "to provide and maintain a navy," "to make rules for the government and regulation of the land and naval forces," "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers"; and to these it is attempted to trace the asserted power to prohibit sale of complainant's beer. (See concerning implied powers, Cooley's Principles of Constitutional Law, 105; Story on the Constitution, 4th ed., § 1243.)

The argument runs—This court has held in Hamilton v. Kentucky Distilleries & Warehouse Co., ante, 146, that under a power implied because necessary and proper to carry into execution the above named powers relating to war, in October, 1919, Congress could prohibit the sale of intoxicating liquors. In order to make such a prohibition effective the sale of non-intoxicating beer must be forbidden. Wherefore, from the implied power to prohibit intoxicants the further power to prohibit this non-intoxicant must be implied.

The query at once arises: If all this be true, why may not the second implied power engender a third under which Congress may forbid the planting of barley or hops, the manufacture of bottles or kegs, etc., etc.? The mischievous consequences of such reasoning were long ago pointed out in Kidd v. Pearson, 128 U. S. 1, 21, where, replying to a suggestion that under the expressly granted power to regulate commerce, Congress might control related matters, it was said:

"The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not comtemplate, more or less clearly, an interstate or foreign market?" * * *

Mr. Justice Clarke also dissents.

LEGAL TENDER CASES.

58.

KNOX v. LEE. PARKER v. DAVIS.

1872. Supreme Court of the United States. 12 Wall. 457.

These were two suits; the first a writ of error to the Circuit Court for the Western District of Texas, the second an appeal from a decree in equity in the Supreme Judicial Court of Massachusetts.

[In the first case, Mrs. Lee sued Knox for conversion of a flock of sheep. The chief issue was the quantum of damages. The ordinary money in use in the United States at the time of the conversion was notes of the United States commonly known as "greenbacks" which had been declared legal tender by acts of Congress of February 25, 1862, July 11, 1862 and March 3, 1863. There was some testimony as to the value of the sheep "in specie," gold or silver. Upon an objection by the defendant the court excluded evidence offered to show that "greenbacks" were not worth their par in gold or silver. After so ruling the court voluntarily charged the jury to "recollect" that the amount they might give by their verdict would be payable in legal tender notes. Judgment was given against the defendant who now complained that the charge tended to lead the jury to give a larger verdict.

The second case arose on a bill in equity by Davis to compel specific performance of a contract by Parker to convey land to Davis upon payment of a sum of money stated in the contract. The contract had been made and the bill filed before any of the above acts were passed. Final judgment, however, was not rendered until 1867, after the passage of the acts, when the Supreme Judicial Court of Massachusetts ordered the defendant to convey upon payment by Davis, into court, of an amount of "greenbacks" equivalent in face value to the contract price, instead of coin for which the defendant had insisted.]

Mr. Justice Strong delivered the opinion of the court.

The controlling questions in these cases are the following: Are the acts of Congress, known as the Legal Tender Acts, constitutional when applied to contracts made before their passage; and, secondly, are they valid as applicable to debts contracted since their enactment? These questions have been elaborately argued, and they have received from the court that consideration which their great importance demands. It would be difficult to overestimate the consequences which must follow our decision. They will affect the entire business of the country, and take hold of the possible continued existence of the government. If it be held by this court that Congress has no constitutional power, under any circumstances, or in any emergency, to make treasury notes a legal tender for the payment of all debts (a power confessedly possessed by every independent sovereignty other than the United States), the government is without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable, even if they were not when the acts of Congress now called in question were enacted. It is also clear that if we hold the acts invalid as applicable to debts incurred, or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derangement, widespread distress, and the rankest injustice. The debts which have been contracted since February 25th, 1862, constitute, doubtless, by far the greatest portion of the existing indebtedness of the country. They have been contracted in view of the acts of Congress declaring treasury notes a legal tender, and in reliance upon that declaration. Men have bought and sold, borrowed and lent, and assumed every variety of obligations contemplating that payment might be made with such notes. Indeed, legal tender treasury notes have become the universal measure of values. If now, by our decision, it be established that these debts and obligations can be discharged only by gold coin; if, contrary to the expectation of all parties to these contracts, legal tender notes are rendered unavailable, the government has become an instrument of the grossest injustice; all debtors are loaded with an obligation it was never contemplated they should assume; a large percentage is added to every debt, and such must become the demand for gold to satisfy contracts, that ruinous sacrifices, general distress, and bankruptcy may be expected. These consequences are too obvious to admit of question. And there is no well-founded distinction to be made between the constitutional validity of an act of Congress declaring treasury notes a legal tender for the payment of debts contracted after its passage and that of an act making them a legal tender for the discharge of all debts, as well those incurred before as those made after its enactment. There may be a difference in the effects produced by the acts, and in the hardship of their operation, but in both cases the fundamental question, that which tests the validity of the legislation, is, can Congress constitutionally give to treasury notes the character and qualities of money? Can such notes be constituted a legitimate circulating medium, having a defined legal value? If they can, then such notes must be available to fulfil all contracts (not expressly excepted) solvable in money, without reference to the time when the contracts were made. Hence it is not strange that those who hold the Legal Tender Acts unconstitutional when applied to contracts made before February, 1862, find themselves compelled also to hold that the acts are invalid as to debts created after that time, and to hold that both classes of debts alike can be discharged only by gold and silver coin.

The consequences of which we have spoken, serious as they are, must be accepted, if there is a clear incompatibility between the Constitution and the Legal Tender Acts. But we are unwilling to precipitate them upon the country unless such an incompatibility plainly appears. A decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress—all the members of which act under the obligation of an oath of fidelity to the Constitution. Such has always been the rule. * * * It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt.

Nor can it be questioned that, when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction applied alike to statutes, wills, contracts, and constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose, and so as to subserve it. In no other way can the intent of the framers of the instrument be discovered. And there are more urgent reasons for looking to the ultimate purpose in examining the powers conferred by a constitution than there are in construing a statute, a will, or a contract. We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines. In Martin v. Hunter, 1 Wheaton, 326, it was said, "The Constitution unavoidably deals in general language. It did not suit the purpose of the people in framing this great charter of our liberties to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution." * * * That would appear, then, to be a most unreasonable construction of the Constitution which denies to the government created by it, the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfilment of its acknowledged duties. Such a right, we hold, was given by the last clause of the eighth section of its first article. The means or instrumentalities referred to in that clause, and authorized, are not enumerated or defined. In the nature of things enumeration and specification were impossible. But they were left to the discretion of Congress, subject only to the restrictions that they be not prohibited, and be necessary and proper for carrying into execution the enumerated powers given to Congress, and all other powers vested in the government of the United States, or in any department or officer thereof.

And here it is to be observed it is not indispensable to the existence of any power claimed for the federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Such a treatment of the Constitution is recognized by its own provisions. This is well illustrated in its language respecting the writ of *habeas corpus*. The power to suspend the privilege of that writ is not expressly given, nor can it be deduced from any one of the particularized grants of power. Yet it is provided that the privileges of the writ shall not be suspended except in certain defined contingencies. This is no express grant of power. It is a restriction. But it shows irresistibly that somewhere in the Constitution power to suspend the privilege of the writ was granted, either by some one or more of the specifications of power, or by them all combined. And, that important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments. The first ten of these were suggested in the conventions of the states, and proposed at the first session of the first Congress, before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recited that the "conventions of a number of the states had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and *restrictive* clauses should be added." This was the origin of the amendments, and they are significant. They tend plainly to show that, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story, in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given. The oath required by law from officers of the government is one. So is building a capitol or a presidential mansion, and so also is the penal code. This last is worthy of brief notice. Congress is expressly authorized "to provide for the punishment of counterfeiting the securities and current coin of the United States, and to define and punish piracies and felonies committed on the high seas and offences against the laws of nations." It is also empowered to declare the punishment of treason, and provision is made for impeachments. This is the extent of power to punish crime expressly conferred. It might be argued that the expression of these limited powers implies an exclusion of all other subjects of criminal legislation. Such is the argument in the present cases. It is said because Congress is authorized to coin money and regulate its value, it cannot declare anything other than gold and silver to be money, or make it a legal tender. Yet Congress, by the Act of April 30, 1790, entitled "An Act more effectually to provide for the punishment of certain crimes against the United States," and the supplementary Act of March 3, 1825, defined and provided for the punishment of a large class of crimes other than those mentioned in the Constitution, and some of the punishments prescribed are manifestly not in aid of any single substantive power. No one doubts that this was rightly done, and the power thus exercised has been affirmed by this court in United States v. Marigold, 9 Howard, 560. This case shows that a power may exist as an aid to the execution of an express power, or an aggregate of such powers, though there is another express power given relating in part to the same subject but less extensive. * * *

Indeed, the whole history of the government and of Congressional legislation has exhibited the use of a very wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed, and this discretion has generally been unquestioned, or, if questioned, sanctioned by this court. This is true not only when an attempt has been made to execute a single power specifically given, but equally true when the means adopted have been appropriate to the execution, not of a single authority, but of all the powers created by the Constitution. Under the power to establish post-offices and post-roads Congress has provided for carrying the mails, punishing theft of letters and mail robberies, and even for transporting the mails to foreign countries. Under the power to regulate commerce, provision has been made by law for the improvement of harbors, the establishment of observatories, the erection of lighthouses, breakwaters, and buoys, the registry, enrolment, and construction of ships, and a code has been enacted for the government of seamen. Under the same power and other powers over the revenue and the currency of the country, for the convenience of the treasury and internal commerce, a corporation known as the United States Bank was early created. To its capital the government subscribed one-fifth of its stock. But the corporation was a private one, doing business for its own profit. Its incorporation was a constitutional exercise of Congressional power for no other reason than that it was deemed to be a convenient instrument or means for accomplishing one or more of the ends for which the government was established, or, in the language of the first article, already quoted, "necessary and proper" for carrying into execution some or all the powers vested in the government. Clearly this necessity, if any existed, was not a direct and obvious one. * * *

Before we can hold the Legal Tender Acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any plain degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited. This brings us to the inquiry whether they were, when enacted, appropriate instrumentalities for carrying into effect, or executing any of the known powers of Congress, or of any department of the government. Plainly to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times.

We do not propose to dilate at length upon the circumstances in which the country was placed, when Congress attempted to make treasury notes a legal tender. They are of too recent occurrence to justify enlarged description. Suffice it to say that a civil war was then raging which seriously threatened the overthrow of the government and the destruction of the Constitution itself. It demanded the equipment and support of large armies and navies, and the employment of money to an extent beyond the capacity of all ordinary sources of supply. Meanwhile the public treasury was nearly empty, and the credit of the government, if not stretched to its utmost tension, had become nearly exhausted. Moneyed institutions had advanced largely of their means, and more could not be expected of them. They had been compelled to suspend specie payments. Taxation was inadequate to pay even the interest on the debt already incurred, and it was impossible to await the income of additional taxes. The necessity was immediate and pressing. The army was unpaid. There was then due to the soldiers in the field nearly a score of millions of dollars. * * * It was at such a time and in such an emergency that the Legal Tender Acts were passed. Now, if it were certain that nothing else would have supplied the absolute necessities of the treasury, that nothing else would have enabled the government to maintain its armies and navy, that nothing else would have saved the government and the Constitution from destruction, while the Legal Tender Acts would, could any one be bold enough to assert that Congress transgressed its powers? Or if these enactments did work these results, can it be maintained now that they were not for a legitimate end, or "appropriate and adapted to that end," in the language of Chief Justice Marshall? That they did work such results is not to be doubted. Something revived the drooping faith of the people; something brought immediately to the government's aid the resources of the nation, and something enabled the successful prosecution of the war, and the preservation of the national life. What was it, if not the legal tender enactments?

But if it be conceded that some other means might have been chosen for the accomplishment of these legitimate and necessary ends, the concession does not weaken the argument. It is urged now, after the lapse of nine years, and when the emergency has passed, that treasury notes without the legal tender clause might have been issued, and that the necessities of the government might thus have been supplied. Hence it is inferred there was no necessity for giving to the notes issued the capability of paying private debts. At best this is mere conjecture. But admitting it to be true, what does it prove? Nothing more than that Congress had the choice of means for a legitimate end, each appropriate, and adapted to that end, though, perhaps, in different degrees. What then? Can this court say that it ought to have adopted one rather than the other? Is it our province to decide that the means selected were beyond the constitutional power of Congress, because we may think that other means to the same ends would have been more appropriate and equally efficient? * * *

The rules of construction heretofore adopted, do not demand that the relationship between the means and the end shall be direct and immediate. Illustrations of this may be found in several of the cases above cited. The charter of a bank of the United States, the priority given to debts due the government over private debts, and the exemption of federal loans from liability to state taxation, are only a few of the many which might be given. The case of Veazie Bank v. Fenno, 8 Wallace, 533, presents a suggestive illustration. There a tax of ten per cent on state bank notes in circulation was held constitutional, not merely because it was a means of raising revenue, but as an instrument to put out of existence such a circulation in competition with notes issued by the government. There, this court, speaking through the Chief Justice, avowed that it is the constitutional right of Congress to provide a currency for the whole country; that this might be done by coin, or United States notes, or notes of National banks; and that it cannot be questioned Congress may constitutionally secure the benefit of such a currency to the people by appropriate legislation. It was said there can be no question of the power of this government to emit bills of credit; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to make them a currency uniform in value and description, and convenient and useful for circulation. Here the substantive power to tax was allowed to be employed for improving the currency. It is not easy to see why, if state bank notes can be taxed out of existence for the purposes of indirectly making United States notes more convenient and useful for commercial purposes, the same end may not be secured directly by making them a legal tender. * * *

To assert, then, that the clause enabling Congress to coin money and regulate its value tacitly implies a denial of all other power over the currency of the nation, is an attempt to introduce a new rule of construction against the solemn decisions of this court. So far from its containing a lurking prohibition, many have thought it was intended to confer upon Congress that general power over the currency which has always been an acknowledged attribute of sovereignty in every other civilized nation than our own, especially when considered in connection with the other clause which denies to the states the power to coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. We do not assert this now, but there are some considerations touching these clauses which tend to show that if any implications are to be deduced from them, they are of an enlarging rather than a restraining character. The Constitution was intended to frame a government as distinguished from a league or compact, a government supreme in some particulars over states and people. It was designed to provide the same currency, having a uniform legal value in all the states. It was for this reason the power to coin money and regulate its value was conferred upon the federal government, while the same power as well as the power to emit bills of credit was withdrawn from the states. The states can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated. This may indeed have been intended. Some powers that usually belong to sovereignties were extinguished, but their extinguishment was not left to inference. In most cases, if not in all, when it was intended that governmental powers, commonly acknowledged as such, should cease to exist, both in the states and in the federal government, it was expressly denied to both, as well as to the United States as to the individual states. And generally, when one of such powers was expressly denied to the states only, it was for the purpose of rendering the federal power more complete and exclusive. Why, then, it may be asked, if the design was to prohibit to the new government, as well as to the states, that general power over the currency which the states had when the Constitution was framed, was such denial not expressly extended to the new government, as it was to the states? * * *

We do not, however, rest our assertion of the power of Congress to enact legal tender laws upon this grant. We assert only that the grant can, in no just sense, be regarded as containing an implied prohibition against their enactment, and that, if it raises any implications, they are of complete power over the currency, rather than restraining. * * *

But, without extending our remarks further, it will be seen that we hold the acts of Congress constitutional as applied to contracts made either before or after their passage. In so holding, we overrule so much of what was decided in Hepburn v. Griswold, 8 Wallace, 603, as ruled the acts unwarranted by the Constitution so far as they apply to contracts made before their enactment.[3] That case was decided by a divided court, and by a court having a less number of judges than the law then in existence provided this court shall have. These cases have been heard before a full court, and they have received our most careful consideration. * * *

[A concurring opinion by Bradley, J., and dissenting opinions by Chase, C. J., Clifford and Field, JJ., are omitted. Nelson, J., also dissented. Judgment in each case affirmed.

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[3] Hepburn v. Griswold was decided in conference on November 27, 1869, by a vote of 5 to 3, the court then consisting of eight judges, but the judgment was not announced in court until February 7, 1870. Justice Grier, one of the majority, resigned February 1, 1870. An Act of April 10, 1869, which went into effect in December 1869 authorized the increase of the court to nine members. Justices Strong and Bradley, the new appointees, and the three who dissented in Hepburn v. Griswold constituted the majority (5 to 4) in the above cases. See reporter's note in 12 Wall. at p. 528. See ch. 31 of Warren's Supreme Court in United States History. For another instance in which a change in the personnel of the court changed the result on a question of constitutional law see Story, J., in Briscoe v. Bank of Commonwealth, 11 Pet. (U. S.) 257, at pp. 328-329, 9 L. ed. 709.

JUILLIARD v. GREENMAN.

1884. Supreme Court of the United States. 110 U. S. 421.

[Some of the notes issued by the United States under the wartime acts sustained in the Legal Tender Cases came into the treasury of the United States by redemption or otherwise. Sometime after January 1, 1879, they were reissued in pursuance of an act of May 31, 1878. Some of those reissued notes were tendered by defendant to plaintiff in payment of a debt and refused, raising the question whether in time of peace Congress constitutionally could continue the legal tender quality of these notes.]

Mr. Justice Gray delivered the opinion of the court. * * *

The power "to borrow money on the credit of the United States" is the power to raise money for the public use on a pledge of the public credit, and may be exercised to meet either present or anticipated expenses and liabilities of the government. It includes the power to issue, in return for the money borrowed, the obligations of the United States in any appropriate form, of stock, bonds, bills, or notes; and in whatever form they are issued, being instruments of the national government, they are exempt from taxation by the governments of the several states. Weston v. Charleston City Council, 2 Pet. 449; Banks v. Mayor, 7 Wall. 16; Bank v. Supervisors, 7 Wall. 26. Congress has authority to issue these obligations in a form adapted to circulation from hand to hand in the ordinary transactions of commerce and business. In order to promote and facilitate such circulation, to adapt them to use as currency, and to make them more current in the market, it may provide for their redemption in coin or bonds, and may make them receivable in payment of debts to the government. So much is settled beyond doubt, and was asserted or distinctly admitted by the judges who dissented from the decision in the Legal Tender Cases, as well as by those who concurred in that decision. Veazie Bank v. Fenno, 8 Wall. 533, 548; Hepburn v. Griswold, 8 Wall. 616, 636; Legal Tender Cases, 12 Wall. 543, 544, 560, 582, 610, 613, 637.

It is equally well settled that Congress has the power to incorporate national banks, with the capacity, for their own profit as well as for the use of the government in its money transactions, of issuing bills which under ordinary circumstances pass from hand to hand as money at their nominal value, and which, when so current, the law has always recognized as a good tender in payment of money debts, unless specifically objected to at the time of the tender. United States Bank v. Bank of Georgia, 10 Wheat. 333, 347; Ward v. Smith, 7 Wall. 447, 451. The power of Congress to charter a bank was maintained in M'Culloch v. Maryland, 4 Wheat.

316, and in Osborn v. United States Bank, 9 Wheat. 738, chiefly upon the ground that it was an appropriate means for carrying on the money transactions of the government. But Chief Justice Marshall said: "The currency which it circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of government than it could otherwise be; and if this be true, the capacity to carry on this trade is a faculty indispensable to the character and objects of the institution." 9 Wheat. 864. And Mr. Justice Johnson, who concurred with the rest of the court in upholding the power to incorporate a bank, gave the further reason that it tended to give effect to "that power over the currency of the country, which the framers of the Constitution evidently intended to give to Congress alone." Ib. 873.

The constitutional authority of Congress to provide a currency for the whole country is now firmly established. In Veazie Bank v. Fenno, 8 Wall. 533, 548, Chief Justice Chase, in delivering the opinion of the court, said: "It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government, and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit." Congress, having undertaken to supply a national currency, consisting of coin, of treasury notes of the United States, and of the bills of national banks, is authorized to impose on all state banks, or national banks, or private bankers, paying out the notes of individuals or of state banks, a tax of ten per cent upon the amount of such notes so paid out. Veazie Bank v. Fenno, above cited; National Bank v. United States, 101 U. S. 1. The reason for this conclusion was stated by Chief Justice Chase, and repeated by the present Chief Justice, in these words: "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile." 8 Wall. 549; 101 U. S. 6.

By the Constitution of the United States, the several states are prohibited from coining money, emitting bills of credit, or making anything but gold and silver coin a tender in payment of debts. But no intention can be inferred from this to deny to Congress either of these powers. Most of the powers granted to Congress are described in the eighth section of the first article; the limitations intended to be set to its powers, so as to exclude certain things which might otherwise be taken to be included in the general grant, are defined in the ninth section; the tenth section is addressed to the states only. This section prohibits the states from doing some things which the United States are expressly prohibited from doing, as well as from doing some things which the United States are expressly authorized to do, and from doing some things which are neither expressly granted nor expressly denied to the United States. Congress and the states equally are expressly prohibited from passing any bill of attainder or *ex post facto* law, or granting any title of nobility. The states are forbidden, while the president and senate are expressly authorized, to make treaties. The states are forbidden, but Congress is expressly authorized, to coin money. The states are prohibited from emitting bills of credit; but Congress, which is neither expressly authorized nor expressly forbidden to do so, has, as we have already seen, been held to have the power of emitting bills of credit, and of making every provision for their circulation as currency, short of giving them the quality of legal tender for private debts—even by those who have denied its authority to give them this quality.

It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. * * * The power of issuing bills of credit, and making them, at the discretion of the legislature, a tender in payment of private debts, had long been exercised in this country by the several colonies and states; and during the Revolutionary War the states, upon the recommendation of the Congress of the Confederation, had made the bills issued by Congress a legal tender. See Craig v. Missouri, 4 Pet. 435, 453; Briscoe v. Bank of Kentucky, 11 Pet. 257, 313, 334-336; Legal Tender Cases, 12 Wall. 557, 558, 622; Phillips on American Paper Currency, *passim*. The exercise of this power not being prohibited to Congress by the Constitution, it is included in the power expressly granted to borrow money on the credit of the United States.

This position is fortified by the fact that Congress is vested with the exclusive exercise of the analogous power of coining money and regulating the value of domestic and foreign coin, and also with the paramount power of regulating foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals.

The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts. If, upon a just and fair interpretation of the whole Constitution, a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected. The decisions of this court, already cited, afford several examples of this. * * *

So, under the power to coin money and to regulate its value, Congress may (as it did with regard to gold by the Act of June 28th, 1834, c. 95, and with regard to silver by the Act of February 28th, 1878, c. 20), issue coins of the same denominations as those already current by law, but of less intrinsic value than those, by reason of containing a less weight of the precious metals, and thereby enable debtors to discharge their debts by the payment of coins of the less real value. A contract to pay a certain sum in money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made. * * *

Congress, as the legislature of a sovereign nation, being expressly empowered by the Constitution, "to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States," and "to borrow money on the credit of the United States," and "to coin money and regulate the value thereof and of foreign coin;" and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills: and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and therefore, within the meaning of that instrument, "necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States."

Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts.

[Field, J., delivered a dissenting opinion.]

CHILD LABOR TAX CASE.

BAILEY v. DREXEL FURNITURE COMPANY.

1922. Supreme Court of the United States. 259 U. S. 20.

Mr. Chief Justice Taft delivered the opinion of the court.

"This case presents the question of the constitutional validity of the Child Labor Tax Law. The plaintiff below, the Drexel Furniture Company, is engaged in the manufacture of furniture in the Western District of North Carolina. On September 20, 1921, it received a notice from Bailey, United States Collector of Internal Revenue for the district, that it had been assessed $6,312.79 for having during the taxable year 1919 employed and permitted to work in its factory a boy under fourteen years of age, thus incurring the tax of ten per cent. on its net profits for that year. The company paid the tax under protest, and after rejection of its claim for a refund, brought this suit. On demurrer to an amended complaint, judgment was entered for the Company against the Collector for the full amount with interest. The writ of error is prosecuted by the Collector direct from the District Court under § 238 of the Judicial Code.

The Child Labor Tax Law is Title XII of an Act entitled "An Act To provide revenue, and for other purposes", approved February 24, 1919, c. 18, 40 Stat. 1057, 1138. The heading of the title is "Tax on Employment of Child Labor." It begins with § 1200 and includes eight sections. Section 1200 is as follows:

"Sec. 1200. That every person (other than a bona fide boys' or girls' canning club recognized by the Agricultural Department of a State and of the United States) operating (a) any mine or quarry situated in the United States in which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year; or (b) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian, during any portion of the taxable year, shall pay for each taxable year, in addition to all other taxes imposed by law, an excise tax equivalent to 10 per centum of the entire net profits received or accrued for such year from the sale or disposition of the product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment."

Section 1203 relieves from liability to the tax any one who employs a child, believing him to be of proper age, relying on a certificate to this effect issued by persons prescribed by a board consisting of the Secretary of the Treasury, the Commissioner of Internal Revenue and the Secretary of Labor, or issued by state authorities. The section also provides in paragraph (b) that "the tax imposed by this title shall not be imposed in the case of any person who proves to the satisfaction of the Secretary that the only employment or permission to work which but for this section would subject him to the tax, has been of a child employed or permitted to work under a mistake of fact as to the age of such child, and without intention to evade the tax."

Section 1206 gives authority to the Commissioner of Internal Revenue, or any other person authorized by him, "to enter and inspect at any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment." The Secretary of Labor, or any person whom he authorizes, is given like authority in order to comply with a request of the commissioner to make such inspection and report the same. Any person who refuses entry or obstructs inspection is made subject to fine or imprisonment or both.

The law is attacked on the ground that it is a regulation of the employment of child labor in the states—an exclusively state function under the federal Constitution and within the reservations of the Tenth Amendment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation conferred by § 8, Article I, of the federal Constitution. We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than sixteen years; in mills and factories, children of an age greater than fourteen years, and shall prevent children of less than sixteen years in mills and factories from working more than eight hours a day or six days in the week. If an employer departs from this prescribed course of business, he is to pay to the government one-tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scienter is associated with penalties not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the states. We can not avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. In the maintenance of local self government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

Out of a proper respect for the acts of a coordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states.

The difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard.

The case before us can not be distinguished from that of Hammer v. Dagenhart, 247 U. S. 251. Congress there enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children within the same ages and for the same number of hours a day and days in a week as are penalized by the act in this case. This court held the law in that case to be void. It said:

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states, a purely state authority."

In the case at the bar, Congress in the name of a tax which on the face of the act is a penalty seeks to do the same thing, and the effort must be equally futile.

The analogy of the Dagenhart Case is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax, and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a state in order to coerce them into compliance with Congress's regulation of state concerns, the court said this was not in fact regulation of interstate commerce, but rather that of state concerns and was invalid. So here the so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the federal Constitution. This case requires as did the Dagenhart Case the application of the principle announced by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 423, in a much quoted passage:

"Should Congress, in the execution of its powers, adapt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land."

But it is pressed upon us that this court has gone so far in sustaining taxing measures the effect or tendency of which was to accomplish purposes not directly within congressional power that we are bound by authority to maintain this law. [Veazie Bank v. Fenno, 8 Wall. 533 was here distinguished.]

The next case is that of McCray v. United States, 195 U. S. 27. That, like the Veazie Bank Case, was the increase of an excise tax upon a subject properly taxable in which the taxpayers claimed that the tax had become invalid because the increase was excessive. It was a tax on oleomargarine, a substitute for butter. The tax on the white oleomargarine was one-quarter of a cent a pound, and on the yellow oleomargarine was first two cents and was then by the act in question increased to ten cents per pound. This court held that the discretion of Congress in the exercise of its constitutional powers to levy excise taxes could not be controlled or limited by the courts because the latter might deem the incidence of the tax oppressive or even destructive. It was the same principle as that applied in the Veazie Bank Case. This was that Congress in selecting its subjects for taxation might impose the burden where and as it would and that a motive disclosed in its selection to discourage sale or manufacture of an article by a higher tax than on some other did not invalidate the tax. In neither of these cases did the law objected to show on its face as does the law before us the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation.

The third case is that of Flint v. Stone Tracy Co., 220 U. S. 107.

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The fourth case is United States v. Doremus,[4] 249 U. S. 86. That involved the validity of the Narcotic Drug Act, 38 Stat. 785, which imposed a special tax on the manufacture, importation and sale or gift of opium or coca leaves or their compounds or derivatives. It required every person subject to the special tax to register with the Collector of Internal Revenue his name and place of business and forbade him to sell except upon the written order of the person to whom the sale was made on a form prescribed by the Commissioner of Internal Revenue. The vender was required to keep the order for two years, and the purchaser to keep a duplicate for the same time and both were to be subject to official inspection. Similar requirements were made as to sales upon prescriptions of a physician and as to the dispensing of such drugs directly to a patient by a physician. The validity of a special tax in the nature of an excise tax on the manufacture, importation and sale of such drugs was, of course, unquestioned. The provisions for subjecting the sale and distribution of the drugs to official supervision and inspection were held to have a reasonable relation to the enforcement of the tax and were therefore held valid.

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[4] Before and since this decision the Harrison Narcotic Drug Act, U. S. C. Title 26, § 211 has been questioned and as to some of its details the more restricted of two meanings has been adopted because the other would raise grave doubts of its validity in these respects. United States v. Jin Fuey Moy (1916) 241 U. S. 394, 60 L. ed. 1061; Linder v. United States (1925) 268 U. S. 5, 69 L. ed. 819. A provision of the act not involved in the above cases was sustained in Alston v. United States (1927) 274 U. S. 289, 71 L. ed. 1052.

The court said that the act could not be declared invalid just because another motive than taxation, not shown on the face of the act, might have contributed to its passage. This case does not militate against the conclusion we have reached in respect of the law now before us. The court, there, made manifest its view that the provisions of the so-called taxing act must be naturally and reasonably adapted to the collection of the tax and not solely to the achievement of some other purpose plainly within state power.

For the reasons given, we must hold the Child Labor Tax Law invalid and the judgment of the District Court is

Affirmed.[5]

Mr. Justice Clarke dissents.

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[5] In Hill v. Wallace (1922) 259 U. S. 44, 66 L. ed. 822, the act of Congress, Aug. 24, 1921 (42 Stat. 187, c. 86) entitled: "An Act taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of boards of trade, and for other purposes" was held invalid. In addition to a tax of 2 cents on every $100 of value imposed by a prior law, this statute imposed a tax of 20 cents a bushel for every bushel involved in every such contract with exception that the 20 cent tax should not apply to such sales when made by or through a board of trade designated by the Secretary of Agriculture who was authorized to designate only such boards of trade as complied with the several detailed requirements referred to by Taft, C. J., who for the court said:

"It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General. Indeed the title of the act recites that one of its purposes is the regulation of boards of trade. As the bill shows, the imposition of 20 cents a bushel on the various grains affected by the tax is most burdensome. The tax upon contracts for sales for future delivery under the Revenue Act is only 2 cents upon $100 of value, whereas this tax varies according to the price and character of the grain from 15 per cent. of its value to 50 per cent. The manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which can have no relevancy to the collection of the tax at all. Even if we conceded, as we do not, that the keeping of a memorandum and of the particulars of each sale as a record for three years or more, not only of contracts for future delivery, but also of cash sales, neither of which are subject to tax in designated boards of trade, would help taxing officers in any way to detect the evasions of this tax outside of such boards, no such construction can be put upon the provisions which require the board of trade to prevent a dissemination of false or misleading reports or to prevent the manipulation of prices or the cornering of grain or which enforce the admission to membership in the board of the representatives of co-operative associations of producers or the abrogation of rules against rebate as applied to such representatives. The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all 'futures' to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power. The elaborate machinery for hearings by the Secretary of Agriculture and by the commission of violations of these regulations, with the withdrawal by the commission of the designation of the board as a contract market, and of complaints against persons who violate the act or such regulations, and the imposition upon them of the penalty of requiring all boards of trade to refuse to permit them the usual privileges, only confirm this view.

"Our decision, just announced, in the Child Labor Tax Case, [259 U. S. 20],

KANSAS v. COLORADO ET AL.

1907. Supreme Court of the United States. 206 U. S. 46.

[The State of Kansas brought this original suit in the Supreme Court to restrain the State of Colorado and certain corporations organized under the latter's laws from diverting the water of the Arkansas River for irrigation of lands in Colorado thereby, as alleged, preventing the natural and customary flow of the river into and through Kansas. The United States filed an intervention petition claiming a right to control the water of the river to aid in the reclamation of arid lands.]

MR. JUSTICE BREWER delivered the opinion of the court. * * *

The primary question is, of course, of national control. For, if the nation has a right to regulate the flow of the waters, we must inquire what it has done in the way of regulation. If it has done nothing the further question will then arise, what are the respective rights of the two states in the absence of national regulation? Congress has, by virtue of the grant to it of power to regulate commerce "among the several States," extensive control over the highways, natural or artificial, upon which such commerce may be carried. It may prevent or remove obstructions in the natural waterways and preserve the navigability of those ways. In United States v. Rio Grande Irrigation Company, 174 U. S. 690, in which was

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involving the constitutional validity of the Child Labor Tax Law, completely covers this case. We there distinguish between cases like Veazie Bank v. Fenno, 8 Wall. 533, and McCray v. United States, 195 U. S. 27, in which it was held that this court could not limit the discretion of Congress in the exercise of its constitutional powers to levy excise taxes because the court might deem the incidence of the tax oppressive or even destructive. It was pointed out that in none of those cases did the law objected to show on its face, as did the Child Labor Tax Law, detailed regulation of a concern or business wholly within the police power of the state, with a heavy exaction to promote the efficacy of such regulation."

In holding that Congress could not by legislation enacted prior to the 17th Amendment (Query whether it now may do so?) control expenditures of candidates in party primaries running for nomination as candidates for election to the United States Senate, it was said: "Many things are prerequisites to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these. It is settled, *e. g.*, that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacturing, mining, etc., commerce could not exist, but this fact does not suffice to subject them to the control of Congress. Kidd v. Pearson, 128 U. S. 1. * * *

"We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted." Reynolds, J., in Newberry v. United States (1921) 256 U. S. 232, 257, 258, 65 L. ed. 913.

considered the validity of the appropriation of the water of a stream by virtue of local legislation, so far as such appropriation affected the navigability of the stream, we said (p. 703):

> "Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each state, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable watercourses of the country even against any state action."

It follows from this that if in the present case the National Government was asserting, as against either Kansas or Colorado, that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge. But the government makes no such contention. On the contrary, it distinctly asserts that the Arkansas River is not now and never was practically navigable beyond Fort Gibson in the Indian Territory, and nowhere claims that any appropriation of the waters by Kansas or Colorado affects its navigability.

✓ It rests its petition of intervention upon its alleged duty of legislating for the reclamation of arid lands; alleges that in or near the Arkansas River, as it runs through Kansas and Colorado, are large tracts of those lands; that the national government is itself the owner of many thousands of acres; that it has the right to make such legislative provision as in its judgment is needful for the reclamation of all these arid lands and for that purpose to appropriate the accessible waters.

In support of the main proposition it is stated in the brief of its counsel:

> "That the doctrine of riparian rights is inapplicable to conditions prevailing in the arid region; that such doctrine, if applicable in said region, would prevent the sale, reclamation, and cultivation of the public arid lands, and defeat the policy of the government in respect thereto; that the doctrine which is applicable to conditions in said arid region, and which prevails therein, is that the waters of natural streams may be used to irrigate and cultivate arid lands, whether riparian or non-riparian, and that the priority of appro-

priation of such waters and the application of the same for beneficial purposes establishes a prior and superior right."

In other words, the determination of the rights of the two states *inter sese* in regard to the flow of waters in the Arkansas River is subordinate to a superior right on the part of the national government to control the whole system of the reclamation of arid lands. That involves the question whether the reclamation of arid lands is one of the powers granted to the general government. As heretofore stated, the constant declaration of this court from the beginning is that this government is one of enumerated powers. "The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." Story, J., in Martin v. Hunter's Lessee, 1 Wheat. 304, 326. "The Government of the United States is one of delegated, limited, and enumerated powers." United States v. Harris, 106 U. S. 629, 635.

Turning to the enumeration of the powers granted to Congress by the eighth section of the first article of the Constitution, it is enough to say that no one of them by any implication refers to the reclamation of arid lands. The last paragraph of the section which authorizes Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof, is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned. The construction of that paragraph was precisely stated by Chief Justice Marshall in these words: "We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional"—a statement which has become the settled rule of construction. From this and other declarations it is clear that the Constitution is not to be construed technically and narrowly, as an indictment, or even as a grant presumably against the interest of the grantor, and passing only that which is clearly included within its language, but as creating a system of government whose provisions are designed to make effective and operative all the governmental powers granted. Yet while so construed it still is true that no independent and unmentioned power passes to the National Government or can rightfully be exercised by the Congress.

We must look beyond section 8 for Congressional authority over arid lands, and it is said to be found in the second paragraph of section 3 of Article IV, reading: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words "territory or other property." It is true it has been referred to in some decisions as granting political and legislative control over the Territories as distinguished from the states of the union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. But clearly it does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits. Appreciating the force of this, counsel for the government relies upon "the doctrine of sovereign and inherent power," adding "I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference." His argument runs substantially along this line: All legislative power must be vested in either the state or the national government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that state; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers.[6] That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. It reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The argument of counsel ignores the principal factor in this article, to wit, "the people." Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, "we the people of the United States," not the people of one state, but the people of all the states, and Article X reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning. * * *

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[6] And see the remarks of the same Justice, in United States ex rel. Turner v. Williams (1904) 194 U. S. 279, 295-296, 48 L. ed. 979, printed *ante* p. 210.

This very matter of the reclamation of arid lands illustrates this: At the time of the adoption of the Constitution within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the state, in which any particular tract of such land was to be found, and the Constitution, therefore, makes no provisions for a national control of the arid regions or their reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the national government. But if no such power has been granted, none can be exercised. * * *

But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters. * * * It may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any state. It is undoubtedly true that the early settlers brought to this country the common law of England, and that that common law throws light on the meaning and scope of the Constitution of the United States, and is also in many states expressly recognized as of controlling force in the absence of express statute. * * *

Now the question arises between two states, one recognizing generally the common law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither state can legislate for or impose its own policy upon the other. A stream flows through the two and a controversy is presented as to the flow of that stream. It does not follow, however, that because Congress cannot determine the rule which shall control between the two states or because neither state can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two states. Indeed, the disagreement, coupled with its effect upon a stream passing through the two states, makes a matter for investigation and determination by this court. It has been said that there is no common law of the United States as distinguished from the common law of the several states. This contention was made in Western Union Telegraph Company v. Call Publishing Company, 181 U. S. 92, in which it was asserted that, as Congress having sole jurisdiction over interstate commerce had prescribed no rates for interstate telegraph communications, there was no limit on the power of a telegraph company in respect thereto. After referring to the general contention, we said (pp. 101, 102):

"Properly understood, no exceptions can be taken to declarations of this kind. There is no body of federal common law separate and distinct from the common law existing in the several states[7] in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress. * * * Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by Congressional enactment."

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[7] When federal courts have jurisdiction of a case solely because of diversity of citizenship of the parties, and the case requires the application of the common law of a state there is a settled practice of those courts to form a judgment as to what is that common law independently of decisions by the courts of that state. The types of cases in which this practice is indulged in and those in which the state court decisions are followed is usually discussed in courses on conflict of laws. Distinguish this practice from the doctrine above; namely, that there is no common law of the United States. The practice itself is acutely criticised in the dissenting opinion of Holmes, J. in Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co. (1928) — U. S. —, 48 Sup. Ct. 404, 72 L. ed. —.

What is the common law? Kent says (vol. 1, p. 471):

"The common law includes those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature."

As it does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes. As Congress cannot make compacts between the states, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force under our system of government is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute. Nor is our jurisdiction ousted, even if, because Kansas and Colorado are states sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal. In The Paquete Habana, 175 U. S. 677, 700, Mr. Justice Gray declared:

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

And in delivering the opinion on the demurrer in this case Chief Justice Fuller said (185 U. S. 146):

"Sitting, as it were, as an international, as well as a domestic tribunal, we apply federal law, state law, and international law, as the exigencies of the particular case may demand."

One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of Missouri v. Illinois, 180 U. S. 208, the action of one state reaches through the agency of natural laws into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. * * *

It is the State of Kansas which invokes the action of this court, charging that through the action of Colorado a large portion of its territory is threatened with disaster. In this respect it is in no manner evading the provisions of the Eleventh Amendment to the federal Constitution. It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a state in this large tract of land bordering on the Arkansas River. Its prosperity affects the general welfare of the state. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint. Georgia v. Tennessee Copper Co., [206 U. S. 230.]

This changes in some respect the scope of our inquiry. It is not limited to the simple matter of whether any portion of the waters of the Arkansas is withheld by Colorado. We must consider the effect of what has been done upon the conditions in the respective states and so adjust the dispute upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream. A little reflection will make this clear. Suppose the controversy was between two individuals, upper and lower riparian owners on a little stream with rocky bank and rocky bottom. The question properly might be limited to the single one of the diminution of the flow by the upper riparian proprietor. The lower riparian proprietor might insist that he was entitled to the full, undiminished and unpolluted flow of the water of the stream as it had been wont to run. It would not be a defense on the part of the upper riparian proprietor that by the use to which he had appropriated the water he had benefited the lower proprietor, or that the latter had received in any other respects an equivalent. The question would be one of legal right, narrowed to place, amount of flow and freedom from pollution.

We do not intimate that entirely different considerations obtain in a controversy between two states. Colorado could not be upheld in appropriating the entire flow of the Arkansas River, on the ground that it is willing to give, and does give, to Kansas something else which may be considered of equal value. That would be equivalent to this court's making a contract between the two states, and that it is not authorized to do. But we are justified in looking at the question not narrowly and solely as to the amount of the flow in the channel of the Arkansas River, inquiring merely whether any portion thereof is appropriated by Colorado, but we may properly consider what, in case a portion of that flow is appropriated by Colorado, are the effects of such appropriation upon Kansas territory. For instance, if there be many thousands of acres in Colorado destitute of vegetation, which by the taking of water from the Arkansas River and in no other way can be made valuable as arable lands producing an abundance of vegetable growth, and this transformation of desert land has the effect, through percolation of water in the soil, or in any other way, of giving to Kansas territory, although not in the Arkansas Valley, a benefit from water as great as that which would enure by keeping the flow of the Arkansas in its channel undiminished, then we may rightfully regard the usefulness to Colorado as justifying its action, although the locality of the benefit which the flow of the Arkansas through Kansas has territorially changed. [Upon extended consideration of the evidence the court concluded that there were offsetting benefits resulting to Kansas such that she made out no sufficient present injury from the acts of Colorado to entitle her to equitable relief.]

The decree which, therefore, will be entered will be one dismissing the petition of the intervenor, without prejudice to the rights of the United States to take such action as it shall deem necessary to preserve or improve the navigability of the Arkansas River. The decree will also dismiss the bill of the State of Kansas as against all the defendants, without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two states resulting from the flow of the river. Each party will pay its own costs. * * *

Mr. Justice White and Mr. Justice McKenna concur in the result. Mr. Justice Moody took no part in the decision of this case.[8]

UNITED STATES v. ARJONA.

1887. Supreme Court of United States. 120 U. S. 479.

Indictment under the act of May 16, 1884, 23 Stat. 22, to prevent and punish the counterfeiting within the United States of notes, bonds, and other securities of foreign governments. The court below certified a division in opinion on several points.

Mr. Chief Justice Waite delivered the opinion of the court.

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Congress has power to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the government of the United States, Art. I, Sec. 8, Cl. 18; and the government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries. It alone can "regulate commerce with foreign nations," Art. I, Sec. 8, Cl. 3; make treaties and appoint ambassadors and other public ministers and consuls. Art. II, Sec. 2, Cl. 2. A state is expressly prohibited from entering into any "treaty, alliance, or confederation." Art. I, Sec. 10, Cl. 1. Thus all official intercourse between a state and foreign nations is prevented, and exclusive authority for that purpose given to the United States. The national government is in this way made responsible to foreign nations for all violations by the United States of their international obligations, and because of this, Congress is expressly authorized "to define and punish * * * offences against the law of nations." Art. I, Sec. 8, Cl. 10.

The law of nations requires every national government to use "due diligence" to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who within its own jurisdiction counterfeit the money of another nation has long been recognized. Vattel, in his Law of Nations, which was first printed at Neuchatel in 1758, and was translated into English and published in England in 1760, uses this language: "From the principles thus laid down, it is easy to conclude, that if one nation counterfeits the money of another, or if she allows and protects false coiners who presume to do it, she does that nation an injury." When this was written money was the chief thing of this kind that needed protection, but still it was added: "There is another custom more modern, and of no less use to commerce than the establishment of coin, namely, *exchange,* or the traffic of bankers, by means of which a merchant remits immense sums from one end of the world to the other, at very trifling expense, and, if he pleases, without risk. For the same reason that sovereigns are obliged to protect commerce, they are obliged to support this custom, by good laws, in which every merchant, whether citizen or foreigner, may find security. In general, it is equally the interest and duty of every nation to have wise and equitable commercial laws established in the country." Vattel, Law of Nations, Phil. ed. 1876, Book I, chap. 10, pages 46, 47. In a note by Mr. Chitty in his London edition of 1834 it is said: "This is a sound principle, which ought to be extended so as to deny effect to any fraud upon a foreign nation or its subjects." Id. 47, note 50. * * *

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[8] Did the Supreme Court in making choice of the principle of justice, rule of law or rule of right by which it decided favorably to the defendant act as a lawgiver filling a gap in the national law which Congress was not authorized to fill, and as to which the nation had not legislated by its direct process of making provision in the Constitution? Is the *central government* of the United States one of "enumerated" powers or is it only Congress that is confined to enumerated purposes of legislation? Consider later whether the treaty-making authority in the central government is restricted to enumerated purposes in law-making.

In the time of Vattel certificates of the public debt of a nation, government bonds, and other government securities, were rarely seen in any other country than that in which they were put out. Banks of issue were not so common as to need special protection for themselves or the public against forgers and counterfeiters elsewhere than at home, and the great corporations, now so numerous and so important, established by public authority for the promotion of public enterprises, were almost unknown, and certainly they had not got to be extensive borrowers of money wherever it could be had at home or abroad on the faith of their *quasi* public securities. Now, however, the amount of national and corporate debt and of corporate property represented by bonds, certificates, notes, bills, and other forms of commercial securities, which are bought and sold in all the money markets of the world, both in and out of the country under whose authority they were created, is something enormous. * * *

No nation can be more interested in this question than the United States. Their money is practically composed of treasury notes or certificates issued by themselves, or of bank bills issued by banks created under their authority and subject to their control. Their own securities, and those of the states, the cities, and the public corporations, whose interests abroad they alone have the power to guard against foreign national neglect, are found on sale in the principal money markets of Europe. If these securities, whether national, municipal, or corporate, are forged and counterfeited with impunity at the places where they are sold, it is easy to see that a great wrong will be done to the United States and their people. Any uncertainty about the genuineness of the security necessarily depreciates its value as a merchantable commodity, and against this international comity requires that national protection shall, as far as possible, be afforded. If there is neglect in that, the United States may, with propriety, call on the proper government to provide for the punishment of such an offence, and thus secure the restraining influences of a fear of the consequences of wrong doing. A refusal may not, perhaps, furnish sufficient cause for war, but it would certainly give just ground of complaint, and thus disturb that harmony between the governments which each is bound to cultivate and promote.

But if the United States can require this of another, that other may require it of them, because international obligations are of necessity reciprocal in their nature. The right, if it exists at all, is given by the law of nations, and what is law for one is, under the same circumstances, law for the other. A right secured by the law of nations to a nation, or its people, is one the United States as the representatives of this nation are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by the Constitution on the government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the states. Therefore the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another nation, and which the law of nations has imposed on them as part of their international obligations. This, however, does not prevent a state from providing for the punishment of the same thing; for here, as in the case of counterfeiting the coin of the United States, the act may be an offence against the authority of a state as well as that of the United States.

Again, our own people may be dealers at home in the public or *quasi* public securities of a foreign government, or of foreign banks or corporations, brought here in the course of our commerce with foreign nations, or sent here from abroad for sale in the money markets of this country. As such they enter into and form part of the foreign commerce of the country. If such securities can be counterfeited here with impunity, our own people may be made to suffer by a wrong done which affects a business that has been expressly placed by the Constitution under the protection of the government of the United States.

It remains only to consider those questions which present the point whether, in enacting a statute to define and punish an offence against the law of nations, it is necessary, in order "to define" the offence, that it be declared in the statute itself to be "an offence against the law of nations." This statute defines the offence, and if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offence against the law of nations. Such being the case, there is no more need of declaring in the statute that it is such an offence than there would be in any other criminal statute to declare that it was enacted to carry into execution any other particular power vested by the Constitution in the government of the United States. Whether the offence as defined is an offence against the law of nations depends on the thing done, not on any declaration to that effect by Congress. As has already been seen, it was incumbent on the United States as a nation to use due diligence to prevent any injury to another nation or its people by counterfeiting its money, or its public or *quasi* public securities. This statute was enacted as a means to that end, that is to say, as a means of performing a duty which had been cast on the United States by the law of nations, and it was clearly appropriate legislation for that purpose. * * *

STATE OF MISSOURI v. HOLLAND.

1920. Supreme Court of United States. 252 U. S. 416.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918, c. 128, 40 Stat. 755, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the states by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the state and contravene its will manifested in statutes. The state also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a state. Kansas v. Colorado, 185 U. S. 125, 142. Georgia v. Tennessee Copper Co., 206 U. S. 230, 237. Marshall Dental Manufacturing Co. v. Iowa, 226 U. S. 460, 462. A motion to dismiss was sustained by the District Court on the ground that the act of Congress is constitutional. 258 Fed. Rep. 479. Accord, United States v. Thompson, 258 Fed.

Rep. 257; United States v. Rockefeller, 260 Fed. Rep. 346. The state appeals.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their annual migrations traversed certain parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified close seasons and protection in other forms, and agreed that the two powers would take or propose to their law-making bodies the necessary measures for carrying the treaty out. 39 Stat. 1702. The above mentioned Act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture. Regulations were proclaimed on July 31, and October 25, 1918. 40 Stat. 1812; 1863. It is unnecessary to go into any details, because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the states. ?

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the states, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the states had been held bad in the District Court. United States v. Shauver, 214 Fed. Rep. 154. United States v. McCullagh, 221 Fed. Rep. 288. Those decisions were supported by arguments that migratory birds were owned by the states in their sovereign capacity for the benefit of their people, and that under cases like Geer v. Connecticut, 161 U. S. 519, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. Andrews v. Andrews, 188 U. S. 14, 33. What was said in that case with regard to the powers of the states applies with equal force to the powers of the nation in cases where the states individually are incompetent to act. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us might be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.

The state as we have intimated found its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a state and its inhabitants the state may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the state upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the state's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another state and in a week a thousand miles away. If we are to be accurate we cannot put the case of the state upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the state would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the states and as many of them deal with matters which in the silence of such laws the state might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties of course "are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States." Baldwin v. Franks, 120 U. S. 678, 683. No doubt the great body of private relations usually fall within the control of the state, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition; it was recognized as early as Hopkirk v. Bell, 3 Cranch, 454, with regard to statutes of limitations, and even earlier, as to confiscation, in Ware v. Hylton, 3 Dall. 199. It was assumed by Chief Justice Marshall with regard to the escheat of land to the state in Chirac v. Chirac, 2 Wheat. 259, 275; Hauenstein v. Lynham, 100 U. S. 483; Geofroy v. Riggs, 133 U. S. 258; Blythe v. Hinckley, 180 U. S. 333, 340. So as to a limited jurisdiction of foreign consuls within a state. Wildenhus's Case, 120 U. S. 1. See Ross v. McIntyre, 140 U. S. 453. Further illustration seems unnecessary, and it only remains to consider the application of established rules to the present case.

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitory within the state and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the states. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. Carey v. South Dakota, 250 U. S. 118.

Decree affirmed.[9]

MR. JUSTICE VAN DEVANTER and MR. JUSTICE PITNEY dissent.

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[9] Further study of the scope and limits of the treaty-making power is deferred. The scope of the statutory law-making power of the general government is to be here studied.

CIVIL RIGHTS CASES.

1883. Supreme Court of the United States. 109 U. S. 3.

These cases were all founded on the first and second sections of the act of Congress, known as the Civil Rights Act, passed March 1st, 1875, entitled "An Act to protect all Citizens in their Civil and Legal Rights." 18 Stat. 335. Two of the cases, those against Stanley and Nichols, were indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, were, one an information, the other an indictment, for denying to individuals the privileges and accommodations of a theatre, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's theatre in San Francisco; and the indictment against Singleton was for denying to another person, whose color was not stated, the full enjoyment of the accommodations of the theatre known as the Grand Opera House in New York, "said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude." * * * The cases of Stanley, Nichols, and Singleton, came up on certificates of division of opinion between the judges below as to the constitutionality of the first and second sections of the act referred to; and the case of Ryan, on a writ of error to the judgment of the Circuit Court for the District of California sustaining a demurrer to the information.

The Stanley, Ryan, Nichols, and Singleton cases were submitted together, by the Solicitor-General at the last term of court, on the 7th day of November, 1882. There were no appearances and no briefs filed for the defendants. [The statute is printed below.][10]

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[10] "SEC. 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

"SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal

Mr. Justice Bradley delivered the opinion of the court.

2. It is obvious that the primary and important question in all the cases is the constitutionality of the law: for if the law is unconstitutional none of the prosecutions can stand. * * *

Are these sections constitutional? The first section, which is the principle one, cannot be fairly understood without attending to the last clause, which qualifies the preceding part.

The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theatres; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theatres, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare, that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and *vice versa*. The second section makes it a penal offence in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments. The power is sought, first, in the Fourteenth Amendment, and the views and arguments of distinguished senators, advanced whilst the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. We have carefully considered those arguments, as was due to the eminent ability of those who put them forward, and have felt, in all its force, the weight of authority which always invests a law that Congress deems itself competent to pass. But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have.

The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States,

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proceedings, either under this Act or the criminal law of any State: *And provided further,* That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

and of the several States, is prohibitory in its character, and prohibitory upon the states. It declares that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen,* the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in United States v. Cruikshank, 92 U. S. 542; Virginia v. Rives, 100 U. S. 313; and Ex parte Virginia, 100 U. S. 339.

An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts, for example. The Constitution prohibited the states from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by state legislation might be counteracted and corrected: and this power was exercised. The remedy which Congress actually provided was that contained in the 25th section of the Judiciary Act of 1789, 1 Stat. 85, giving to the Supreme Court of the United States jurisdiction by writ of error to review the final decisions of state courts whenever they should sustain the validity of a state statute or authority alleged to be repugnant to the Constitution or laws of the United States. By this means, if a state law was passed impairing the obligation of a contract, and the state tribunals sustained the validity of the law, the mischief could be corrected in this court. The legislation of Congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts generally; and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably Congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a state law; and under the broad provisions of the Act of March 3d, 1875, ch. 137, 18 Stat. 470, giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States, it is possible that such jurisdiction now exists. But under that, or any other law, it must appear as well by allegation, as proof at the trial, that the Constitution had been violated by the action of the state legislature. Some obnoxious state law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any federal remedy in the case; and for the very sufficient reason, that the constitutional prohibition is against state laws impairing the obligation of contracts.

And so in the present case, until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against state laws and acts done under state authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, state laws, or state action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the state legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the state without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a state to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the states may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the states may commit or take, and which, by the amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the states. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the states; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in states that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the state or its authorities.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the states may deprive persons of life, liberty, and property without due process of law (and the amendment itself does suppose this), why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theatres? The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the states are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

We have not overlooked the fact that the fourth section of the act now under consideration has been held by this court to be constitutional. That section declares "that no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any state, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars." In Ex parte Virginia, 100 U. S. 339, it was held that an indictment against a state officer under this section for excluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws, namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the state government, carry into effect such a rule of disqualification. In the Virginia case, the state, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute-book of the state actually laid down any such rule of disqualification, or not, the state, through its officer, enforced such a rule: and it is against such state action, through its officers and agents, that the last clause of the section is directed. This aspect of the law was deemed sufficient to divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same act which we are now considering.

These sections, in the objectionable features before referred to, are different also from the law ordinarily called the "Civil Rights Bill," originally passed April 9th, 1866, 14 Stat. 27, ch. 31, and re-enacted with some modifications in sections 16, 17, 18, of the Enforcement Act, passed May 31st, 1870, 16 Stat. 140, ch. 114. That law, as re-enacted, after declaring that all persons within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding, proceeds to enact, that any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any state or Territory to the deprivation of any rights secured or protected by the preceding section (above quoted), or to different punishment, pains, or penalties, on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment as specified in the act. This law is clearly corrective in its character, intended to counteract and furnish redress against state laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. In the Revised Statutes, it is true, a very important clause, to wit, the words "any law, statute, ordinance, regulation or custom to the contrary notwithstanding," which gave the declaratory section its point and effect, are omitted; but the penal part, by which the declaration is enforced, and which is really the effective part of the law, retains the reference to state laws, by making the penalty apply only to those who should subject parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any state or Territory: thus preserving the corrective character of the legislation. Rev. St. §§ 1977, 1978, 1979, 5510. The Civil Rights Bill here referred to is analogous in its character to what a law would have been under the original Constitution, declaring that the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it, under color or pretence that it had been rendered void or invalid by a state law, he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defence.

In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but, unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the state where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the state by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the states alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuse and perpetration.

Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes, the coining of money, the establishment of post-offices and post-roads, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular state legislation or state action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or ~~proceedings of state~~ officers.

If the principles of interpretation which we have laid down are correct, as we deem them to be (and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of United States v. Harris, 106 U. S. 629), it is clear that the law in question cannot be sustained by any grant of legislative power made to Congress by the Fourteenth Amendment. That amendment prohibits the states from denying to any person the equal protection of the laws, and declares that Congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse state legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces state legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment; and, in our judgment, it has not.

We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no state can abridge or interfere with. Whether it is such a right, or not, is a different question which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.

We have also discussed the validity of the law in reference to cases arising in the states only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District is not a question for consideration in the cases before us: they all being cases arising within the limits of states. And whether Congress, in the exercise of its power to regulate commerce amongst the several states, might or might not pass a law regulating rights in public conveyances passing from one state to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.

But the power of Congress to adopt direct and primary, as distinguished from corrective legislation, on the subject in hand, is sought, in the second place, from the Thirteenth Amendment, which abolishes slavery. This amendment declares "that neither slavery, nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;" and it gives Congress power to enforce the amendment by appropriate legislation.

This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States. * * *

The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents. Under the Fourteenth Amendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against state regulations or proceedings. * * * The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. * * * It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business.

Innkeepers and public carriers, by the laws of all states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy under that amendment and in accordance with it. * * *

On the whole we are of opinion, that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several states is concerned.

[HARLAN, J., gave a dissenting opinion.]

HODGES v. UNITED STATES.

1906. Supreme Court of the United States. 203 U. S. 1.

On October 8, 1903, the grand jury returned into the District Court of the United States for the Eastern District of Arkansas an indictment charging that the defendants, (now plaintiffs in error) with others, "did knowingly, willfully and unlawfully conspire to oppress, threaten and intimidate Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, citizens of the United States of African descent, in the free exercise and enjoyment of rights and privileges secured to them and each of them by the Constitution and laws of the United States and because of their having exercised the same, to wit: [The gist of the alleged offense was a conspiracy furthered by threats of violence to compel the eight citizens to abandon their employment in a lumber manufactory "because they were colored men and citizens of African descent," this color and descent being laid in the indictment as the motive for the conspiracy.]

A demurrer to this indictment, on the ground that the offense created by sections 1977 and 5508,[11] Rev. Stat., under which it was found, was not within the jurisdiction of the courts of the United States, but was judicially cognizable by state tribunals only, was overruled, a trial had, and the three plaintiffs in error found guilty, sentenced separately to imprisonment for different terms and to fine, and to be thereafter ineligible to any office of profit or trust created by the Constitution or laws of the United States.

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[11] Section 5508 (now U. S. C. Title 18, Sec. 51). "*Conspiracy to injure persons in exercise of civil rights.* If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

"Sec. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. * * *

There being constitutional questions involved, the judgment was brought directly to this court on writ of error.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court. * * *

That prior to the three *post bellum* Amendments to the Constitution the national government had no jurisdiction over a wrong like that charged in this indictment is conceded; that the Fourteenth and Fifteenth Amendments do not justify the legislation is also beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the state is complained of. Unless, therefore, the Thirteenth Amendment vests in the nation the jurisdiction claimed the remedy must be sought through state action and in state tribunals subject to the supervision of this court by writ of error in proper cases.[12] * * *

Notwithstanding the adoption of these three Amendments, the national government still remains one of enumerated powers, and the Tenth Amendment, which reads "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," is not shorn of its vitality. True the Thirteenth Amendment grants certain specified and additional power to Congress, but any Congressional legislation directed against individual action which was not warranted before the Thirteenth Amendment must find authority in it. And in interpreting the scope of that Amendment it is well to bear in mind the words of Mr. Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. 1, 188, which, though spoken more than four score years ago, are still the rule of construction of constitutional provisions:

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[12] In the dissenting opinion it is said: "The objections urged to the view taken by the court are not met by the suggestion that this court may revise the final judgment of the state court, if it should deny to the complaining party a right secured by the federal Constitution; for the revisory power of this court would be of no avail to the complaining party if it be true, as seems now to be adjudged, that a conspiracy to deprive colored citizens, solely because of their race, of the right to earn a living in a lawful way, infringes no right secured to them by the federal Constitution."

"As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

The Thirteenth Amendment reads:

"Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Sec. 2. Congress shall have power to enforce this article by appropriate legislation."

The meaning of this is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the nation. It is the denunciation of a condition and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the nation it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African. * * *

A reference to the definitions in the dictionaries of words whose meaning is so thoroughly understood by all seems an affectation, yet in Webster "slavery" is defined as "the state of entire subjection of one person to the will of another." Even the secondary meaning given recognizes the fact of subjection, as "one who has lost the power of resistance; one who surrenders himself to any power whatever; as a slave to passion, to lust, to strong drink, to ambition," and "servitude" is by the same authority declared to be "the state of voluntary or compulsory subjection to a master."

It is said, however, that one of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts, and that when these defendants, by intimidation and force, compelled the colored men named in the indictment to desist from performing their contract they to that extent reduced those parties to a condition of slavery, that is, of subjection to the will of defendants, and deprived them of a freeman's power to perform his contract. But every wrong done to an individual by another, acting singly or in concert with others, operates *pro tanto* to abridge some of the freedom to which the individual is entitled. A freeman has a right to be protected in his person from an assault and battery. He is entitled to hold his property safe from trespass or appropriation, but no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery. Indeed, this is conceded by counsel for the government, for in their brief (after referring to certain decisions of this court) it is said:

"With these decisions, and many others that might be cited, before us, it is vain to contend that the federal Constitution secures to a citizen of the United States the right to work at a given occupation or particular calling free from injury, oppression, or interference by individual citizens.

"Even though such right be a natural or inalienable right, the duty of protecting the citizen in the enjoyment of such right, free from individual interference, rests alone with the state.

"Unless, therefore, the additional element, to wit, the infliction of an injury upon one individual citizen by another, solely on account of his color, be sufficient ground to redress such injury the individual citizen suffering such injury must be left for redress of his grievance to the state laws."

The logic of this concession points irresistibly to the contention that the Thirteenth Amendment operates only to protect the African race. This is evident from the fact that nowhere in the record does it appear that the parties charged to have been wronged by the defendants had ever been themselves slaves, or were the descendants of slaves. They took no more from the Amendment than any other citizens of the United States. But if, as we have seen, that denounces a condition possible for all races and all individuals, then a like wrong perpetrated by white men upon a Chinese, or by black men upon a white man, or by any men upon any man on account of his race, would come within the jurisdiction of Congress, and that protection of individual rights which prior to the Thirteenth Amendment was unquestionably within the jurisdiction solely of the states, would by virtue of that Amendment be transferred to the nation, and subject to the legislation of Congress. * * *

For these reasons we think the United States court had no jurisdiction of the wrong charged in the indictment.

Judgments reversed.

Mr. Justice Brown concurs in the judgments. Mr. Justice Harlan, with whom concurs Mr. Justice Day, dissenting. [Dissenting opinion is omitted. It included this remark: "The opinion of the court, it may be observed, does not, in words, adjudge section 5508 to be unconstitutional. But if its scope and effect are not wholly misapprehended by me, the court does adjudge that Congress cannot make it an offense against the United States for individuals to combine or conspire to prevent, even by force, citizens of African descent, solely because of their race, from earning a living."]

JAMES v. BOWMAN.

1903. Supreme Court of the United States. 190 U. S. 127.

In December, 1900, an indictment was found by the United States District Court for the District of Kentucky against the appellee, Henry Bowman, and one Harry Weaver, based upon section 5507 of the Revised Statutes of the United States. The indictment charged in substance that certain "men of African descent, colored men, negroes, and not white men," being citizens of Kentucky and of the United States, were, by means of bribery, unlawfully and feloniously intimidated and prevented from exercising their lawful right of voting at a certain election held in the Fifth Congressional District of Kentucky on the 8th day of November, 1898, for the election of a representative in the fifty-sixth Congress of the United States.

No allegation is made that the bribery was because of the race, color or previous condition of servitude of the men bribed. The appellee, Henry Bowman, having been arrested and held in default of bail, sued out a writ of *habeas corpus* on the ground of the unconstitutionality of section 5507. The District Judge granted the writ, following reluctantly the decision of the Circuit Court of Appeals for the Sixth Circuit, in Lackey v. United States, 46 C. C. A. 189; 107 Fed. Rep. 114. From that judgment the government has taken this appeal.

Section 5507[13] is as follows:

"Sec. 5507. Every person who prevents, hinders, controls, or intimidates another from exercising, or in exercising the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section."

The Fifteenth Amendment provides:

"Sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

Mr. Justice Brewer delivered the opinion of the court.

The single question presented for our consideration is whether section 5507 can be upheld as a valid enactment, for if not, the indictment must also fall, and the defendant was rightfully discharged. On its face the section purports to be an exercise of the power granted to Congress by the Fifteenth Amendment, for it declares a punishment upon any one who by means of bribery prevents another to whom the right of suffrage is guaranteed by such amendment from exercising that right. But that amendment relates solely to action "by the United States or by any State," and does not contemplate wrongful individual acts. It is in this respect similar to * * * the Fourteenth Amendment. * * *

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[13] This section was repealed by § 341 of the Act of March 4, 1909, ch. 321.

But we are not left alone to this reasoning from analogy. The Fifteenth Amendment itself has been considered by this court and the same limitations placed upon its provisions. In United States v. Reese, 92 U. S. 214, 217, we said:

"The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the states, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption this could be done. It was as much within the power of a state to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation.' "

In passing it may be noticed that this indictment charges no wrong done by the State of Kentucky, or by any one acting under its authority. The matter complained of was purely an individual act of the defendant. Nor is it charged that the bribery was on account of race, color or previous condition of servitude. True, the parties who were bribed were alleged to be "men of African descent, colored men, negroes, and not white men," and again, that they were "persons to whom the right of suffrage and the right to vote was then and there guaranteed by the Fifteenth Amendment to the Constitution of the United States." But this merely describes the parties wronged as within the classes named in the amendment. They were not bribed because they were colored men, but because they were voters. No discrimination on account of race, color or previous condition of servitude is charged.

These authorities show that a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress to prevent action by the state through some one or more of its official representatives, and that an indictment which charges no discrimination on account of race, color or previous condition of servitude is likewise destitute of support by such amendment.

But the contention most earnestly pressed is that Congress has ample power in respect to elections of representatives in Congress; that the election which was held, and at which this bribery took place, was such an election; and that therefore under such general power this statute and this indictment can be sustained. The difficulty with this contention is that Congress has not by this section acted in the exercise of such power. It is not legislation in respect to elections of federal officers, but is levelled at all elections, state or federal and it does not purport to punish bribery of any voter, but simply of those named in the Fifteenth Amendment. On its face it is clearly an attempt to exercise power supposed to be conferred by the Fifteenth Amendment in respect to all elections, and not in pursuance of the general control by Congress over particular elections. To change this statute, enacted to punish bribery of persons named in the Fifteenth Amendment at all elections, to a statute punishing bribery of any voter at certain elections would be in effect judicial legislation. It would be wresting the statute from the purpose with which it was enacted and making it serve another purpose. Doubtless even a criminal statute may be good in part and bad in part, providing the two can be clearly separated, and it is apparent that the legislative body would have enacted the one without the other, but there are no two parts to the statute. If the contention be sustained it is simply a transformation of the statute in its single purpose and scope. * * *

Congress has no power to punish bribery at all elections. The limits of its power are in respect to elections in which the nation is directly interested, or in which some mandate of the national Constitution is disobeyed, and courts are not at liberty to take a criminal statute, broad and comprehensive in its terms and in these terms beyond the power of Congress, and change it to fix [fit] some particular transaction which Congress might have legislated for if it had seen fit.

The judgment of the District Court is

Affirmed.

MR. JUSTICE MCKENNA took no part in the decision of this case. MR. JUSTICE HARLAN and MR. JUSTICE BROWN dissented.

LOGAN v. UNITED STATES.

1892. Supreme Court of the United States. 144 U. S. 263.

The facts of this case are that five Marlow brothers and others were in the custody of a United States deputy marshal in the Northern District of Texas under commitment to answer a federal indictment on a charge of committing larceny in the Indian country, within the exclusive jurisdiction of the United States. While these prisoners were being removed from one jail to another by the deputy marshal a large lynching party attacked them resulting in fatalities on both sides. Logan was suspected of being a member of the lynching party. He and others were indicted by a federal grand jury, under Rev. Stat. § 5508[14] charged with conspiracy to injure and oppress the prisoners, naming them, "citizens of the United States in the free exercise and enjoyment of a right secured to them by the Constitution and laws of the United States, to wit, the right to be protected by said deputy United States marshal from the assault of" the defendants and other evil-disposed persons and "the right to be held" in the custody of the deputy marshal. By a motion equivalent to a demurrer the defendants challenged the indictment as charging no offence against the laws of the United States or within the jurisdiction of the federal court but an offence, if any, against the laws of the State of Texas of which the state courts would have exclusive jurisdiction. This motion was over-ruled, and defendants excepted, were tried and convicted and now on error:[15]

MR. JUSTICE GRAY delivered the opinion of the court. * * *

The principal question in this case is whether the right of a citizen of the United States, in the custody of a United States marshal under a lawful commitment to answer for an offence against the United States, to be protected against lawless violence, is a right secured to him by the Constitution or laws of the United States, or whether it is a right which can be vindicated only under the laws of the several states. * * *

Although the Constitution contains no grant, general or specific, to Congress of the power to provide for the punishment of crimes, except piracies and felonies on the high seas, offences against the law of nations, treason, and counterfeiting the securities and current coin of the United States, no one doubts the power of Congress to provide for the punishment of all crimes and offences against the United States, whether committed within one of the states of the union, or within territory over which Congress has plenary and exclusive jurisdiction.

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[14] Section 5508 (U. S. C. Title 18, § 51) is printed in the footnote to p. 321, *ante*.

[15] The statement of facts has been much condensed and several procedural points omitted.

To accomplish this end, Congress has the right to enact laws for the arrest and commitment of those accused of any such crime or offence, and for holding them in safe custody until indictment and trial; and persons arrested and held pursuant to such laws are in the exclusive custody of the United States, and are not subject to the judicial process or executive warrant of any state. Ableman v. Booth, 21 How. 506; Tarble's Case, 13 Wall. 397; Robb v. Connolly, 111 U. S. 624. The United States, having the absolute right to hold such prisoners, have an equal duty to protect them, while so held, against assault or injury from any quarter. The existence of that duty on the part of the government necessarily implies a corresponding right of the prisoners to be so protected; and this right of the prisoners is a right secured to them by the Constitution and laws of the United States. * * *

The prisoners were in the exclusive custody and control of the United States, under the protection of the United States, and in the peace of the United States. There was a co-extensive duty on the part of the United States to protect against lawless violence persons so within their custody, control, protection and peace; and a corresponding right of those persons, secured by the Constitution and laws of the United States, to be so protected by the United States. If the officers of the United States, charged with the performance of the duty, in behalf of the United States, of affording that protection and securing that right, neglected or violated their duty, the prisoners were not the less under the shield and panoply of the United States.

The cases heretofore decided by this court, and cited in behalf of the plaintiffs in error, are in no way inconsistent with these views, but, on the contrary, contain much to support them. The matter considered in each of those cases was whether the particular right there in question was secured by the Constitution of the United States, and was within the acts of Congress. But the question before us is so important, and the learned counsel for the plaintiffs in error have so strongly relied on those cases, that it is fit to review them in detail. * * * [The Civil Rights Cases and others are here discussed.]

The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the Amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the states, as the case may be, and cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet that every right, created by, arising under or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object. * * *

In the case at bar, the right in question does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. Any government which has power to indict, try and punish for crime, and to arrest the accused and hold them in safekeeping until trial, must have the power and the duty to protect against unlawful interference its prisoners so held, as well as its executive and judicial officers charged with keeping and trying them.

In the very recent Case of Neagle, 135 U. S. 1, at October term, 1889, it was held that, although there was no express act of Congress authorizing the appointment of a deputy marshal or other officer to attend a justice of this court while travelling in his circuit, and to protect him against assault or injury, it was within the power and the duty of the executive department to protect a judge of any of the courts of the United States, when there was just reason to believe that he would be in personal danger while executing the duties of his office; that an assault upon such a judge, while in discharge of his official duties, was a breach of the peace of the United States, as distinguished from the peace of the state in which the assault took place; and that a deputy marshal of the United States, specially charged with the duty of protecting and guarding a judge of a court of the United States, had imposed upon him the duty of doing whatever might be necessary for that purpose, even to the taking of human life.

In delivering judgment, Mr. Justice Miller, repeating the language used by Mr. Justice Bradley speaking for the court in Ex parte Siebold, 100 U. S. 371, 394, said: "It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the states. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent." 135 U. S. 60. After further discussion of that question, and of the powers of sheriffs in the State of California, where the transaction took place, Mr. Justice Miller added: "That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California; are questions too clear to need argument to prove them." 135 U. S. 69.

The United States are bound to protect against lawless violence all persons in their service or custody in the course of the administration of justice. This duty and the correlative right of protection are not limited to the magistrates and officers charged with expounding and executing the laws, but apply, with at least equal force, to those held in custody on accusation of crime, and deprived of all means of self-defence.

For these reasons, we are of opinion that the crime of which the plaintiffs in error were indicted and convicted was within the reach of the constitutional powers of Congress, and was covered by section 5508 of the Revised Statutes. * * *[16]

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[16] In re Quarles (1895) 158 U. S. 532, 39 L. ed. 1080, Q and B were convicted under U. S. C. Title 18, § 51 of conspiracy to injure W because W had exercised a "right" to inform a United States deputy marshall that G had violated the internal revenue laws of the United States; and in furtherance of the conspiracy Q and B beat and bruised W. Without reference to any specific clause of the Constitution which secured this right to W or any other private citizen, the Supreme Court upon consideration of the merits refused to grant Q and B a habeas corpus. Gray, J., for the court, said: "Every right, created by, arising under, or dependent upon the Constitution, may be protected and enforced by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object. United States v. Logan, 144 U. S. 293. * * * It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States. It is the right, as well as the duty, of every citizen, when called upon by the proper officer, to act as part of the *posse comitatus* in upholding the laws of his country. It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offence against those laws: * * * The right of a citizen informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. United States v. Logan, 144 U. S. 294. * * * To leave to the several states the prosecution and punishment of conspiracies to oppress citizens of the United States, in performing the duty and exercising the right of assisting to uphold and enforce the laws of the United States, would tend to defeat the independence and the supremacy of the national government." Accord: Motes v. United States (1900) 178 U. S. 458, 44 L. ed. 1150. The student should note that in sustaining the conviction by interpreting the statute to cover the conduct for which the accused were convicted, the court sustained the power of Congress to reach that conduct to the particular extent. Can Congress reach every conspiracy by two or more persons to injure a third, in the United States?

One of the omitted portions of the above opinion (Logan v. United States) is

STURGES v. CROWNINSHIELD.

1819. Supreme Court of the United States. 4 Wheat. 122, 192, 193, 195, 196.

[Construing Article I, Section 8 of the Constitution: "The Congress shall have power * * * to establish uniform laws on the subject of bankruptcies throughout the United States" and holding that each state had power to pass a local bankruptcy law so long as there was no act of Congress with which it conflicted.]

CHIEF JUSTICE MARSHALL said: "In considering this question, it must be recollected that, previous to the formation of

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the following: "In United States v. Waddell, 112 U. S. 76, at October term, 1884, the court reaffirmed the constitutionality of section 5508 of the Revised Statutes, and speaking by the same eminent judge [Miller] said: 'The statute itself is careful to limit its operation to an obstruction or oppression in "the free exercise of a right or privilege secured by the Constitution or laws of the United States, or because of his having exercised such rights." The protection of this section extends to no other right, to no right or privilege dependent on a law or laws of the state. Its object is to guarantee safety and protection to persons in the exercise of rights dependent on the laws of the United States, including, of course, the Constitution and treaties as well as statutes, and it does not, in this section at least, design to protect any other rights.' 112 U. S. 79. The particular right, held in that case to be dependent on and secured by the laws of the United States, and to be protected by section 5508 of the Revised Statutes against interference by individuals, was the right of a citizen, having made a homestead entry on public land, within the limits of a state, to continue to reside on the land for five years, for the purpose of perfecting his title to a patent, under sections 2289-2291 of the Revised Statutes, of which the court said: 'The right here guaranteed is not the mere right of protection against personal violence. This, if the result of an ordinary quarrel or malice, would be cognizable under the laws of the state and by its courts. But it is something different from that. It is the right to remain on the land in order to perform the requirements of the act of Congress, and, according to its rules, perfect his incipient title. Whenever the acts complained of are of a character to prevent this, or throw obstruction in the way of exercising this right, and for the purpose and with intent to prevent it, or to injure or oppress a person because he has exercised it, then, because it is a right asserted under the law of the United States and granted by that law, those acts come within the purview of the statute and of the constitutional power of Congress to make such statute.' 112 U. S. 80."

Congress has power to legislate for the protection of an eligible voter's right to vote for members of Congress and a conspiracy between election officers not to count such votes is punishable under U. S. C. Title 18, § 51. United States v. Mosley (1915) 238 U. S. 383, 59 L. ed. 1355. Observe that the right to vote for members of the House of Representatives and of the Senate is conferred by the Constitution, though only upon such persons as by state law are qualified to vote for the more numerous branch of the state legislature. Constitution, Art. I, Sec. 2; Amendment XVII; Ex parte Yarbrough (1884) 110 U. S. 651, 28 L. ed. 274. Compare United States v. Gradwell (1917) 243 U. S. 476, 61 L. ed. 857 holding that rights of candidates in a primary for nomination to run for the United States Senate are not within the protection of U. S. C. Title 18, § 51 (Rev. Stats. § 5508, Penal Code § 19); nor does this section cover a conspiracy to bribe voters at an election at which presidential electors, a United States senator and a member of the House of Representatives are to be chosen. United States v. Bathgate (1918) 246 U. S. 220, 62 L. ed. 676. Note that the last two cases cited only interpret § 51 and do not pass upon the scope of the power of Congress.

the new Constitution, we were divided into independent states, united for some purposes, but, in most respects, sovereign. These states could exercise almost every legislative power, and, among others, that of passing bankrupt laws. When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed, not from the people of America, but from the people of the several states; and remain, after the adoption of the Constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been, that the mere grant of a power to Congress did not imply a prohibition on the states to exercise the same power. But it has never been supposed, that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it.

"Is the power to establish uniform laws on the subject of bankruptcies, throughout the United States, of this description? * * * It is obvious that much inconvenience would result from that construction of the Constitution, which should deny to the state legislatures the power of acting on this subject, in consequence of the grant to Congress. It may be thought more convenient that much of it should be regulated by state legislation, and Congress may purposely omit to provide for many cases to which their power extends. It does not appear to be a violent construction of the Constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the Union may not reach. But be this as it may, the power granted to Congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states."[17]

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[17] "The constitution containing a grant of powers in many instances similar to those already existing in the state governments, and some of these being of

UNITED STATES v. LANZA ET AL.

1922. Supreme Court of the United States. 260 U. S. 377.

[The defendants were indicted in the United States District Court for the Western District of Washington charged with manufacturing intoxicating liquor, transporting it and having it in their possession in violation of the National Prohibition Act. The defendants pleaded in bar a prior conviction for the same acts in the Superior Court of Whatcomb County, State of Washington, wherein they had been tried upon an information charging them with having done these acts in violation of a state prohibition statute. The United States District Court sustained the plea and ordered the indictment dismissed. The United States took this writ of error under the Criminal Appeals Act (c. 2564, 34 Stat. 1246) to reverse the order.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the court. * * *

The Eighteenth Amendment is as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

The defendants insist that two punishments for the same act, one under the National Prohibition Act and the other under a state law, constitute double jeopardy under the Fifth Amendment; and in support of this position it is argued that both laws derive their force from the same authority,—the second section of the Amend-

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vital importance also to state authority and state legislation, it is not to be admitted that a mere grant of such powers in affirmative terms to Congress, does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion, that the powers so granted are never exclusive of similar powers existing in the states, unless where the constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states. The example of the first class is to be found in the *exclusive* legislation delegated to Congress over places purchased by the consent of the legislature of the state in which the same shall be, for forts, arsenals, dockyards, &c.; of the second class, the prohibition of a state to coin money or emit bills of credit; of the third class, as this Court have already held, the power to establish an uniform rule of naturalization, and the delegation of admirality and maritime jurisdiction. In all other cases not falling within the classes already mentioned, it seems unquestionable that the states retain concurrent authority with Congress, not only upon the letter and spirit of the eleventh [tenth] amendment of the constitution, but upon the soundest principles of general reasoning." Story, J., in Houston v. Moore (1820) 5 Wheat. (U. S.) 1, 48-49, 5 L. ed. 19.

ment,—and therefore that in principle it is as if both punishments were in prosecutions by the United States in its courts.

Consideration of this argument requires an analysis of the reason and purpose of the second section of the Amendment. We dealt with both sections in the National Prohibition Cases, 253 U. S. 350. The conclusions of the Court, relevant here, are Nos. 6, 7, 8 and 9.

"6. The first section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits.

"7. The second section of the Amendment—the one declaring 'The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation'—does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means.

"8. The words 'concurrent power' in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

"9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them."

The Amendment was adopted for the purpose of establishing prohibition as a national policy reaching every part of the United States and affecting transactions which are essentially local or intrastate, as well as those pertaining to interstate or foreign commerce. The second section means that power to take legislative measures to make the policy effective shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several states within their territorial limits shall not cease to exist. Each state, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States and such as are adopted by a state become laws of that state. They may vary in many particulars, including the penalties prescribed, but this is an inseparable incident of independent legislative action in distinct jurisdictions.

To regard the Amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the Amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that in vesting the national government with the power of country-wide prohibition, state power would be excluded. In effect the second section of the Eighteenth Amendment put an end to restrictions upon the state's power arising out of the federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the Amendment took from the states all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this Amendment, but from power originally belonging to the states, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the federal Constitution. This is the *ratio decidendi* of our decision in Vigliotti v. Pennsylvania, 258 U. S. 403.

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government, Barron v. Baltimore, 7 Pet. 243, and the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority. Here the same act was an offense against the State of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that state is not a conviction of a different offense against the United States and so is not double jeopardy.

This view of the Fifth Amendment is supported by a long line of decisions by this court. [Some quotations and several citations are here omitted.]

Counsel for defendants in error invokes the principle that, as between federal and state jurisdictions over the same prisoner, the one which first gets jurisdiction may first exhaust its jurisdiction to the exclusion of the other. Ponzi v. Fessenden, 258 U. S. 254. This is beside the point and has no application. The effect of the ruling of the court below was to exclude the United States from jurisdiction to punish the defendants after the state court had exhausted its jurisdiction and when there was no conflict of jurisdiction.

If Congress sees fit to bar prosecution by the federal courts for any act when punishment for violation of state prohibition has been imposed, it can, of course, do so by proper legislative provision; but it has not done so. If a state were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that state to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect. But it is not for us to discuss the wisdom of legislation, it is enough for us to hold that, in the absence of special provision by Congress, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors is not a bar to a prosecution in a court of the United States under the federal law for the same acts.

Judgment reversed with direction to sustain the demurrer to the special plea in bar of the defendants and for further proceedings in conformity with this opinion.

Section 5.—Special Problems of Sole and Dual Control.

OSBORN ET AL. v. THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF THE UNITED STATES.[1]

1824. Supreme Court of the United States. 9 Wheat. 738.

[The President, Directors and Company of the Bank of the United States filed a bill in the Circuit Court of the United States praying an injunction to restrain Osborn, Auditor of the State of Ohio, from proceeding to enforce against them an Ohio statute, passed February 8, 1819, entitled, "An act to levy and collect a tax from all banks, and individuals, and companies and associations of individuals, that may transact banking business in this state, without being allowed to do so by the laws thereof." This act recited that the Bank of the United States pursued its operations in Ohio contrary to a law of the state and that if it continued to transact banking business in the state it should pay an annual tax of $50,000. In case of refusal to pay, the statute authorized the auditor to levy the amount on the money or other goods of the bank. An injunction was granted. Ohio officers in contempt of this injunction seized $100,000 in specie and bank bills from the branch bank at Chillicothe, Ohio. The bill was amended to include a prayer for the return of this money. The Circuit Court granted final decrees as prayed for and this appeal was taken.]

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[1] In this case the Supreme Court consented to reconsider the validity of the charter granted by Congress to the second Bank of the United States, held valid in McCulloch v. Maryland. The first Bank of the United States was created in 1791 and its charter expired at the end of its 20 year limitation, without judicial determination of its validity. The charter of the second was not renewed at its

MARSHALL, C. J., delivered the opinion of the court. * * *

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expiration in 1836. The grounds for sustaining it are again considered here because the Act of 1864 authorizing the creation of the present national banks was sustained on the authority of McCulloch v. Maryland and Osborn v. the President etc. of the Bank. See Farmers & Mechanics Nat. Bank v. Dearing (1875) 91 U. S. 29, 33, 23 L. ed. 196. The Act of 1816 was a special charter incorporating a single banking association with authority to create branches. (See the epitome of the statute in the foot-note to p. 256, ante.) While the latter was a general enabling act authorizing any five or more persons to incorporate a banking association by compliance with its requirements. (U. S. C. Title 12, § 21). Nearly all of the national banks are located in the states.

The Federal Reserve Bulletin of January, 1928, shows that on October 10, 1927, there were about 27,000 banks in the United States doing ordinary banking business. Of these about 8,000 were organized under the National Bank Act of 1864 as amended (Title 12, U. S. C.) and the remainder under state laws. The relative extent to which these two classes of banks shared in the ordinary banking business of the country is fairly indicated by deposits on that date of 20 billion in national banks, 33 billion in state banks; by loans of 21 billion by national banks and 33 billion by state banks, ib. pp. 106-107.

The problem of dual control of human affairs by two governments both operating within the areas called states is a complex one varying as the types of affairs vary. Herein are materials for the study of this problem so far as it has been worked out with reference to banking.

The governmental instrumentality features of the national banks as authorized in the Act of 1864 are (1) they may be used as depositaries and financial agents by the general government (U. S. C. Title 12, § 90) and (2) each national bank may issue circulating notes (ib., §§ 101 ff.) which serve as currency, though they are legal tender for very few purposes. (ib., § 109). Each national bank's notes are its own promises to pay, to be distinguished from government notes. The statute requires a national bank to deposit bonds of the United States with the treasurer of the United States for the benefit of holders of these notes as security for their redemption. (ib., §§ 131-138).

The private functions of national banks are those customary in private banking, and have been enlarged since 1864. An extreme instance is the Act of September 7, 1916 (U. S. C. Title 12, § 92) authorizing national banks in places of not over 5,000 population to act as agents for fire, life or other insurance by soliciting and selling insurance, and as brokers in making or procuring loans on real estate. The validity of this statute seems not to have been decided. See also the statute considered in First Nat. Bank v. Fellows ex rel. Union Trust Co., 244 U. S. 416, 61 L. ed. 1233, *infra*, p. 343.

The foundation of the argument in favour of the right of a state to tax the bank, is laid in the supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object.

If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the state, as any individual would be; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true. The bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connexion with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the Court, in the case of M'Culloch v. The State of Maryland, is founded on, and sustained by, the idea that the bank is an instrument which is "necessary and proper for carrying into effect the powers vested in the government of the United States." It is not an instrument which the government found ready made, and has supposed to be adapted to its purposes; but one which was created in the form in which it now appears, for national purposes only. It is, undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage. The appellants endeavour to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, &c. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.

If there be any thing in this distinction, it would tend to show that so much of the act as incorporates the bank is constitutional, but so much of it as authorizes its banking operations is unconstitutional. Congress can make the inanimate body, and employ the machine as a depository of, and vehicle for, the conveyance of the treasure of the nation, if it be capable of being so employed, but cannot breathe into it the vital spirit which alone can bring it into useful existence.

Let this distinction be considered.

Why is it that Congress can incorporate or create a bank? This question was answered in the case of M'Culloch v. The State of Maryland. It is an instrument which is "necessary and proper" for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter? If it can, if it be as competent to the purposes of government without, as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. * * *

This distinction, then, has no real existence. To tax its faculties, its trade, and occupation, is to tax the bank itself. To destroy or preserve the one, is to destroy or preserve the other.

It is urged, that Congress has not, by this act of incorporation, created the faculty of trading in money; that it had anterior existence, and may be carried on by a private individual, or company, as well as by a corporation. As this profession or business may be taxed, regulated, or restrained, when conducted by an individual, it may, likewise, be taxed, regulated, or restrained, when conducted by a corporation.

The general correctness of these propositions need not be controverted. Their particular application to the question before the Court, is alone to be considered. We do not maintain that the corporate character of the bank exempts its operations from the action of state authority. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially.

Were the Secretary of the Treasury to be authorized, by law, to appoint agencies throughout the union, to perform the public functions of the bank, and to be endowed with its faculties, as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the states as the bank, and not more so. If, instead of the Secretary of the Treasury, a distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labour, and expense, the profits of the banking business, instead of other emoluments, to be drawn from the treasury, which banking business was essential to the operations of the government, would each state in the union possess a right to control these operations? The question on which this right would depend must always be, are these faculties so essential to the fiscal operations of the government, as to authorize Congress to confer them? Let this be admitted, and the question, does the right to preserve them exist? must always be answered in the affirmative.

Congress was of opinion that these faculties were necessary, to enable the bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national legislature. But, were it now to undergo revision, who would have the hardihood to say, that, without the employment of a banking capital, those services could be performed? That the exercise of these faculties greatly facilitates the fiscal operations of the government, is too obvious for controversy; and who will venture to affirm, that the suppression of them would not materially affect those operations, and essentially impair, if not totally destroy, the utility of the machine to the government. The currency which it circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of government, than it could otherwise be; and, if this be true, the capacity to carry on this trade, is a faculty indispensable to the character and objects of the institution.

The appellants admit, that, if this faculty be necessary, to make the bank a fit instrument for the purposes of the government, Congress possesses the same power to protect the machine in this, as in its direct fiscal operations; but they deny that it is necessary to those purposes, and insist that it is granted solely for the benefit of the members of the corporation. Were this proposition to be admitted, all the consequences which are drawn from it might follow. But it is not admitted. The Court has already stated its conviction, that without this capacity to trade with individuals, the bank would be a very defective instrument, when considered with a single view to its fitness for the purposes of government. On this point the whole argument rests. * * *

The appellants rely greatly on the distinction between the bank and the public institutions, such as the mint or the post office. The agents in those offices are, it is said, officers of government, and are excluded from a seat in Congress. Not so the directors of the bank.

The connexion of the government with the bank, is likened to that with contractors.

It will not be contended, that the directors, or other officers of the bank, are officers of government. But it is contended, that, were their resemblance to contractors more perfect than it is, the right of the state to control its operations, if those operations be necessary to its character, as a machine employed by the government, cannot be maintained. Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true, that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under state control.

If the trade of the bank be essential to its character, as a machine for the fiscal operations of the government, that trade must be as exempt from state control as the actual conveyance of the public money. Indeed, a tax bears upon the whole machine; as well upon the faculty of collecting and transmitting the money of the nation, as on that of discounting the notes of individuals. No distinction is taken between them.

Considering the capacity of carrying on the trade of banking, as an important feature in the character of this corporation, which was necessary, to make it a fit instrument for the objects for which it was created, the Court adheres to its decision in the case of M'Culloch against The State of Maryland, and is of opinion, that the act of the State of Ohio, which is certainly much more objectionable than that of the State of Maryland, is repugnant to a law of the United States, made in pursuance of the constitution, and, therefore, void.[2]

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[2] Compare Smith v. Kansas City Title & Tr. Co. (1921) 255 U. S. 180, 65 L. ed. 577, where the validity of the Act of Congress of July 17, 1916 as amended January 18, 1918, establishing the Federal Land Banks and Joint Stock Land Banks was sustained on the authority of M'Culloch v. Maryland. Day, J., for the court said:

"It is said that the power [given by the statute] to designate these banks as such depositaries has not been exercised by the Government, and that the Federal Land Banks have acted as federal agents only in the case of loans of money for seed purposes made in the summer of 1918, to which we have already referred. But the existence of the power under the Constitution is not determined by the extent of the exercise of the authority conferred under it. Congress declared it necessary to create these fiscal agencies, and to make them authorized depositaries of public money. Its power to do so is no longer open to question.

"But, it is urged, the attempt to create these federal agencies, and to make these banks fiscal agents and public depositaries of the Government, is but a pretext. But nothing is better settled by the decisions of this court than that when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the Government to question its motives. Veazie

FIRST NATIONAL BANK OF BAY CITY v. FELLOWS, ATTORNEY GENERAL, EX REL. UNION TRUST CO.

1917. Supreme Court of the United States. 244 U. S. 416.

Mr. Chief Justice White delivered the opinion of the court. * * *

Section 11 (k) of the Act of Congress approved December 23, 1913, establishing the Federal Reserve Board (38 Stat. 251, 262, c. 6), gives to that board authority "To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

The First National Bank of Bay City having obtained the certificate required began the exercise of the powers stated. Thereupon certain trust companies which under the laws of Michigan had the authority to do the same character of business petitioned the Attorney General of the state to test the right of the national bank to use the functions on the ground that its doing so was contrary to the laws of the State of Michigan and that the action of the Federal Reserve Board purporting to give authority was in contravention of the Constitution of the United States. The Attorney General then, on the relation of the trust companies, commenced in the Supreme Court of the state a proceeding in the nature of *quo warranto* to test the right of the corporation to exercise the functions. The bank in defense fully stated its federal charter, the rights given

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Bank v. Fenno, 8 Wall. 533, 541; McCray v. United States, 195 U. S. 27; Flint v. Stone Tracy Co., 220 U. S. 107, 147, 153, 156, and cases cited.

"That Congress has seen fit in making these banks fiscal agencies and depositaries of public moneys, to grant to them banking powers of a limited character, in nowise detracts from the authority of Congress to use them for the governmental purposes named, if it sees fit to do so. A bank may be organized with or without the authority to issue currency. It may be authorized to receive deposits in only a limited way. Speaking generally, a bank is a moneyed institution to facilitate the borrowing, lending and caring for money. But whether technically banks, or not, these organizations may serve the governmental purposes declared by Congress in their creation. Furthermore, these institutions are organized to serve as a market for United States bonds. Not less than 5% of the capital of the Federal Land Banks, for which stock is outstanding to Farm Loan Associations, is required to be invested in United States bonds. Both kinds of banks are empowered to buy and sell United States bonds. * * *

"We, therefore, conclude that the creation of these banks, and the grant of authority to them to act for the Government as depositaries of public moneys and purchasers of Government bonds, brings them within the creative power of Congress although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United States Bank, or the authority given to national banks to carry on additional activities, destroyed the authority of Congress to create those institutions." Pp. 210-211.

by the act of Congress and the action of the Federal Reserve Board taken thereunder. The Attorney General demurred to this defense, first, because Congress had no power to confer the authority which was called in question; second, because if it had the power, it was without right to delegate to the Reserve Board the determination of when it should be used; and third, because the exercise of the powers was in contravention of the laws and authority of the state and the Reserve Board therefore under the act had no power to grant the certificate.

The case was heard by the full court. * * * It said:

"But in the reasoning of the judges, in the opinions to which I have referred [McCulloch v. Maryland and Osborn v. Bank] I find, I think, a conclusive argument supporting the proposition that congress has exceeded its constitutional powers in granting to banks the right to act as trustees, executors and administrators. If for mere profit it can clothe this agency with the powers enumerated, it can give it the rights of a trading corporation, or a transportation company, or both. There is, as Judge Marshall points out, a natural connection between the business of banking and the carrying on of federal fiscal operations. There is none, apparently, between such operations and the business of settling estates, or acting as the trustee of bondholders. This being so, there is in the legislation a direct invasion of the sovereignty of the state which controls not only the devolution of estates of deceased persons and the conducting of private business within the state, but as well the creation of corporations and the qualifications and duties of such as may engage in the business of acting as trustees, executors and administrators. Such an invasion I think the court may declare and may prevent by its order operating upon the offending agency." [192 Mich. 640, 653.]

But we are of opinion that the doctrine thus announced not only was wholly inadequate to distinguish the case before us from the rulings in McCulloch v. Maryland and Osborn v. Bank, but on the contrary directly conflicted with what was decided in those cases, that is to say, disregarded their authority so as to cause it to be our duty to reverse for the following reasons:

1. Because the opinion of the court instead of testing the existence of the implied power to grant the particular functions in question by considering the bank as created by Congress as an entity with all the functions and attributes conferred upon it, rested the determination as to such power upon a separation of the particular functions from the other attributes and functions of the bank and ascertained the existence of the implied authority to confer them by considering them as segregated, that is, by disregarding their

relation to the bank as component parts of its operations,—a doctrine which, as we have seen, was in the most express terms held to be unsound in both of the cases.

2. Because while in the premise to the reasoning the right of Congress was fully recognized to exercise its legislative judgment as to the necessity for creating the bank including the scope and character of the public and private powers which should be given to it, in application the discretion of Congress was disregarded or set aside by exercising judicial discretion for the purpose of determining whether it was relevant or appropriate to give the bank the particular functions in question.

3. Because even under this mistaken view the conclusion that there was no ground for implying the power in Congress was erroneous because it was based on a mistaken standard, since for the purpose of testing how far the functions in question which were conferred by the act of Congress on the bank were relevant to its business or had any relation to discrimination by state legislation against banks created by Congress it considered not the actual situation, that is, the condition of the state legislation, but an imaginary or non-existing condition, that is, the assumption that so far as the state power was concerned the particular functions were in the state enjoyed only by individuals or corporations not coming at all, actually or potentially, in competition with national banks. And the far-reaching effect of this error becomes manifest when it is borne in mind that plainly the particular functions enumerated in the statute were conferred upon national banks because of the fact that they were enjoyed as the result of state legislation by state corporations, rivals in a greater or less degree of national banks.

4. In view of the express ruling that the enjoyment of the powers in question by the national bank would not be in contravention of the state law, it follows that the reference of the court below to the state authority over the particular subjects which the statute deals with must have proceeded upon the erroneous assumption that because a particular function was subject to be regulated by the state law, therefore Congress was without power to give a national bank the right to carry on such functions. But if this be what the statement signifies, the conflict between it and the rule settled in McCulloch v. Maryland and Osborn v. Bank, is manifest. What those cases established was that although a business was of a private nature and subject to state regulation, if it was of such a character as to cause it to be incidental to the successful discharge by a bank chartered by Congress of its public functions, it was competent for Congress to give the bank the power to exercise such private business in cooperation with or as part of its public

authority. Manifestly this excluded the power of the state in such case, although it might possess in a general sense authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function, since to do so would be but the exertion of state authority to prohibit Congress from exerting a power which under the Constitution it had a right to exercise. From this it must also follow that even although a business be of such a character that it is not inherently considered susceptible of being included by Congress in the powers conferred on national banks, that rule would cease to apply if by state law state banking corporations, trust companies, or others which by reason of their business are rivals or quasi-rivals of national banks are permitted to carry on such business. This must be, since the state may not by legislation create a condition as to a particular business which would bring about actual or potential competition with the business of national banks and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency. Of course as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers. And these considerations clearly were in the legislative mind when it enacted the statute in question. This result would seem to be plain when it is observed (a) that the statute authorizes the exertion of the particular functions by national banks when not in contravention of the state law, that is, where the right to perform them is expressly given by the state law or what is equivalent is deducible from the state law because that law has given the functions to state banks or corporations whose business in a greater or less degree rivals that of national banks, thus engendering from the state law itself an implication of authority in Congress to do as to national banks that which the state law has done as to other corporations; and (b) that the statute subjects the right to exert the particular functions which it confers on national banks to the administrative authority of the Reserve Board, giving besides to that Board power to adopt rules regulating the exercise of the functions conferred, thus affording the means of coordinating the functions when permitted to be discharged by national banks with the reasonable and non-discriminating provisions of state law regulating their exercise as to state corporations,—the whole to the end that harmony and the concordant exercise of the national and state power might result.[3]

[Van Devanter and Day, J. J., dissented from a portion of the opinion not included above.]

EASTON v. IOWA.

1903. Supreme Court of the United States. 188 U. S. 220.

In 1899, in the District Court of Wenneshiek County, State of Iowa, James H. Easton, who had been previously indicted, was tried, found guilty, and sentenced to imprisonment in the penitentiary of Iowa at hard labor for a term of five years, under the provisions of a statute of that state, for the offence of having received, as president of the First National Bank of Decorah, Iowa, a deposit of one hundred dollars in money in said bank, at a time when the bank was insolvent and when such insolvency was known to the defendant. [On appeal the state Supreme Court affirmed and now on error:]

Mr. Justice Shiras delivered the opinion of the court.

Those portions of the Iowa statute whose validity is the question in this case consist of sections 1884 and 1885 of the code of that state, and are in the following terms:

"Sec. 1884. No bank, banking house, exchange broker, deposit office, firm, company, corporation, or person engaged in the banking, brokerage, exchange or deposit business, shall, when insolvent, accept or receive on deposit, with or without interest, any money, bank bills or notes, United States Treasury notes or currency, or other notes, bills, checks or drafts, or renew any certificate of deposit.

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[3] After the decision of the above case Congress enlarged the statute passed upon therein to read as follows:

"To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

"Whenever the laws of such state authorize or permit the exercise of any or all of the foregoing powers by state banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of state or local law within the meaning of this chapter."

This statute, at least so far as it authorized national banks to act as executors, was held valid in Missouri ex rel. Burnes Nat. Bank v. Duncan (1924) 265 U. S. 14, 68 L. ed. 881, two Justices dissenting. Holmes, J., for the majority said of the statute: "This says in a roundabout and polite but unmistakable way that whatever may be the state law, national banks having the permit of the Federal Reserve Board may act as executors if trust companies competing with them have that power," [and the attack upon its validity is] "fully answered by the reasoning in First National Bank of Bay City v. Fellows."

"Sec. 1885. [Penalties for knowingly violating the previous section.] * * *

It will be observed that national banks or banking associations are not specifically named in the statute; and it was hence argued on behalf of the defendant, that such institutions are not within the enactment. As, however, the state courts, following a previous decision of the Supreme Court of Iowa, in the case of State v. Fields, 98 Iowa, 748, held that the statute was applicable to all banks, whether organized under the laws of the state or the acts of Congress, we must accept that construction as correct, and confine our consideration to the question whether, as so construed, the act is within the jurisdiction of the state. * * *

The principles enunciated in McCulloch v. Maryland, 4 Wheat. 316, 425, and in Osborn v. United States Bank, 9 Wheat. 738, though expressed in respect to banks incorporated directly by acts of Congress, are yet applicable to the later and present system of national banks.

In the latter case it was said by Chief Justice Marshall:

"The bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court, in McCulloch v. Maryland, is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.'"

A similar view of the nature of banks organized under the national bank laws has been frequently expressed by this court. Thus, in Farmers' National Bank v. Dearing, 91 U. S. 29, it was said:

"National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end."

Such being the nature of these national institutions, it must be obvious that their operations cannot be limited or controlled by state legislation, and the Supreme Court of Iowa was in error when it held that national banks are organized and their business prosecuted for private gain, and that there is no reason why the officers of such banks should be exempt from the penalties prescribed for fraudulent banking. Nor is it altogether true, as asserted by that court, that there is no act of Congress prohibiting the receipt of deposits by national banks or their officers, when a bank is insolvent. It is true that there is no express prohibition contained in the federal statutes, but there are apt provisions, sanctioned by severe penalties, which are intended to protect the depositors and other creditors of national banks from fraudulent banking. It is not necessary to quote at length those provisions, but it will be sufficient to say that a bank organized under the national bank act is authorized to make contracts; to prescribe, by its board of directors, by-laws regulating the manner in which its general business shall be conducted, and the privileges granted by law exercised and enjoyed; to exercise by its board of directors, or duly authorized officers, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes and drafts, bills of exchange; by receiving deposits; by buying and selling exchange; by loaning money on personal security. Such banks are required to deposit with the Treasurer of the United States, as security for their circulating notes, United States bonds in an amount not less than one-fourth of their capital; to report to the Treasurer of the United States twice each year the average amount of their deposits, and to pay to said Treasurer each half year a tax upon such deposits; and to make to the Comptroller of the Currency not less than five reports during each year, (and special reports as often as he may require,) according to such form as he may require, verified by the oath or affirmation of the president or cashier, which reports shall exhibit in detail the resources and liabilities of the association. The Comptroller is directed to appoint suitable persons to make examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and in doing so to examine any of the officers or agents thereof, and to make a full and detailed report of the condition to the Comptroller. Whenever the Comptroller becomes satisfied of the insolvency of such bank he may, after due examination of its affairs, appoint a receiver, who shall take possession of the assets of the association, wind up its affairs, and make ratable distribution of its assets. And severe penalties are imposed upon any officer or agent of such association who violates any of the provisions of the national bank act.

It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute.

It is argued by the learned Attorney General on behalf of the State of Iowa that "the effect of the statute of Iowa is to require of the officers of all banks within the state a higher degree of diligence in the discharge of their duties. It gives to the general public greater confidence in the stability and solvency of national banks, and in the honesty and integrity of their managing officers. It enables them better to accomplish the purposes and designs of the general government, and is an aid, rather than impediment, to their utility and efficiency as agents and instrumentalities of the United States."

But we are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities.

Nor can we concede that by such legislation of a state, as was attempted in this instance, the affairs of a national bank, or the security of its creditors, would be advantageously affected. The provision of the state statute is express that it is the duty of the officers of the bank, when they know it is insolvent, to at once suspend its active operations; for it is obvious, that to refuse to accept deposits would be equivalent to a cessation of business. Whether a bank is or is not actually insolvent may be, often, a question hard to answer. There may be good reason to believe that, though temporarily embarrassed the bank's affairs may take a fortunate turn. Some of the assets that cannot at once be converted into money may be of a character to justify the expectation that, if actual and open insolvency be avoided, they may be ultimately collectible, and thus the ruin of the bank and its creditors be prevented. McDonald v. Chemical Nat. Bank, 174 U. S. 610. But under the state statute, no such conservative action can be followed by the officers of the bank except at the risk of the penalties of fine and imprisonment. In such a case the provisions of the federal statute would permit the Comptroller to withhold closing the bank and to give an opportunity to escape final insolvency. It would seem that such an exercise of discretion on the part of the Comptroller would, in many cases, be better for all concerned than the unyielding course of action prescribed by the state law. However, it is not our province to vindicate the policy of the federal statute, but to declare that it cannot be overridden by the policy of the state.

Similar legislation to that of the State of Iowa has been considered and disapproved by the supreme courts of several of the other states.

Thus in Commonwealth v. Ketner, 92 Penn. St. 372, one Torrey was indicted and found guilty under a charge that, as the cashier of the First National Bank of Ashland, organized under the laws of the United States, he had embezzled the moneys of the said bank contrary to the form of the act of assembly of the State of Pennsylvania, prescribing a penalty of fine and imprisonment. A writ of *habeas corpus* was allowed by he Supreme Court of the state, and the accused was discharged. * * *

In Allen's Appeal, 119 Pa. St. 192, the question was whether a state law, which forbade "any cashier of any bank from engaging, directly or indirectly, in the purchase or sale of stock, or in any other profession, occupation or calling other than his duty as cashier," and which declared the same to be a misdemeanor, was applicable to the cashier of a national bank, and it was held that it was not so applicable, the court saying, among other things: * * *

"If the state may impose one qualification upon the cashiers, why not another? If upon the cashier, why not upon the president or other officer? Nay, further, suppose the legislature should declare that no person should be a bank director unless he has arrived at fifty years of age, or should be the owner of one hundred shares of stock, could we apply such an act to national banks? If so, such institutions would have a precarious existence. They would be liable to be interfered with at every step, and it might not be long before the whole national banking system would have to be thrown aside as so much worthless lumber." * * *

So, in In re Thomas, 82 Fed. Rep. 304, it was held by the Circuit Court of the United States for the Southern District of Ohio that, the governor of the soldiers' home at Dayton, Ohio, in serving to the inmates, as food, oleomargarine furnished by the government, is not subject to the law of the state prescribing the manner in which oleomargarine shall be used in eating houses, because his act is that of the government of the United States within its constitutional powers, and wholly beyond the control or regulation of the legislature of the state.

This judgment was affirmed by this court in Ohio v. Thomas, 173 U. S. 276. * * *

This subject has received recent and careful consideration in the case of Davis v. Elmira Savings Bank, 161 U. S. 275, twice argued in this court. The legislature of the State of New York had provided by law that savings banks, organized under the laws of that state, should have a preference as depositors in banks in case of the insolvency of such banks, and it was sought to apply this provision to the case of a deposit by a savings bank in a national bank which had subsequently become insolvent. But this court held that such a provision could not be extended by a state to national banks, because it was repugnant to that provision of the national banking act which requires the assets of an insolvent national bank to be ratably distributed among its creditors. * * *

Cross v. North Carolina, 132 U. S. 131, was a case wherein this court pointed out the distinction between crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United

States; and accordingly it was held that the crime of forging promissory notes, purporting to be made by individuals, and made payable to or at a national bank, was a distinct and separate offence, indictable under the laws of the state.

Undoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction. So, likewise, it may declare, by special laws, certain acts to be criminal offences when committed by officers or agents of its own banks and institutions. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States.

It was by failing to observe the distinction between the two classes of cases that, we think, the courts below fell into error.

Judgment reversed.

FIRST NATIONAL BANK OF SAN JOSE v. STATE OF CALIFORNIA.

1923. Supreme Court of United States. 262 U. S. 366.

[Section 1273, California Code of Civil Procedure, declared escheated to the state any deposit in "any bank" if the depositor within twenty years after such deposit had made no new deposit, had not drawn on the deposit, had made no claim, and neither the depositor nor any claimant had filed notice of present residence, and the state's attorney general was authorized to institute actions for deposits so declared escheated. This was such an action. The state had judgment, which was affirmed by the state Supreme Court, and now on error:]

Mr. Justice McReynolds delivered the opinion of the Court. * * *

The Supreme Court declined to express an "opinion upon the question whether the judgment of the superior court herein operates as a present escheat of the rights of the several depositors against the respective banks, or whether under section 1272 they each still have the right within the time there stated to prosecute an action to obtain payment of their several deposits from the state treasurer," and said, "if they have such right the judgment of the superior court would not be a bar thereto."

Section 5136, U. S. Revised Statutes, confers upon national banks power to receive deposits, which necessarily implies the right to accept loans of money, promising to repay upon demand to lender or his order. These banks are instrumentalities of the federal government. Their contracts and dealings are subject to the operation of general and undiscriminating state laws which do not conflict with the letter or the general object and purposes of congressional legislation. But any attempt by a state to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created. Davis v. Elmira Savings Bank, 161 U. S. 275, 283, 288, 290.

"National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. * * * Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single state cannot give.'" Farmers' & Mechanics' National Bank v. Dearing, 91 U. S. 29, 33, 34.

Congressional legislation in respect of national banks "has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." Easton v. Iowa, 188 U. S. 220, 229.

Plainly, no state may prohibit national banks from accepting deposits or directly impair their efficiency in that regard. And we think, under circumstances like those here revealed, a state may not dissolve contracts of deposit even after twenty years and require national banks to pay to it the amounts then due; the settled principles stated above oppose such power.

Does the statute conflict with the letter or general object and purposes of the legislation by Congress? Obviously, it attempts to qualify in an unusual way agreements between national banks and their customers long understood to arise when the former receive deposits under their plainly granted powers. If California may thus interfere other states may do likewise; and, instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or ten, or fifteen. We cannot conclude that Congress intended to permit such results. They seem incompatible with the purpose to establish a system of governmental agencies specifically empowered and expected freely to accept deposits from customers irrespective of domicile with the commonly consequent duties and liabilities. The depositors of a national bank often live in many different states and countries; and certainly it would not be an immaterial thing if the deposits of all were subject to seizure by the state where the bank happened to be located. The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation.

This Court has often pointed out the necessity for protecting federal agencies against interference by state legislation. The approved principle of *obsta principiis* should be adhered to.[4]

Reversed.

FIRST NATIONAL BANK IN ST. LOUIS v. STATE OF MISSOURI.

1924. Supreme Court of the United States. 263 U. S. 640.

Mr. Justice Sutherland delivered the opinion of the Court.

The State of Missouri brought this proceeding in the nature of *quo warranto* in the state Supreme Court against the plaintiff in error to determine its authority to establish and conduct a branch bank in the City of St. Louis. The information avers that the bank was organized under the laws of the United States and was and is engaged in a general banking business in that city at a banking house, the location of which is given; that, in contravention of its charter and of the act of Congress under which it was incorporated, it has illegally opened and is operating a branch bank for doing a general banking business in a separate building several blocks from its banking house, and proposes to open additional branch banks at various other locations, and that this is in violation of a statute of the state expressly prohibiting the establishment of branch banks. The prayer is that, upon final hearing, the bank be ousted from the privilege of operating this branch bank or any other. A demurrer to the information was interposed and the cause thereupon submitted. The contention of the state was upheld and judgment rendered in accordance with the prayer. 297 Mo. 397.

The correctness of the judgment is challenged under numerous specifications of error presenting federal questions, which, for the purposes of the case, may be considered under two heads: (1) ? Whether the state statute is valid as applied to national banks; and (2) Whether a proceeding to call a national bank to account 2? for acts of the kind here alleged may be maintained by the state, and whether the form of remedy pursued is sustainable.

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[4] The following cases were here cited: McCulloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; Osborn v. United States Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Farmers & Mechanics Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; California v. Central Pacific R. Co., 127 U. S. 1, 32 L. ed. 150; Davis v. Elmira Sav. Bank, supra; Easton v. Iowa, 188 U. S. 220, 47 L. ed. 452; Covington v. First Nat. Bank, 198 U. S. 100, 49 L. ed. 963; Farmers & Mechanics Sav. Bank v. Minnesota, 232 U. S. 516, 58 L. ed. 706; Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234; Bank of California v. Richardson, 248 U. S. 476, 63 L. ed. 372.

First, The Missouri statute (§ 11737, R. S. Mo., 1919) provides "that no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house." That the facts alleged in the information bring the case within that part of the statute which prohibits the maintenance of branch banks and that the statute applies to national banks is conclusively established by the decision of the state court, and we confine ourselves to the inquiry whether, as thus applied, the statute is valid.

National banks are brought into existence under federal legislation, are instrumentalities of the federal government and are necessarily subject to the paramount authority of the United States. Nevertheless, national banks are subject to the laws of a state in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States. National Bank v. Commonwealth, 9 Wall. 352, 362; Davis v. Elmira Savings Bank, 161 U. S. 275, 283. These two cases are cited and followed in the later case of McClellan v. Chipman, 164 U. S. 347, 357, and the principle which they establish is said to contain a rule and an exception, "the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States." See also Waite v. Dowley, 94 U. S. 527, 533. The question is whether the Missouri statute falls within the rule or within the exception.

Does it conflict with the laws of the United States? In our opinion, it does not. The extent of the powers of national banks is to be measured by the terms of the federal statutes relating to such associations, and they can rightfully exercise only such as are expressly granted or such incidental powers as are necessary to carry on the business for which they are established. Bullard v. Bank, 18 Wall. 589, 593; Logan County National Bank v. Townsend, 139 U. S. 67, 73; California Bank v. Kennedy, 167 U. S. 362, 366. Among other things the federal law (Rev. Stat., § 5134) provides that the organization certificate of the association shall specifically state "the place where its operations of discount and deposit are to be carried on, designating the state, Territory or district, and the particular county, city, town, or village." By another provision (Rev. Stats. § 5190) it is required that "the usual business of each national banking association shall be transacted at an office or banking-house located in the place specified in its organization certificate." Strictly, the latter provision, employing as it does, the article "an," to qualify words in the singular number, would confine the association to one office or banking-house. We are asked, however, to construe it otherwise in view of the rule that "words importing the singular number may extend and be applied to several persons or things." Rev. Stat., § 1. But obviously this rule is not one to be applied except where it is necessary to carry out the evident intent of the statute. See Garrigus v. Board of Commissioners, 39 Ind. 66, 70; Moynahan v. City of New York, 205 N. Y. 181, 186. Here there is not only nothing in the context or in the subject matter to require the construction contended for, but other provisions of the national banking laws are persuasively to the contrary. By § 5138, Rev. Stat., the minimum amount of capital is fixed in proportion to the population of the place where the bank is located. If it had been intended to allow the establishment by an association of not one bank only but, in addition, as many branch banks as it saw fit, it is remarkable, to say the least, that there should have been no provision for adjusting the capital to the latter contingency or for determining how or under what circumstances such branch banks might be established or for regulating them. Section 5155, Rev. Stat., provides that it shall be lawful for a state bank "having branches, the capital being joint and assigned to and used by the mother-bank and branches in definite proportions, to become a national banking association * * * and to retain and keep in operation its branches * * * the amount of the circulation * * * to be regulated by the amount of capital assigned to and used by each." This provision, confined by its terms, as it is, to existing state institutions, may be fairly considered as constituting an exception to the general rule, and the presence of safeguarding limitations in the excepted case, with their entire absence from the statute otherwise, goes far in the direction of confirming the conclusion that the general rule does not contemplate the establishment of branch banks. This apparently was the interpretation of Congress itself, since in two instances at least special legislation was deemed necessary to allow the establishment of branch banks, viz: at the Chicago Exposition, in 1892, c. 71, 27 Stat. 33, and at the St. Louis Exposition, in 1901, c. 864, 31 Stat. 1444, § 21, the existence of the branch bank in each instance being expressly limited to the period of two years. * * *

Second. The state statute as applied to national banks is, therefore, valid, and the corollary that it is obligatory and enforceable necessarily results, unless some controlling reason forbids; and, since the sanction behind it is that of the state and not that of the national government, the power of enforcement must rest with the former and not with the latter. To demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law. It is insisted with great earnestness that the United States alone may inquire by *quo warranto* whether a national bank is acting in excess of its charter powers, and that the state is wholly without authority to do so. This contention will be conceded since it is plainly correct, but the attempt to apply it here proceeds upon a complete misconception of what the state is seeking to do, a misconception which arises from confounding the relief sought with the circumstances relied upon to justify it. The state is neither seeking to enforce a law of the United States nor endeavoring to call the bank to account for an act in excess of its charter powers. What the state is seeking to do is to vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation. The latter inquiry is preliminary and collateral, made only for the purpose of determining whether the state law is free to act in the premises or whether its operation is precluded in the particular case by paramount law. Having determined that the power sought to be exercised by the bank finds no justification in any law or authority of the United States, the way is open for the enforcement of the state statute. In other words, the national statutes are interrogated for the sole purpose of ascertaining whether anything they contain constitutes an impediment to the enforcement of the state statute, and the answer being in the negative, they may be laid aside as of no further concern.

The application of the state statute to the present case and the power of the state to enforce it being established, the nature of the remedy to be employed is a question for state determination; and the judgment of the state court that the one here employed was appropriate is conclusive unless it involves a denial of due process of law, which plainly it does not. We are not concerned with the question whether an information in the nature of *quo warranto*, according to the general principles of the law, is in fact appropriate. It is enough that the Supreme Court of the state has so held. * * *

The judgment of the Supreme Court of Missouri is therefore

Affirmed.

MR. JUSTICE VAN DEVANTER, dissenting. * * *

It must be admitted that, in so far as the legislation of Congress does not provide otherwise, the general laws of a state have the same application to the ordinary transactions of a national bank,—such as incurring and discharging obligations to depositors, presenting drafts for acceptance or payment and giving notice of their dishonor, taking pledges for the repayment of money loaned, and receiving or making conveyances of real property,—that they have to like transactions of others. But not so of questions of corporate power. As explained in Easton v. Iowa and other cases, their solution must turn on the laws of the United States under which the bank is created. * * *

Only where those laws bring state laws into the problem,—as by enabling national banks to act as executors, administrators, etc., where that is permitted by state laws,—can the latter have any bearing on the question of corporate power—the privileges which the bank may exercise. First National Bank v. Union Trust Co., 244 U. S. 416.

The proceeding now before us is an information in the nature of *quo warranto* brought in the Supreme Court of Missouri, whereby that state challenges the power of a national bank in the City of St. Louis to conduct a branch bank established by it in that city and asks that the bank be ousted from that privilege on the grounds, first, that establishing and conducting the branch is a violation of the bank's charter powers, and, secondly, that it is prohibited by a law of the state.

It is not claimed that the laws of the United States contain any provision whereby the privilege asserted by the bank is made to depend on the will or legislative policy of the state; nor do they in fact contain any such provision. Whether the bank has the privilege which it asserts is therefore in no way dependent on or affected by the state law, but turns exclusively on the laws of the United States. If they grant the privilege, expressly or by fair implication, no law of the state can abridge it or take it away. And if they do not grant it, they in effect prohibit it, and no law of the state can strengthen or weaken the prohibition. In either event nothing can turn on the state law. It simply has no bearing on the solution of the question.

In this situation the state is not, in my opinion, entitled to maintain the proceeding. It has no distinctive right to protect, nor any applicable law to vindicate or enforce. The proceeding is one which may be maintained only in the public right. Here the state is not authorized to represent or to speak for the public. The bank is not a creation and instrumentality of the state, but of the national government. Its presence in the state is attributable to the national power, not to the state's permission. Whether the bank shall be kept within its legitimate powers and made to discontinue any departure from or abuse of them is a matter in which the people of all the states have the same interest, the bank being a national creation and instrumentality. The people of Missouri merely share in the common interest. "In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from the status." Massachusetts v. Mellon, 262 U. S. 447, 486. It therefore is apparent that the state is here mistakenly appropriating to itself a function which belongs to the United States. * * * [Taft, C. J., and Butler, J., concurred in this dissent.]

NOTE.

Cross v. North Carolina (1889) 132 U. S. 131, 33 L. ed. 287: The criminal law of a state may be invoked to punish one who forges a note payable to a national bank even though the purpose of the forgery is to enable the bank, by false entry of the note as an asset, to deceive the United States bank examiner.

Commonwealth v. Marsino (1925) 252 Mass. 224, 147 N. E. 859: There is no statute of Congress making larceny from a national bank punishable and such a larceny is punishable under state law. Compare Commonwealth v. Felton (1869) 101 Mass. 204 with Commonwealth v. Barry (1874) 116 Mass. 1.

Commonwealth v. Clark County Nat. Bank (1919) 187 Ky. 151, 219 S. W. 175: A national bank is subject to a state statute which escheats to the state real property held in the state by any corporation, not necessary and proper for carrying on its business.

Farmers & Mechanics Nat. Bank v. Dearing (1875) 91 U. S. 29, 23 L. ed. 196: The national statute so explicitly prescribes the effect which usury shall have upon loans made by national banks as to make inapplicable to such loans any state law which prescribes a different effect. (How New York reacted to adjust her usury law to prevent putting her state banks at a disadvantage, see note by the present writer, in 6 Col. Law Rev. 519-521. See also, Schlesinger v. Gilhooly (1907) 189 N. Y. 1, 81 N. E. 619.)

State ex rel. Whitmore v. Barboglio (1924) 63 Utah 432, 226 Pac. 904: It is not inconsistent with any national law for a state court on an information in the nature of a quo warranto to determine title, in case of a disputed election, to the office of director of a national bank, but a state statute which restricts such actions to officers of corporations "created by the authority of this state" does deprive the state court of jurisdiction.

Merchants Nat. Bank v. Ford (1907) 124 Ky. 403, 99 S. W. 260: On notes given in Kentucky and assigned to a national bank even though located in another state the maker has the defenses allowed by Kentucky law.

Guthrie v. Harkness (1905) 199 U. S. 148, 50 L. ed. 130: State common law or declaratory statute giving corporate shareholders a right to inspect the books of their corporation applies to national banks.

Woodworth v. Old Second Nat. Bank (1908) 154 Mich. 459, 117 N. W. 893, 118 N. W. 581: State courts have jurisdiction to compel officers of a national bank to permit stockholder's examination of its records for a proper purpose. Accord: Matter of Tuttle v. Iron Nat. Bank (1902) 170 N. Y. 9, 62 N. E. 761, Winter v. Baldwin (1889) 89 Ala. 483, 7 So. 734.

McClellan v. Chipman (1896) 164 U. S. 347, 41 L. ed. 461: Where a state statute invalidates preferences given or conveyances made by insolvent debtors or by debtors in contemplation of insolvency it validly applies to preferences given or conveyances made to national banks, there being no provision of any national statute in conflict therewith.

Davis v. Elmira Sav. Bank (1896) 161 U. S. 275, 40 L. ed. 700: A New York statute making savings banks as depositors in other banks preferred creditors in case of insolvency of the latter banks is invalid as to deposits of savings banks in national banks because the national statute requires the United States

Comptroller of the Currency in winding up insolvent national banks to distribute the assets ratably to all creditors.

"Instrumentalities like national banks or the federal reserve banks, in which there are private interests, are not departments of the government. They are private corporations in which the government has an interest." Brandeis, J., in Emergency Fleet Corporation, United States Shipping Board v. Western Union Tel. Co. (1928) 275 U. S. 415, 425, holding that the Fleet Corporation is a department of the government within the meaning of a national statute, Post Roads Act, July 24, 1864, by which acceptance of its benefits by telegraph companies bound them to give preferential rates to "departments of the government." See for the organization and functions of this peculiar corporation, the case cited and those cited in it.

"The right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks * * * is undeniable." Van Reed v. Peoples Nat. Bank (1905) 198 U. S. 554, 557, 49 L. ed. 1161. The extent to which national banks may sue or be sued civilly in state or national courts is distinct from the question what law, state or national, either court shall apply, that is what law, state or national, governs in the particular matter. Congress has declared that a national bank shall be deemed for purposes of suing or being sued a "citizen" of the state in which it is located. Congress has also declared that most types of suits by or against national banks shall be cognizable in state courts, but that some are cognizable exclusively in the federal courts. U. S. C., Title 28, § 41, subd. (16), Title 12, § 94.

That a state may not tax the operations of a national bank but may under restrictions tax the property of the corporation and the shares of shareholders as their property, see the chapter on Taxation. See Alfred J. Schweppe (1922) 6 Minn. Law. Rev. 219-229.

Speaking of state banks, banks organized under the laws of a state, that have voluntarily joined the Federal Reserve Bank system, it has been said:

"Finally Congress may employ state corporations with their consent as instrumentalities of the United States, Clallam County v. United States, 263 U. S. 341, and may make frauds that impair their efficiency crimes, United States v. Walter, 263 U. S. 15," Westfall v. United States (1927) 274 U. S. 256, 71 L. ed. 1036, sustaining a conviction of Westfall charged with aiding and procuring the branch manager of a state bank which was a member of the Federal Reserve System to misapply the funds of the state bank, the indictment being drawn under a national statute, and the statute as thus construed was held valid.

BATTLE v. UNITED STATES.

1908. Supreme Court of the United States. 209 U. S. 36.

Mr. Justice Holmes delivered the opinion of the court.

This case comes up on a writ of error to the United States Circuit Court, after a conviction of the plaintiff in error of murder without capital punishment. The chief error assigned is that the court proceeded without jurisdiction—an objection taken by demurrer and renewed in other forms. The crime was committed upon land bought by the United States in the city of Macon, on which it was building a post office and court-house, and over which the State of Georgia had ceded jurisdiction; but it is said that murder in a post office of the United States has not been made an offense against the United States, whatever might be the power of Congress if it saw fit to put it forth.

There can be no doubt of the power of Congress to purchase land within a state for post offices or courts, by consent of the legislature of the state, and to exercise exclusive legislation over the same. Post offices are among the "other needful buildings" for the erection of which, as well as of "forts, magazines, arsenals, dock-yards," it is assumed that land will be bought, and for which land has been bought by the government all over the United States. Const., Art. I, § 8, cl. 17. Indeed, this is not denied. The power to establish post offices is given by Art. I, § 8, cl. 7, in terms. See Kohl v. United States, 91 U. S. 367, 372; Burt v. Merchants' Insurance Co., 106 Mass., 356; Trombley v. Humphrey, 23 Mich., 471, 475; Sinks v. Reese, 19 Ohio St. 306. The exclusive legislative power and jurisdiction of the United States is equally clear. Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 525; Benson v. United States, 146 U. S. 325. So that the question is only whether the statutes of the United States extend to this case, which was the question intended to be raised.

By Rev. Stat. § 5339, "Every person who commits murder—First. Within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States; * * * shall suffer death"; and by the act of January 15, 1897, c. 29, § 1, 29 Stat. 487, in such cases "the jury may qualify their verdict by adding thereto 'without capital punishment,'" whereupon the sentence is imprisonment at hard labor for life. The jurisdiction of the United States courts under these sections is exclusive. Rev. Stat. § 711. If the language of the Constitution is wide enough to authorize the purchase of land for a post office and court-house and the acceptance of a grant of jurisdiction, there is no reason for taking the language of the statute in any narrower sense. The argument, although ostensibly directed against the statute, must embrace the Constitution, and, as we have implied, such an argument comes many years too late. [After brief comment upon some exceptions taken to the trial judge's instructions the opinion concludes:]

The foregoing are the exceptions argued. In our opinion there is nothing in them or in any that were taken. The judgment of the Circuit Court must stand.[5]

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[5] Accord: United States v. Andem (1908) 158 Fed. 996 (forgery in a federal building at Trenton, New Jersey (in Trenton? or surrounded by Trenton?) over

FORT LEAVENWORTH R. CO. v. LOWE.

1885. Supreme Court of the United States. 114 U. S. 525.

This was a suit at law brought by the plaintiff in error as plaintiff below in a District Court of the State of Kansas to recover taxes imposed upon it and paid, on its property within the Fort Leavenworth Military Reservation. The defendant, sheriff of the County of Leavenworth, demurred to the complaint. The demurrer was sustained by the district court, and the judgment thereon was affirmed by the supreme court of the state. This writ of error was brought to review that judgment. The facts which raise the federal question are stated in the opinion of the court.

Mr. Justice Field delivered the opinion of the court.

The plaintiff, a corporation organized under the laws of Kansas, was in 1880, and has ever since been, the owner of a railroad in the reservation of the United States in that state, known as the Fort Leavenworth Military Reservation. In that year its track, right of way, franchises, road-bed, telegraph line and instruments connected therewith on the reservation, were assessed by the board of assessors of the state, and a tax of $394.40 levied thereon, which was paid by the railroad company under protest, in order to prevent a sale of the property. The present action is brought to recover back the money thus paid, on the ground that the property, being entirely within the reservation, was exempt from assessment and taxation by the state.

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which the United States had acquired exclusive jurisdiction, held punishable by a federal court, the law applicable being that stated in a New Jersey statute which by adoption Congress had made a part of the statutory law of the United States in said federal "island" at Trenton); State ex rel. Jones v. Mack (1897) 23 Nev. 359, 47 Pac. 763, 62 Am. St. 811 (a state court has no jurisdiction to try a person charged with assault committed with a deadly weapon on such a federal "island" as is above described).

Cf. United States v. Bateman (1888) 34 Fed. 86 (The Presidio, an area adjoining San Francisco, was occupied by the United States as a military reservation from its conquest from Mexico continuously until the homicide was committed. Prior to the admission of California and since, the area has been public land of the United States reserved from sale. The act of Congress admitting California into the Union did not reserve any special authority ("sovereignty") to the general government over the area. Held, that the homicide, one soldier killing another, both being stationed there, was not an offense against the United States which did not have over the area the exclusive jurisdiction referred to in Art. I, § 8, Cl. 17, and that the State of California had sole jurisdiction to punish the offense); Accord: United States v. Stahl (1868) Fed. Cas. No. 16373, McCahon 206, 1 Kans. 606; Clay v. State (1866) 4 Kans. 49 (homicide in Ft. Leavenworth military reservation); and see United States v. Tully (1905) 140 Fed. 899 (Tully was convicted of murder by the state trial court and the conviction was reversed by the state supreme court on the ground that the offense was not committed within the jurisdiction of the state, the place of committal being land used by the United States army as an annex to the Ft. Missoula military reservation in Montana. On a subsequent indictment in the federal court the accused was discharged for want of jurisdiction, the federal court disagreeing with the state supreme court as to the status of the site of the crime).

The land constituting the reservation was part of the territory acquired in 1803 by session from France, and, until the formation of the State of Kansas, and her admission into the union, the United States possessed the rights of a proprietor, and had political dominion and sovereignty over it. For many years before that admission it had been reserved from sale by the proper authorities of the United States for military purposes, and occupied by them as a military post. The jurisdiction of the United States over it during this time was necessarily paramount. But in 1861 Kansas was admitted into the union upon an equal footing with the original states, that is, with the same rights of political dominion and sovereignty, subject like them only to the Constitution of the United States. Congress might undoubtedly, upon such admission, have stipulated for retention of the political authority, dominion and legislative power of the United States over the reservation, so long as it should be used for military purposes by the government; that is, it could have excepted the place from the jurisdiction of Kansas, as one needed for the uses of the general government. But from some cause, inadvertence perhaps, or over-confidence that a recession of such jurisdiction could be had whenever desired, no such stipulation or exception was made. The United States, therefore, retained after the admission of the state only the rights of an ordinary proprietor; except [that,] as an instrument for the execution of the powers of the general government, that part of the tract, which was actually used for a fort or military post, was beyond such control of the state, by taxation or otherwise, as would defeat its use for those purposes. So far as the land constituting the reservation was not used for military purposes, the possession of the United States was only that of an individual proprietor.[6] The state could have exercised with reference to it, the same authority and jurisdiction which she could have exercised over similar property held by private parties. This defect in the jurisdiction of the United States was called to the attention of the government in 1872. In April of that year the secretary of war addressed a communication to the attorney-general, enclosing papers touching the reservation, and submitting for his official opinion the questions, whether under the Constitution the reservation of the land for a site as a military post and for public buildings took it out of the operation of the law of March 3, 1859, 11 Stat. 430, and, if so, what action would be required on the part of the executive or Congress to restore the land to the exclusive jurisdiction of the United States. The attorney-general replied that the act admitting Kansas as a state into the union had the effect to withdraw from federal jurisdiction all the territory within the boundaries of the new state, excepting only that of the Indians having treaties with the United States, which provided that without their consent such territory should not be subject to state jurisdiction, and the reservation was not within this exception; and that to restore the federal jurisdiction over the land included in the reservation, it would be necessary to obtain from the State of Kansas a cession of jurisdiction, which he had no doubt would upon application be readily granted by the state legislature. 14 Opin. Attorneys General, 33. It does not appear from the record before us that such application was ever made; but, on the 22d of February, 1875, the legislature of the state passed an act entitled "An Act to cede jurisdiction to the United States over the territory of the Fort Leavenworth Military Reservation," the first section of which is as follows:

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[6] If this statement is correct in its general suggestion or point of view is it not too sweeping? Compare Van Brocklin v. Tennessee (1886) 117 U. S. 151, 29 L. ed. 845 (land owned by the United States within a state though unoccupied and unused for any governmental purpose other than eventual sale is exempt from state taxation); Camfield v. United States (1897) 167 U. S. 518, 42 L. ed. 260 (Congress may by legislation protect federal proprietary interests in vacant public land which lies within the bounds of a state even by regulations which restrict the conduct of adjacent landowners upon their own land); Wilcox v. Jackson (1839) 13 Pet. (U. S.) 498, 516, 10 L. ed. 264 (Congress has exclusive power to make the rules of law which determine how and when the title to public land passes from the United States. See Const. Art. IV, Sec. 3, Cl. 2.); Utah Power & Light Co. v. United States (1917) 243 U. S. 389, 61 L. ed. 791 (a state can not authorize condemnation of public lands of the United States within the bounds of the state for public utility purposes). In the last cited case Van Devanter, J. for the court said: "True, for many purposes a state has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them. Thus while the state may punish public offenses, such as murder or larceny, committed on such lands, and may tax private property, such as live stock, located thereon, it may not tax the lands themselves or invest others with any right whatever in them.

"That exclusive jurisdiction be, and the same is hereby ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the Fort Leavenworth Reservation in said state, as declared from time to time by the president of the United States, saving, however, to the said state the right to serve civil or criminal process within said reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said state, but outside of said cession and reservation; and saving further to said state the right to tax railroad, bridge, and other corporations, their franchises and property, on said reservation." Laws of Kansas, 1875, p. 95.

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* * * And so we are of opinion that the inclusion within a state of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power."

The question as to the right of the plaintiff to recover back the taxes paid depends upon the validity and effect of the last saving clause in this act. As we have said, there is no evidence before us that any application was made by the United States for this legislation, but, as it conferred a benefit, the acceptance of the act is to be presumed in the absence of any dissent on their part. The contention of the plaintiff is that the act of cession operated under the Constitution to vest in the United States exclusive jurisdiction over the reservation, and that the last saving clause, being inconsistent with that result, is to be rejected. The Constitution provides that "Congress shall have power to *exercise exclusive legislation in all cases whatsoever* over such district, (not exceeding ten miles square,) as may, by cession of particular states and the acceptance of Congress, become the seat of the government of the United States, and *to exercise like authority* over all places purchased by the consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Art. 1, sec. 8. * * *

This power of exclusive legislation is to be exercised, as thus seen, over places purchased, by consent of the legislatures of the states in which they are situated, for the specific purposes enumerated. It would seem to have been the opinion of the framers of the Constitution that, without the consent of the states, the new government would not be able to acquire lands within them; and therefore it was provided that when it might require such lands for the erection of forts and other buildings for the defence of the country, or the discharge of other duties devolving upon it, and the consent of the states in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislative authority over them. Purchase with such consent was the only mode then thought of for the acquisition by the general government of title to lands in the states. Since the adoption of the Constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary, for the purchase by the general government of lands within the states. If any doubt has ever existed as to its power thus to acquire lands within the states, it has not had sufficient strength to create any effective dissent from the general opinion. The consent of the states to the purchase of lands within them for the special purposes named is, however, essential, under the Constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion.[7] Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the states equally with the property of private individuals.[8]

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[7] Meaning governmental authority additional to what the general government had over it prior to such consent, that is, passing from the federal into the unitary scheme of American government.

But not only by direct purchase have the United States been able to acquire lands they needed without the consent of the states, but it has been held that they possess the right of eminent domain within the states, * * *. This doctrine was authoritatively declared in Kohl v. United States, 91 U. S. 367. * * *

Besides these modes of acquisition, the United States possessed, on the adoption of the Constitution, an immense domain lying north and west of the Ohio River, acquired as the result of the Revolutionary War from Great Britain, or by cessions from Virginia, Massachusetts and Connecticut; and, since the adoption of the Constitution, they have by cession from foreign countries, come into the ownership of a territory still larger, lying between the Mississippi River and the Pacific Ocean, and out of these territories several states have been formed and admitted into the union. The proprietorship of the United States in large tracts of land within these states has remained after their admission. There has been, therefore, no necessity for them to purchase or to condemn lands within those states, for forts, arsenals, and other public buildings, unless they have disposed of what they afterwards needed. Having the title, they have usually reserved certain portions of their lands from sale or other disposition, for the uses of the government.

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[8] Certainly persons thereon are within the jurisdiction of the state and as much within the control of the state as are persons in any other part of the state. Of course, federal agents thereon doing acts validly authorized by federal law are exempt from state interference as are federal agents doing federally authorized acts in other parts of the state.

In Ohio v. Thomas (1899) 173 U. S. 276, 283, 43 L. ed. 699, Thomas was convicted in an Ohio court for violation of an Ohio statute which imposed regulations upon the using or serving of oleomargarine in eating houses. On his petition to a federal court for a writ of habeas corpus it appeared that the acts charged were done by him as governor of a national soldiers' home located in the State of Ohio. Though the United States had acquired this land with the consent of the state Congress had granted the state's jurisdiction back to it. The writ was issued and the prisoner discharged. In affirming the discharge the Supreme Court held that the governor used and served the oleomargarine under specific authority of Congress given in appropriation bills enacted in response to itemized estimates which the court said must be presumed to have included oleomargarine as part of the rations of the inmates. Mr. Justice Peckham, for the court, said: "Federal officers who are discharging their duties in a state and who are engaged as this appellee was engaged in superintending the internal government and management of a federal institution, under the lawful direction of its board of managers and with the approval of Congress, are not subject to the jurisdiction of the state in regard to those very matters of administration which are thus approved by federal authority.

"In asserting that this officer under such circumstances is exempt from the state law, the United States are not thereby claiming jurisdiction over this particular piece of land, in opposition to the language of the act of Congress ceding back the jurisdiction the United States received from the state. The government is but claiming that its own officers, when discharging duties under federal authority pursuant to and by virtue of valid federal laws, are not subject to arrest or other liability under the laws of the state in which their duties are performed."

In Pundt v. Pendleton (1909) 167 Fed. 997, teamsters employed by the quarter-master's department of the United States army, not enlisted men, and free to quit "except as bound by contract" who had worked for the government, one more than a year others about three years, were held exempt from state public road service required by Georgia law of all male inhabitants of the state between the ages of 16 and 50. Was the fact material that the teamsters lived inside a federal military reservation which had been purchased by the United States with the consent of the legislature of Georgia?

This brief statement as to the different modes in which the United States have acquired title to lands upon which public buildings have been erected will serve to explain the nature of their jurisdiction over such places, and the consistency with each other of decisions on the subject by federal and state tribunals, and of opinions of the attorneys general.

When the title is acquired by purchase by consent of the legislatures of the states, the federal jurisdiction is exclusive of all state authority. This follows from the declaration of the Constitution that Congress shall have "like authority" over such places as it has over the district which is the seat of government; that is, the power of "exclusive legislation in all cases whatsoever." Broader or clearer language could not be used to exclude all other authority than that of Congress; and that no other authority can be exercised over them has been the uniform opinion of federal and state tribunals, and of the attorneys general.

The reservation which has usually accompanied the consent of the states, that civil and criminal process of the state courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them; but is admitted to prevent them from becoming an asylum for fugitives from justice. * * *

The case referred to in which the subject was considered by a learned state court is that of Commonwealth v. Clary, 8 Mass. 72. There the Supreme Court of Massachusetts held that the courts of the commonwealth could not take cognizance of offences committed upon lands in the town of Springfield purchased with the consent of the commonwealth by the United States for the purpose of erecting arsenals upon them. That was the case of a prosecution against the defendant for selling spirituous liquors on the land without a license, contrary to a statute of the state. But the court held that the law had no operation within the lands mentioned.

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In Sinks v. Reese, 19 Ohio St. 306, the question came before the Supreme Court of Ohio, as to the effect of a proviso in the act of that state, ceding to the United States its jurisdiction over lands within her limits for the purposes of a National Asylum for Disabled Volunteer Soldiers, which was, that nothing in the act should be construed to prevent the officers, employees and inmates of the asylum, who were qualified voters of the State, from exercising the right of suffrage at all township, county, and state elections in the township in which the National Asylum should be located. And it was held that, upon the purchase of the territory by the United States, with the consent of the legislature of the state, the general government became invested with exclusive jurisdiction over it and its appurtenances in all cases whatsoever; and that the inmates of such asylum resident within the territory, being within such exclusive jurisdiction, were not residents of the state so as to entitle them to vote, within the meaning of the [state] constitution, which conferred the elective franchise upon its residents alone.[9] * * *

These authorities are sufficient to support the proposition which follows naturally from the language of the Constitution, that no other legislative power than that of Congress can be exercised over lands within a state purchased by the United States with her consent for one of the purposes designated; and that such consent under the Constitution operates to exclude all other legislative authority.

But with reference to lands owned by the United States, acquired by purchase without the consent of the state, or by cessions from other governments, the case is different. Story, in his Commentaries on the Constitution, says: "If there has been no cession by the state of the place, although it has been constantly occupied and used under purchase, or otherwise, by the United States for a fort or arsenal, or other constitutional purpose, the state jurisdiction still remains complete and perfect;" and in support of this statement he refers to People v. Godfrey, 17 Johns. 225. In that case the land on which Fort Niagara was erected, in New York, never having been ceded by the state to the United States, it was adjudged that the courts of the state had jurisdiction of crimes or offences against the laws of the state committed within the fort or its precincts, although it had been garrisoned by the troops of the United States and held by them since its surrender by Great Britain pursuant to the treaties of 1783 and 1794. * * *

Where, therefore, lands are acquired in any other way by the United States within the limits of a state than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government.[10] Their exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the state over the places acquired will be as full and complete as over any other places within her limits.

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[9] Accord: State ex rel. Lyle v. Willett (1906) 117 Tenn. 334, 97 S. W. 299.

For peculiarities as to the establishment and status of this National Home for Disabled Volunteer Soldiers and its branches see U. S. C. A., tit. 24, §§ 71, 77, 79; National Home v. Parrish (1913) 229 U. S. 494, 57 L. ed. 1296; State ex rel. Lyle v. Willett, *supra*.

As already stated, the land constituting the Fort Leavenworth Military Reservation was not purchased, but was owned by the United States by cession from France many years before Kansas became a state; and whatever political sovereignty and dominion the United States had [has] over the place comes from the cession of the state since her admission into the union. It not being a case where exclusive legislative authority is vested by the Constitution of the United States, that cession could be accompanied with such conditions as the state might see fit to annex not inconsistent with the free and effective use of the fort as a military post. * * *

We are here met with the objection that the legislature of a state has no power to cede away her jurisdiction and legislative power over any portion of her territory, except as such cession follows under the Constitution from her consent to a purchase by the United States for some one of the purposes mentioned. If this were so, it would not aid the railroad company; the jurisdiction of the state would then remain as it previously existed. But aside from this consideration, it is undoubtedly true that the state, whether represented by her legislature, or through a convention specially called for that purpose, is incompetent to cede her political jurisdiction and legislative authority over any part of her territory to a foreign country, without the concurrence of the general government. The jurisdiction of the United States extends over all the territory within the states, and, therefore, their authority must be obtained, as well as that of the state within which the territory is situated, before any cession of sovereignty or political jurisdiction can be made to a foreign country. * * *

In their relation to the general government, the states of the union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the state, they are not those of a different country; and the two, the state and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution.

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[10] Compare the cases on national banks.

It is for the protection and interests of the states, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the states. As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the states as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the state would be desirable, we do not perceive any objection to its grant by the legislature of the state. Such cession is really as much for the benefit of the state as it is for the benefit of the United States. It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the state.

The Military Reservation of Fort Leavenworth was not, as already said, acquired by purchase with the consent of Kansas. And her cession of jurisdiction is not of exclusive legislative authority over the land, except so far as that may be necessary for its use as a military post; and it is not contended that the saving clause in the act of cession interferes with such use. There is, therefore, no constitutional prohibition against the enforcement of that clause. The right of the state to subject the railroad property to taxation exists as before the cession. The invalidity of the tax levied not being asserted on any other ground than the supposed exclusive jurisdiction of the United States over the reservation notwithstanding the saving clause, the judgment of the court below must be

Affirmed.

EFFECT OF A CESSION OF JURISDICTION BY A STATE TO THE UNITED STATES.

"The greatest landed proprietor throughout the several states is undoubtedly the United States. Besides numerous Indian reservations, national parks, and forest and game preserves, the federal government maintains military or naval stations in every state but one,[11] post offices and court houses in most large cities,[12] and many other institutions, from life-saving stations to penitentiaries, throughout the country. Thus, such places as Ft. Leavenworth,

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[11] The military reservations are listed in MILITARY RESERVATIONS, NATIONAL CEMETERIES AND MILITARY PARKS (Judge Advocate Gen. Dept. 1916).

[12] Congress appropriates funds for the erection of approximately 100 new federal buildings a session. See ROSE, JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS (3d ed. 1926) § 91.

Muscle Shoals, West Point, Sandy Hook and Old Point Comfort are under federal proprietorship. Moreover, the United States is the country's greatest landlord. Besides a numerous official personnel, its reservations contain thousands of civilian inhabitants, whose status, by reason of the nature of federal proprietorship, is often peculiar. They are within the physical limits of a state but, in many cases, beyond its jurisdiction. Hence they are to a certain extent beyond the law. * * *

"Congress early enacted penal laws for territory over which it had [exclusive] jurisdiction,[13] and in 1825 passed the first assimulation crime statute,[14] providing that where an offense was not specially provided for by any federal law, it should be prosecuted in the federal courts and receive the same punishment as the laws of the state in which the territory was situated prescribed for a like offense. This statute was held to be not unconstitutional as a delegation of legislative power,[15] since it was construed as adopting only such state penal laws as existed at the time of its enactment,[16] or re-enactment.[17] It has been substantially re-enacted in 1866,[18] when a provision that no subsequent repeal of any state law should have any effect was added, in 1898,[19] and in 1909.[20] It is not operative, however, when the state law in its terms does not permit of adoption, as where the state law provides that a prosecution for criminal libel may be brought only in the county where the libelous paper is published.[21]

"While Congress has thus provided a criminal code for ceded territory, it has enacted little or no law respecting private rights. Under the rule of international law applicable when territory passes from one sovereignty to another, the local law regarding private rights existing at the time of the cession, so far as it is not inconsistent with the laws of the United States, has been held to continue until superseded by federal legislation.[22] Thus a railway has been held responsible as an insurer for the killing of cattle on its right of way through a military reservation, when at the time of the cession a state statute imposed on it such responsibility on failure to fence its track.[23] But a refusal on the part of the War Department to permit fencing because it would "greatly restrict the use of the reservation for drill and maneuver purposes" has been held a good defense to a similar action.[24] The laws of negligence[25] and the rights of action for wrongful death[26] in effect at the time of the cession have likewise been held to continue, except where abrogated by the enactment of a federal employees' compensation law.[27] But state laws, such as a workmen's compensation act[28] or a law imposing responsibility on a telegraph company for failure to deliver a message,[29] passed subsequent to the cession and creating new causes of action, have no application. * * *

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[13] (1790) 1 Stat. 113.

[14] (1825) 4 Stat. 115.

[15] Franklin v. United States, 216 U. S. 559, 54 L. ed. 615, 30 Sup. Ct. 434 (1909).

[16] United States v. Paul, 6 Pet. 141, 8 L. ed. 348 (U. S. 1832).

[17] United States v. Tucker, 122 Fed. 518 (W. D. Ky. 1903). Hence until re-enactment, the statute does not apply to the laws of a state which was admitted to the union after its enactment. United States v. Barnaby, 51 Fed. 20 (D. Mont. 1892).

[18] (1866) 14 Stat. 13.

[19] (1898) 30 Stat. 717.

[20] 35 Stat. 1145 (1909), U. S. Comp. Stat. (1916) § 10462, 18 U. S. C. A. (1927) § 468.

[21] United States v. Press Pub. Co., 219 U. S. 1, 55 L. ed. 65, 31 Sup. Ct. 212 (1911).

[22] Chicago, R. I. & P. Ry. v. McGlinn, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. 1005 (1885).

"While Congress has kept the penal law of ceded territory reasonably up to date by re-enactment of the assimulation crime statute, private rights within such territory are in general determined only by such law as existed at the time of cession, in many cases fifty or one hundred years ago. Moreover, its inhabitants are usually denied by the state wherein the territory is situated the civil and political rights which it accords to residents, and are given no substitutes by Congress. Thus it has been held that they are not entitled to vote in state elections,[30] to send their children to the public schools,[31] to benefit by the poor laws,[32] or to sue for divorce in the state courts.[33] The exemption which they enjoy from state taxation[34] and from the duty to work on state roads[35] seems inadequate compensation for so great a loss of civil rights. On grounds of necessity it has been held that a state court retained probate jurisdiction over ceded territory, Congress not having conferred it on the federal courts,[36] and a similar view has been expressed by dissenting judges with regard to divorce.[37] But by the weight of authority inhabitants of such territory are considered non-residents of the state for all purposes.[38]"—37 Yale Law J. (1928) 796, 799-801, 802.[39]

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[23] *Ibid.*

[24] Anderson v. Chicago & N. W. Ry., 102 Neb. 578, 168 N. W. 196 (1918).

[25] Steele v. Halligan, 229 Fed. 1011 (S. D. Wash. 1916).

[26] Hoffman v. Leavenworth Light Co., 91 Kan. 450, 138 Pac. 632 (1914); Kaufman v. Hopper, 220 N. Y. 184, 115 N. E. 470 (1917).

[27] Webb v. White Engineering Corp., 204 Ala. 429, 85 So. 729 (1920).

[28] McCarthy v. Packard Co., 105 App. Div. 436, 94 N. Y. Supp. 203 (1st Dept. 1905), *aff'd* 182 N. Y. 555, 75 N. E. 1130; Kaufman v. Hopper, *supra* note 26.

[29] Western Union Tel. Co. v. Chiles, 214 U. S. 274, 53 L. ed. 994, 29 Sup. Ct. 613 (1909).

[30] Sinks v. Reese, 19 Ohio St. 306 (1869) (after this decision, Congress, in (1871) 16 Stat. 399, retroceded jurisdiction to the state); In re Town of Highlands, 48 N. Y. St. Rep. 795, 22 N. Y. Supp. 137 (Sup. Ct. 1892); State v. Willett, 117 Tenn. 334, 97 S. W. 299 (1906).

[31] Opinion of the Justices, 42 Mass. 580 (1841).

[32] *Ibid.*

[33] Lowe v. Lowe, 150 Md. 592, 133 Atl. 729 (1926), 46 A. L. R. 993, annotation, 36 YALE LAW JOURNAL 146, 40 HARV. L. REV. 130, 11 MINN. L. REV. 74.

[34] Opinion of Justices, *supra* note 31; 6 Op. Att'y Gen. 577 (1854); Concessions Co. v. Morris, 109 Wash. 46, 186 Pac. 655 (1919).

[35] 16 Op. Att'y Gen. 468 (1880).

[36] Divine v. Unaka Nat'l Bank, 125 Tenn. 98, 140 S. W. 747 (1911).

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[37] See Lowe v. Lowe, *supra* note 33, at 602, 133 Atl. at 733. See also for the argument *ab inconvenienti,* Crook, Horner & Co. v. Old Point Comfort Hotel Co., 54 Fed. 604 (E. D. Va. 1893) at 611.

[38] (1926) 40 Harv. L. Rev. 130.

[39] [In an action by a prisoner in the federal prison on McNeil's Island (surrounded by the State of Washington and acquired by the United States with the consent of the legislature of the state) against the warden for injury inflicted in the prison grounds alleged to have been caused by negligence of the warden it was said: "There being two purchases of the land at McNeil Island, one in territorial days and the other after statehood, there would be two dates as of which these laws were adopted and fixed. This fact would involve the determination upon the trial of whether the accident to plaintiff occurred upon the land ceded prior to the admission of the state or subsequently * * * It follows, therefore, that the laws of negligence in effect in the territory at the time the first portion of the present site was acquired and those of the state in effect at the time the second portion thereof was acquired became, so far as that territory is concerned, the laws of the United States, and, as modified by the then existing enactments of Congress and those subsequently passed, are the laws under which this case arises." Steele v. Halligan (1916) 229 Fed. 1011, 1018.—By the present editor.]

CHAPTER III.

CITIZENSHIP, NATIONAL AND STATE.

Section 1.—What is National Citizenship?

"Modern systems of public law recognize four concepts which it is necessary for this purpose to define briefly. These are nationality, alienage, subjection and citizenship.

"Nationality is the characteristic or status of a person by virtue of which he belongs to a particular state.[1] As a synonym for *nationalität,* many German writers prefer *staatsangehörigkeit,* which accurately embodies the above definition.

"The opposite of nationality is alienage, a proposition that completely defines alienage. Re-stated, alienage is the characteristic of not belonging to the state, from the standpoint of which the person is being regarded. Alienage is a negative, nationality a positive. Thus we say clothed with American nationality, but not clothed with alienage. 'American alienage' would be an inexcusable novelty. Alienage is regarded as a disability, an incapacity. Yet we speak of the status of alienage and the status of nationality, just as, in private law, we speak of the status of infancy, or of lunacy. A person who has the status of alienage is called an alien. To find a corresponding term to apply to a person who has the status of nationality has troubled writers on public law in all languages. 'Subject' and 'citizen' have been so much abused that neither has any longer the singleness or the definiteness of meaning that is desired in accurate writing. In France several years ago, the word *national* came into use for this purpose, and is now general there. The more learned and clearer American and English writers have adopted it; and clearness of thought and exposition demand its use.

"It is permissible, therefore, to state that a person is a national of the state in which he has the status of nationality. Recurring to the definition of nationality, a national is a person who belongs to the state, nothing more nor less.

"What is meant by belonging to a state is that the person who belongs, who is a national, is one upon whom the state has primary claims as against other states. The chief significance of nationality is in international relations.

"The jurisdiction of the state extends in a qualified way over its nationals while they are abroad. The state may make acts done by them abroad criminal (crimes against itself) and, upon their return, may punish them. It may command its nationals to return home at a time of public emergency to serve the state, as in its armies, and their refusal to obey is just ground for punishment, should the state later lawfully get possession of their persons; and no other state may complain. The chief benefit of nationality is that the national abroad is entitled[2] to the protection of his state.

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[1] The term "nationality" is used in its legal, not its ethnological, sense. In this essay the word "state" is used in its international sense of an independent nation or country, such as the British Empire, France or the United States of America.

"With the alien it is different. So long as he remains outside of the territorial limits of a particular state, he is in nowise subject to the jurisdiction of that state, except in rare instances of his committing an act outside and in violation of the law of a state, which takes effect within the territorial limits of that state. Piracy is an anomalous exception.

"So soon as an alien crosses the territorial boundary into a state, he becomes almost wholly subject to its jurisdiction. But not wholly. It seems that he cannot be compulsively enlisted in the army of the state, at least in an international war. He may not be prevented from leaving the state, except for cause, that is, when leaving would permit him to escape or evade a duty which has lawfully been imposed upon him, or which he assumed. If he is a national of a foreign state his state has the privilege of diplomatic intervention to protect him from, or claim compensation for, arbitrary acts of the state in which he resides, if those acts are violative of international law, or treaties. The special privileges of the head of a foreign state, a foreign minister, or ambassador, and the less extensive privileges of a foreign consul, are additional exceptions.

"These qualifications, though potentially of great importance, are practically so slight, or applicable to such a limited number of persons, that it may be repeated that an alien who has entered the territorial limits of a state is almost wholly subject to its jurisdiction.

"Once he has lawfully left the territory, having discharged all duties lawfully imposed upon him or assumed by him, he entirely ceases to be subject to the state.

"With these fundamental notions, which cannot be treated in detail here, the concepts of nationality and alienage stand out clearly and distinctly.

"As to any particular state it may be said that every person in the world is either a national or an alien.

"Now, it may be asked, what law determines this distribution or division of all persons in the world among the several states? What law determines which persons belong to this state and to that? Being an international matter it would seem that international law itself should furnish the rule of division. But it does not do so. International law has here a complete hiatus. The only rule that it lays down is, that each state may determine for itself what persons it will regard as nationals. In short, it lays down a rule of confusion, and confusion exists. As a result we have cases of double nationality. By French law a person born in the United States of French parents may be a French national; by the American law he is an American national, etc. In instances now rare, a person may have no nationality at all, a *heimatlos* as European writers term him.

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[2] Perhaps it is more accurate to say that a state is privileged to "protect" its nationals.

"International law, whether public or private, does not even offer a recognized rule for resolving these conflicts of laws, though the doctrine of election at majority promises to grow into a rule of law.

"This confusion is not at all inherent in the concept of nationality, or in the status itself, but resides wholly in the rule of division, in the determination of what persons have the nationalities of the several states. That is, while international law has defined the rights of a national, it has provided no rules for determining who are nationals of the various states. Of course, since in the crude condition of international law, each state legislates for itself in this matter, it should be perfectly feasible to declare accurately who, by the laws of a given state, are nationals of that state.

"Now a word as to the concept, 'subjection.' In English law a national was and is called a 'subject.' So too an alien, while within the territorial limits, was regarded as a 'temporary' subject, as owing a temporary allegiance.[3] It is apparent that 'subject' has a double sense. As applied to the alien within the state it means one who is subject to the state, not a subject of the state. Subjection is a tantamount derivative from subject, in the sense of subject to the state, but not from subject as a synonym for national. The confused use of the word 'subject' is so obvious that it must either be discarded altogether, or it must be confined to the idea of one subject to the jurisdiction, one in a condition of subjection to the state. Of course, there will be degrees of subjection. The alien within the state is almost wholly subject, the alien without is almost wholly not subject. So far the word 'subject' has been discussed on its merits, and it appears that its use in our law to designate the concept 'national' will only perpetuate confused thought.

"In fact it is rarely so used. In the seventeenth and eighteenth centuries, in monarchical states, it became so intimately associated with the idea of subjects of a monarch that the American revolutionists and the democratic revolutionists in continental Europe at the close of the eighteenth century, regarded it as an odious term, resorting to 'citizen,' 'member,' and even 'inhabitant' to avoid its use. An American national today has no objection to being called a subject of the American national democratic state,[4] but this affords no reason for retaining or reviving the word as an equivalent for national. Subject and subjection, without this, have their appropriate and distinct meaning.

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[3] See Carlisle v. United States (1873) 16 Wall. 147, 21 L. ed. 426. "A statute of Henry VIII enacted that if anybody should rob or take 'the goods of the king's subjects within his realm,' and be found guilty the party robbed should have restitution of his goods. Of this statute Sir Matthew Hale said that 'though it speaks of the king's subjects, it extends to aliens robbed; for though they are not the king's natural born subjects, they are the king's subjects when in England, by local allegiance.' 1 Hale's Pleas of the Crown, p. 42." Field, J., Ross v. McIntyre (1891) 140 U. S. 453, 476, 35 L. ed. 581.

"Finally, we have the concept 'citizenship.' The modern public law of England recognizes no such distinct concept. All persons, by that law are either subjects (nationals) or aliens. There is no class of nationals so specialized, or so privileged, as to require the recognition of this additional status.

"In Roman law the *civitas* as a distinct status of persons was recognized. Through the one thousand years of Roman history the complex of special privileges enjoyed by a person by virtue of his citizen status varied. These were not confined to political privileges. Details are not in place here. It is sufficient that, perhaps at all times, there were persons who belonged to the Roman state, but were not citizens.[5]

"In the middle ages the term 'citizen' designated a burgess (German, *bürger*), one who was an especially privileged inhabitant of a city, mainly the possessor of political privileges. In the French Constitution of 1799 a portion of the nationals were set apart and designated 'citizens.' These alone were made eligible to vote and hold office. It is believed that they differed from other nationals in no other respect. The Constitution itself answered the question who are 'citizens.'

"The Civil Code (1804) accepted this distinction. It referred to the fact that a French national could be a citizen only by fulfilling the qualifications of the Constitution of 1799, then still in force; that the enjoyment of civil rights was independent of citizenship; that every French national should enjoy civil rights, and set forth comprehensive rules to determine who were French nationals. Under that system, as under every other, the fundamental, the primary relationship is that of nationality. The foundation of the state, the state itself, is the body of nationals. These were represented in the electoral capacity by the citizen class. The name 'citizen' could have been dispensed with. 'Electors' and 'eligibles to office' would have supplied adequate terminology. Citizenship under that system was defined as a specially privileged political status, as the possession of the two designated political privileges.

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[4] "The plain men who formed the constitution of New Jersey were not carried away by such refinements. They supposed (perhaps weakly) that allegiance might be due *to the people* as well as *to the king*, and that even a *republican* might be called, without offense, a *subject*, provided his master was *the law*." Rawle, counsel, in McIlvaine v. Coxe's Lessee (U. S. 1804) 2 Cranch 280, 318, 2 L. ed. 279.

[5] Mommsen's very full treatment of the whole subject in his *Römische Staatsrecht* is especially enlightening and written with a rare understanding of modern problems of nationality.

"In short there is no universal definition of citizenship when citizenship ceases to be synonymous with nationality. While nationality is an inherent necessity, a matter of international significance and defined by international law, citizenship, if it is confined to less than the whole body of nationals, if it is a specially privileged status conferred upon some nationals and denied to others, is purely an internal affair, variantly defined by the various legislations that recognize it. Moreover, the concept may be entirely dispensed with and ignored in a liberal system of legislation, without loss.

"In fact, three positions may be taken in any system of law: (1) to ignore and avoid the use of 'citizen' and 'citizenship'; (2) to recognize 'citizens' as an especially privileged class of nationals, in which case the terms must be defined by the system of law recognizing them; or (3) the legislation of a state may prefer the words citizen and citizenship though using them as exact equivalents of national and nationality. In that case it would be immaterial that the national was also called citizen at home, except that by ancient usage, the usage of the middle ages and in modern France, the term citizen has received a restricted sense, with which the word citizen as the equivalent of national is, and may be, confused.

"Is the citizenship spoken of in the Constitution of the United States a status distinct from and differing from American nationality? * * *"—D. O. McGovney. American Citizenship (1911) 11 Col. L. Rev. 231-236.[6]

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[6] The remainder of the essay (11 Col. L. Rev. 236-250, 326-347) to which the above extract served as an introduction attempted to answer the question above put. A careful examination of our legal literature including constitutions, treaties, judicial decisions and *dicta* of judges seemed to establish that prior to the acquisition of our "insular possessions" at the close of the Spanish-American war there was no conscious recognition of the existence of any third category of persons other than citizens and aliens, and much to indicate that in American law citizenship and nationality are coextensive concepts. An exception may be Chief Justice Taney's remark that free negroes owed allegiance to the United States though he thought they were not citizens. The conclusion was drawn by the author that there is no justification for the idea that there are American nationals who are not citizens. He now doubts the soundness of his conclusion, and for two reasons: first, a distinction may exist though not recognized as existing, and there is no case which required a court to consider whether such a distinction existed (the *dicta* that American born tribal Indians were aliens may have been given too much weight); second, the concept, citizenship, like every other complex legal concept is the sum of its component parts. The status of citizenship as a concept in our constitutional law is the bundle of powers, privileges, immunities, duties and disabilities which, by the provisions of the Constitution, a citizen has by virtue of being a citizen. This concept in the field of constitutional law called citizenship may not be so rich a compound as the student may have presupposed and yet be richer than that compound known in international relations as nationality. Our legal literature offers no ready answer. Does the definition of citizenship in Minor v. Happersett comport with equivalence or difference between citizenship and nationality? Throughout this chapter there should be frequent recurrence to the question, what are the compositions of the concepts national citizenship and state citizenship. A distinction between nation-conferred state citizenship and state-conferred state citizenship may be observed.

COOK v. TAIT, UNITED STATES COLLECTOR OF INTERNAL REVENUE

1924. Supreme Court of the United States. 265 U. S. 47.

MR. JUSTICE McKENNA delivered the opinion of the Court.

Action by plaintiff in error, who will be referred to as plaintiff, to recover the sum of $298.34 as the first installment of an income tax paid, it is charged, under the threats and demands of Tait.

The tax was imposed under the Revenue Act of 1921, which provides by section 210 (40 Stat. 227, 233):

"That, in lieu of the tax imposed by section 210 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 8 per centum of the amount of the net income in excess of the credits provided in section 216: Provided, that in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 4 per centum."

Plaintiff is a native citizen of the United States, and was such when he took up his residence and became domiciled in the city of Mexico. A demand was made upon him by defendant in error, designated defendant, to make a return of his income for the purpose of taxation under the revenue laws of the United States. Plaintiff complied with the demand, but under protest; the income having been derived from property situated in the city of Mexico. A tax was assessed against him in the sum of $1,193.38, the first installment of which he paid, and for it, as we have said this action was brought.

The question in the case, and which was presented by the demurrer to the declaration is, as expressed by plaintiff, whether Congress has power to impose a tax upon income received by a native citizen of the United States who, at the time the income was received, was permanently resident and domiciled in the city of Mexico, the income being from real and personal property located in Mexico.

Plaintiff assigns against the power, not only his rights under the Constitution of the United States, but under international law, and in support of the assignments cites many cases. It will be observed that the foundation of the assignments is the fact that the citizen receiving the income and the property of which it is the product are outside of the territorial limits of the United States. These two facts, the contention is, exclude the existence of the power to tax. Or to put the contention another way, to the existence of the power and its exercise, the person receiving the income and the property from which he receives it must both be within the territorial limits of the United States to be within the taxing power of the United States. The contention is not justified, and that it is not justified is the necessary deduction of recent cases. In United States v. Bennett, 232 U. S. 299, the power of the United States to tax a foreign-built yacht owned and used during the taxing period outside of the United States by a citizen domiciled in the United States was sustained. The tax passed on was imposed by a tariff act, but necessarily the power does not depend upon the form by which it is exerted.

We may make further exposition of the national power as the case depends upon it. It was illustrated at once in United States v. Bennett by a contrast with the power of a state. It was pointed out that there were limitations upon the latter that were not on the national power. The taxing power of a state, it was decided, encountered at its borders the taxing power of other states and was limited by them. There was no such limitation, it was pointed out, upon the national power, and that the limitation upon the states affords, it was said, no ground for constructing a barrier around the United States, "shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty."

The contention was rejected that a citizen's property without the limits of the United States derives no benefit from the United States. The contention, it was said, came from the confusion of thought in "mistaking the scope and extent of the sovereign power of the United States as a nation and its relations to its citizens and their relation to it." And that power in its scope and extent, it was decided, is based on the presumption that government by its very nature benefits the citizen and his property wherever found, and that opposition to it holds on to citizenship while it "belittles and destroys its advantages and blessings by denying the possession by government of an essential power required to make citizenship completely beneficial." In other words, the principle was declared that the government, by its very nature, benefits the citizen and his property wherever found, and therefore has the power to make the benefit complete. Or, to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, nor was not and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen. The consequence of the relations is that the native citizen who is taxed may have domicile, and the property from which his income is derived may have situs, in a foreign country and the tax be legal—the government having power to impose the tax.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

MINOR v. HAPPERSETT.

1874. Supreme Court of the United States. 21 Wall. 162.

[Error to the Supreme Court of Missouri. Mrs. Minor brought an action in an inferior court of Missouri against a registrar of voters because of his refusal to register her as a voter at a general election in which presidential electors, a member of Congress and other officers were to be chosen. He relied for his refusal upon the constitution of Missouri which gave the privilege of voting only to male citizens of the United States. The Supreme Court of Missouri on appeal had affirmed a judgment for the defendant.]

Chief Justice Waite delivered the opinion of the court. * * *

It is contended that the provisions of the constitution and laws of the State of Missouri which confine the right of suffrage and registration therefor to men, are in violation of the Constitution of the United States, and therefore void. The argument is, that as a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the state in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the state cannot by its laws or constitution abridge.

There is no doubt that women may be citizens. They are persons, and by the fourteenth amendment "all persons born or naturalized in the United States and subject to the jurisdiction thereof" are expressly declared to be "citizens of the United States and of the State wherein they reside." But, in our opinion, it did not need this amendment to give them that position. Before its adoption the Constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several states, yet there were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words "subject," "inhabitant," and "citizen" have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the states upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more. * * *

The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common-law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens. The words "all children" are certainly as comprehensive, when used in this connection, as "all persons," and if females are included in the last they must be in the first. That they are included in the last is not denied. In fact the whole argument of the plaintiffs proceeds upon that idea. * * * [After a brief review of the early statutes on naturalization the opinion continues:] From this it is apparent that from the commencement of the legislation upon this subject alien women and alien minors could be made citizens by naturalization, and we think it will not be contended that this would have been done if it had not been supposed that native women and native minors were already citizens by birth. * * * The Fourteenth Amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the Amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The Amendment prohibited the state, of which she is a citizen, from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship on her. That she had before its adoption.

If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters.

The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them.

It certainly is nowhere made so in express terms. The United States has no voters in the states, of its own creation. The elective officers of the United States are all elected directly or indirectly by state voters. The members of the House of Representatives are to be chosen by the people of the states, and the electors in each state must have the qualifications requisite for electors of the most numerous branch of the state legislature. Senators are to be chosen by the legislatures of the states, and necessarily the members of the legislature required to make the choice are elected by the voters of the state. Each state must appoint in such manner, as the legislature thereof may direct, the electors to elect the President and Vice-President. * * *

The Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. * * * This makes it proper to inquire whether suffrage was coextensive with the citizenship of the states at the time of its adoption. It if was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.

When the federal Constitution was adopted, all the states, with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of those constitutions we find that in no state were all citizens permitted to vote. [The various electoral qualifications of male sex, age, property-holding and tax-paying prescribed in those constitutions are here stated.] * * *

As has been seen, all the citizens of the states were not invested with the right of suffrage. * * * Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.

Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. * * *

Judgment affirmed.

GUINN AND BEAL v. UNITED STATES.

1915. Supreme Court of the United States. 238 U. S. 347.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This case is before us on a certificate drawn by the court below as the basis of two questions which are submitted for our solution in order to enable the court correctly to decide issues in a case which it has under consideration. Those issues arose from an indictment and conviction of certain election officers of the State of Oklahoma (the plaintiffs in error) of the crime of having conspired unlawfully, wilfully and fraudulently to deprive certain negro citizens, on account of their race and color, of a right to vote at a general election held in that state in 1910, they being entitled to vote under the state law and which right was secured to them by the Fifteenth Amendment to the Constitution of the United States. The prosecution was directly concerned with Sec. 5508,[7] Rev. Stat., now Sec. 19 of the Penal Code. * * *

The questions which the court below asks are these:

"1. Was the amendment to the constitution of Oklahoma, heretofore set forth, valid?

"2. Was that amendment void insofar as it attempted to debar from the right or privilege of voting for a qualified candidate for a member of Congress in Oklahoma, unless they were able to read and write any section of the constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote for a qualified candidate for a member of Congress in that state, but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves?"

As these questions obviously relate to the provisions concerning suffrage in the original constitution and the amendment to those provisions which forms the basis of the controversy, we state the text of both. The original clause so far as material was this:

"The qualified electors of the state shall be male citizens of the United States, male citizens of the state, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, who have resided in the state one year, in the county six months, and in the election precinct thirty days, next preceding the election at which any such elector offers to vote."

And this is the amendment:

"No person shall be registered as an elector of this state or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the state of Oklahoma; but no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officer when electors apply for ballots to vote."

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[7] The text of this section is printed ante, p. 321.

Considering the questions in the light of the text of the suffrage amendment it is apparent that they are twofold because of the twofold character of the provisions as to suffrage which the amendment contains. The first question is concerned with that provision of the amendment which fixes a standard by which the right to vote is given upon conditions existing on January 1, 1866, and relieves those coming within that standard from the standard based on a literacy test which is established by the other provision of the amendment. The second question asks as to the validity of the literacy test and how far, if intrinsically valid, it would continue to exist and be operative in the event the standard based upon January 1, 1866, should be held to be illegal as violative of the Fifteenth Amendment. * * * Let us consider these subjects under separate headings.

1. *The operation and effect of the Fifteenth Amendment.* * * *
Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning * * *.

But it is equally beyond the possibility of question that the Amendment in express terms restricts the power of the United States or the states to abridge or deny the right of a citizen of the United States to vote on account of race, color or previous condition of servitude. The restriction is coincident with the power and prevents its exertion in disregard of the command of the Amendment. But while this is true, it is true also that the Amendment does not change, modify or deprive the states of their full power as to suffrage except of course as to the subject with which the Amendment deals and to the extent that obedience to its command is necessary. * * *

While in the true sense, therefore, the Amendment gives no right of suffrage, it was long ago recognized that in operation its prohibition might measurably have that effect; that is to say, that as the command of the Amendment was self-executing and reached without legislative action the conditions of discrimination against which it was aimed, the result might arise that as a consequence of the striking down of a discriminating clause a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out. Ex parte Yarbrough, 110 U. S. 651; Neal v. Delaware, 103 U. S. 370. A familiar illustration of this doctrine resulted from the effect of the adoption of the Amendment on state constitutions in which at the time of the adoption of the Amendment the right of suffrage was conferred on all white male citizens, since by the inherent power of the Amendment the word white disappeared and therefore all male citizens without discrimination on account of race, color or previous condition of servitude came under the generic grant of suffrage made by the state. * * *

2. *The standard of January 1, 1866, fixed in the suffrage amendment and its significance.*

The inquiry of course here is, Does the amendment as to the particular standard which this heading embraces involve the mere refusal to comply with the commands of the Fifteenth Amendment as previously stated? This leads us for the purpose of the analysis to recur to the text of the suffrage amendment. Its opening sentence fixes the literacy standard which is all-inclusive since it is general in its expression and contains no word of discrimination on account of race or color or any other reason. This however is immediately followed by the provisions creating the standard based upon the condition existing on January 1, 1866, and carving out those coming under that standard from the inclusion in the literacy test which would have controlled them but for the exclusion thus expressly provided for. * * * It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude prohibited by the Fifteenth Amendment, but the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage. In other words, we seek in vain for any ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed by in substance and effect lifting those conditions over to a period of time after the Amendment to make them the bases of the right to suffrage conferred in direct and positive disregard of the Fifteenth Amendment. And the same result, we are of opinion, is demonstrated by considering whether it is possible to discover any basis of reason for the standard thus fixed other than the purpose above stated. We say this because we are unable to discover how, unless the prohibitions of the Fifteenth Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the Fifteenth Amendment. Certainly it cannot be said that there was any peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless the Fifteenth Amendment was in view. * * *

3. *The determination of the validity of the literacy test and the possibility of its surviving the disappearance of the 1866 standard with which it is associated in the suffrage amendment.*

No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted. Whether this test is so connected with the other one relating to the situation on January 1, 1866, that the invalidity of the latter requires the rejection of the former is really a question of state law, but in the absence of any decision on the subject by the Supreme Court of the state, we must determine it ourselves. * * * [The court inferred that these clauses were intended to be inseparable.] * * *

We answer the first question, No, and the second question, Yes.[8]

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

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[8] A substantially like statute of Maryland was held invalid in Myers v. Anderson (1915) 238 U. S. 368, 59 L. ed. 1349.

An act of Congress which denies the privilege of voting in a Territory to bigamists, polygamists and men cohabiting with more than one woman is valid. Murphy v. Ramsey (1885) 114 U. S. 15, 29 L. ed. 47 though the discrimination is made not as a punishment for crime but solely as a determination of qualification for voting. A state may require citizens of the United States who move into the state to make a declaration of intention to become citizens of the state one year before they may register as voters, and thus discriminate in granting the electoral privilege between those citizens who have and those who have not made the declaration. Pope v. Williams (1904) 193 U. S. 621, 48 L. ed. 817.

The disabilities imposed upon the states and the United States by the 15th and 19th Amendments confer correlatively upon citizens of the United States immunities from the types of discrimination therein prohibited. These immunities are conferred upon none but citizens and consequently these immunities constitute a part of the concept of citizenship of the United States, notwithstanding that the privilege of voting is not an element of such citizenship. "The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the states, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a state to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this Amendment, there was no constitutional guaranty against this discrimination: now there is. It follows that the Amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the Amendment, Congress may enforce by 'appropriate legislation.'" Waite, C. J., in United States v. Reese (1876) 92 U. S. 214, 217-218, 23 L. ed. 563. "In United States v. Reese et al., we hold that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is, exemption

Section 2.—Who are National Citizens?

UNITED STATES v. WONG KIM ARK.

1898. Supreme Court of the United States. 169 U. S. 649.

This was a writ of *habeas corpus*, issued October 2, 1895, by the District Court of the United States for the Northern District of California, to the collector of customs at the port of San Francisco, in behalf of Wong Kim Ark, who alleged that he was a citizen of the United States, of more than twenty-one years of age, and was born at San Francisco in 1873 of parents of Chinese descent and subjects of the Emperor of China, but domiciled residents at San Francisco; and that, on his return to the United States on the steamship Coptic in August, 1895, from a temporary visit to China, he applied to said collector of customs for permission to land, and was by the collector refused such permission, and was restrained of his liberty by the collector, and by the general manager of the steamship company acting under his direction, in violation of the Constitution and laws of the United States, not by virtue of any judicial order or proceeding, but solely upon the pretence that he was not a citizen of the United States. * * *

The court ordered Wong Kim Ark to be discharged, upon the

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from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the states comes from the states; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been." Waite, C. J., in United States v. Cruikshank (1876) 92 U. S. 542, 555-556, 23 L. ed. 588.

May a state give resident white aliens the privilege of voting and deny it to resident aliens of other races? Can not the complete definition of citizenship as a concept of constitutional law be framed by bringing together all the rights, powers, privileges, immunities, eligibilities, duties and disabilities which a person who is a citizen of the United States has under the constitution by virtue solely of his being a citizen? The various clauses of the constitution may be examined, care being exercised to distinguish those rights which are peculiar to citizens. Cases in the other sections of this chapter will assist.

Regulation of Elections. On the distribution of powers between Congress and the states to regulate elections of representatives in Congress, senators and presidential electors and the history of legislation on these matters the leading cases are: United States v. Reese (1876) 92 U. S. 214, 23 L. ed. 563; Ex parte Yarbrough (1884) 110 U. S. 651, 28 L. ed. 274; Ex parte Siebold (1880) 100 U. S. 371, 25 L. ed. 717; Ohio ex rel. Davis v. Hildebrant (1916) 241 U. S. 565, 60 L. ed. 1172; United States v. Gradwell (1917) 243 U. S. 476, 61 L. ed. 857; United States v. Mosley (1915) 238 U. S. 383, 59 L. ed. 1355 (construction of Rev. Stats. § 5508, Crim. Code § 19, U. S. C. Title 18, § 51); United States v. Bathgate (1918) 246 U. S. 220, 62 L. ed. 676 (same); In re Green (1890) 134 U. S. 377, 33 L. ed. 951 (presidential electors); McPherson v. Blacker (1892) 146 U. S. 1, 36 L. ed. 869 (same). Note the doubt left by Newberry v. United States (1921) 256 U. S. 232, 65 L. ed. 913, as to power in Congress to regulate primaries for choosing senatorial candidates.

ground that he was a citizen of the United States. 71 Fed. Rep. 382. The United States appealed to this court, and the appellee was admitted to bail pending the appeal. * * *

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court. * * *

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

I. In construing any act of legislation, whether a statute enacted by the legislature, or a Constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same lawmaking power, of which the act in question is an amendment, but also to the condition and to the history of the law as previously existing, and in the light of which the new act must be read and interpreted.

Read

The Constitution of the United States, as originally adopted, uses the words "citizen of the United States" and "natural-born citizen of the United States." By the original Constitution, every representative in congress is required to have been "seven years a citizen of the United States," and every senator to have been "nine years a citizen of the United States"; and "no person except a natural-born[1] citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of president." The Fourteenth Article of Amendment, besides declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," also declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And the Fifteenth Article of Amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude."

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[1] "Natural-born subject" in the English law is said to mean a subject who is a subject at or from birth whether by the common-law rule as to birth within British dominions or by a statute which declares a person born abroad to be a subject at or from birth. Dicey, Conflict of Laws (1896) 173, 178; 4th ed. (1927) passim, 158-173. Prior to the statute 7 Anne, c. 5, there were no natural-born subjects (with negligible exceptions) who were not native-born, hence probably the tendency to use natural-born and native-born as synonyms. After that statute there were subjects to whom the former term applied and the latter did not.

The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. Minor v. Happersett, 21 Wall. 162; Ex parte Wilson, 114 U. S. 417, 422; Boyd v. U. S., 116 U. S. 616, 624, 625; Smith v. Alabama, 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent, Comm. 336; Bradley, J., in Moore v. U. S., 91 U. S. 270, 274. * * *

II. The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called "ligealty," "obedience," "faith," or "power," of the king. The principle embraced all persons born within the king's allegiance, and subject to his protection. Such allegiance and protection were mutual,—as expressed in the maxim, "Protectio trahit subjectionem, et subjectio protectionem,"—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the king.

This fundamental principle, with these qualifications or explanations of it, was clearly, though quaintly, stated in the leading case known as Calvin's Case, or the Case of the Postnati, decided in 1608, after a hearing in the Exchequer Chamber before the Lord Chancellor and all the judges of England, and reported by Lord Coke and by Lord Ellesmere. Calvin's Case, 7 Rep., 1, 4b-6a, 18a, 18b; Ellesmere, on Postnati, 62-64; s. c. 2 How. St. Tr. 559, 607, 613-617, 639, 640, 659, 679.

The English authorities ever since are to the like effect. Co. Litt. 8a, 128b; Lord Hale, in Harg. Law Tracts, 210, and in 1 Hale, P. C. 61, 62; 1 Bl. Comm. 366, 369, 370, 374; 4 Bl. Comm. 74, 92; Lord

Kenyon, in Doe v. Jones, 4 Term R. 300, 308; Cockburn, on Nationality, 7; Dicey, Conflict of Laws, [1896] pp. 173-177, 741. * * *

It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, and the jurisdiction of the English sovereign; and therefore every child born in England[2] of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born.

III. The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established. * * *

In Inglis v. Sailors' Snug Harbor (1830) 3 Pet. 99, * * * Mr. Justice Story [said]: "Two things usually concur to create citizenship: First, birth locally within the dominions of the sovereign; and, secondly, birth within the protection and obedience, or, in other words, within the ligeance, of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such, *de facto*. There are some exceptions which are founded upon peculiar reasons, and which, indeed, illustrate and confirm the general doctrine. Thus, a person who is born on the ocean is a subject of the prince to whom his parents then owe allegiance; for he is still deemed under the protection of his sovereign, and born in a place where he has dominion in common with all other sovereigns. So the children of an ambassador are held to be subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince." 3 Pet. 155. "The children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens." 3 Pet. 156. "Nothing is better settled at the common law than the doctrine that the children, even of aliens, born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth." 3 Pet. 164. * * *

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[2] "The doctrine as originally formulated was probably limited to the kingdom, or the realm: but even as early as the statute of Edward III, it took the more expanded form 'birth within the ligeance,' and it was on this basis that it was expounded in Calvin's Case (1608) 7 Co. Rep. 1a. From this it should follow that it is now correct to say that 'birth within the dominions' makes a person a British subject by the common law." Piggott, Nationality (1906) 205.

IV. It was contended by one of the learned counsel for the United States that the rule of the Roman law, by which the citizenship of the child followed that of the parent, was the true rule of international law as now recognized in most civilized countries, and had superseded the rule of the common law, depending on birth within the realm, originally founded on feudal considerations.

But at the time of the adoption of the Constitution of the United States in 1789, and long before, it would seem to have been the rule in Europe generally, as it certainly was in France, that, as said by Pothier, "citizens, true and native-born citizens, are those who are born within the extent of the dominion of France," and "mere birth within the realm gives the rights of a native-born citizen, independently of the origin of the father or mother, and of their domicile"; and children born in a foreign country, of a French father who had not established his domicile there, nor given up the intention of returning, were also deemed Frenchmen, as Laurent says, by "a favor, a sort of fiction," and Calvo, "by a sort of fiction of exterritoriality, considered as born in France, and therefore invested with French nationality." * * * The Code Napoléon of 1807 changed the law of France, and adopted, instead of the rule of country of birth, *jus soli,* the rule of descent or blood, *jus sanguinis,* as the leading principle. * * *

The later modifications of the rule in Europe rest upon the Constitutions, laws, or ordinances of the various countries, and have no important bearing upon the interpretation and effect of the Constitution of the United States. The English naturalization act of 33 Vict. (1870) c. 14, and the commissioners' report of 1869, out of which it grew, both bear date since the adoption of the Fourteenth Amendment of the Constitution; and, as observed by Mr. Dicey, that act has not affected the principle by which any person who, whatever the nationality of his parents, is born within the British dominions, acquires British nationality at birth, and is a natural-born British subject. Dicey, Conflict of Laws, 741. At the time of the passage of that act, although the tendency on the continent of Europe was to make parentage, rather than birthplace, the criterion of nationality, and citizenship was denied to the native-born children of foreign parents in Germany, Switzerland, Sweden, and Norway, yet it appears still to have been conferred upon such children in Holland, Denmark, and Portugal, and, when claimed under certain specified conditions, in France, Belgium, Spain, Italy, Greece, and Russia. Cockburn on Nationality, 14-21.

There is, therefore, little ground for the theory that at the time of the adoption of the Fourteenth Amendment of the Constitution of the United States there was any settled and definite rule of international law generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.

Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own Constitution and laws, what classes of persons shall be entitled to its citizenship.

Both in England and in the United States, indeed, statutes have been passed at various times enacting that certain issue born abroad of English subjects, or of American citizens, respectively, should inherit, to some extent at least, the rights of their parents. But those statutes applied only to cases coming within their purport, and they have never been considered, in either country, as affecting the citizenship of persons born within its dominion. * * *

By the statute of 7 Anne, (1708) c. 5, Sec. 3, "the children of all natural-born subjects, born out of the ligeance of Her Majesty, her heirs and successors"—explained by the statute of 4 Geo. II, (1731) c. 21, to mean all children born out of the ligeance of the Crown of England, "whose fathers were or shall be natural-born subjects of the Crown of England, or of Great Britain, at the time of the birth of such children respectively"—"shall be deemed, adjudged and taken to be natural-born subjects of this kingdom, to all intents, constructions and purposes whatsoever." That statute was limited to foreign-born children of natural-born subjects; and was extended by the statute of 13 Geo. III, (1773) c. 21, to foreign-born grandchildren of natural-born subjects, but not to the issue of such grandchildren; or, as put by Mr. Dicey, "British nationality does not pass by descent or inheritance beyond the second generation." See De Geer v. Stone, 22 Ch. D. 243. Dicey, Conflict of Laws, (1896) 742. * * *

It was enacted by the statute of February 10, 1855, c. 71, that "persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States."[4] 10 Stat. 604; Rev. St. § 1993 [U. S. C. Title 8, § 6].

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[4] In Weedin v. Chin Bow (1927) 274 U. S. 657, 71 L. ed. 1284, it is held that in order that a father may transmit American citizenship to his child under this statute the father must have resided in the United States at some time *prior* to the birth of the child.

The race of the father is immaterial to the application of this statute. Quan Hing Sun v. White (1918) 254 Fed. 402. So also it seems that the race and alienage of the mother are immaterial, the father's citizenship and his having resided in the United States are the only necessary facts. It seems that the child may remain abroad all his life without thereby losing citizenship thus acquired. It is held that to retain his citizenship he need not come during his minority to reside in the United States. Ex parte Ng Doo Wong (1915) 230 Fed. 751. See (1916) 30 Op. Atty. Gen. 529, 532-537, to the effect that this

It thus clearly appears that, during the half century intervening between 1802 and 1855, there was no legislation whatever for the citizenship of children born abroad, during that period, of American parents who had not become citizens of the United States before the act of 1802; and that the act of 1855, like every other act of congress upon the subject, has, by express proviso, restricted the right of citizenship, thereby conferred upon foreign-born children of American citizens, to those children themselves, unless they became residents of the United States Here is nothing to countenance the theory that a general rule of citizenship by blood or descent has displaced in this country the fundamental rule of citizenship by birth within its sovereignty. * * *

The first section of the Fourteenth Amendment of the Constitution begins with the words, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." As appears upon the face of the Amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in Dred Scott v. Sandford (1857) 19 How. 393; and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. Slaughter House Cases (1873) 16 Wall. 36, 73; Strauder v. West Virginia (1879) 100 U. S. 303, 306; Ex parte Virginia (1879) 100 U. S. 339, 345; Neal v. Delaware (1880) 103 U. S. 370, 386; Elk v. Wilkins (1884) 112 U. S. 94, 101. But the opening words, "All persons born," are general, not to say universal, restricted only by place and jurisdiction, and not by color or race, as was clearly recognized in all the opinions delivered in the Slaughter House Cases, above cited. * * *

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retention of American citizenship is not dependent upon any declaration of intention, election at majority or oath of allegiance, construing the requirements of such acts made in the last two sentences of U. S. C. Title 8, § 6 to relate merely to protection, that is, American diplomatic officials may refuse protection to a foreign-born and foreign-residing citizen who neglects to comply with them. See also Weedin v. Chin Bow (1927) 274 U. S. 657, 668-669, 71 L. ed. 1284.

It seems that the statute by use of the word "father" does not permit citizenship to descend or be derived from a mother. It seems that it is sufficient that the father is a citizen by naturalization, the statute not being limited to fathers who are natural-born citizens; the similar British legislation prior to 1914 was so limited. Rex v. Albany Street Police Station Supt. (1915) 3 K. B. 716. The present British legislation is the British Nationality and Status of Aliens Acts of 1914 and 1922, printed and expounded in Dicey, Conflict of Laws (1927) 158-205.

Mr. Justice Miller, indeed, while discussing the causes which led to the adoption of the Fourteenth Amendment, made this remark: "The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states, born within the United States." 16 Wall. 73. This was wholly aside from the question in judgment, and from the course of reasoning bearing upon that question. It was unsupported by any argument, or by any reference to authorities; and that it was not formulated with the same care and exactness as if the case before the court had called for an exact definition of the phrase is apparent from its classing foreign ministers and consuls together—whereas it was then well settled law, as has since been recognized in a judgment of this court in which Mr. Justice Miller concurred, that consuls, as such, and unless expressly invested with a diplomatic character in addition to their ordinary powers, are not considered as intrusted with authority to represent their sovereign in his intercourse with foreign states, or to vindicate his prerogatives, or entitled by the law of nations to the privileges and immunities of ambassadors or public ministers, but are subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside. 1 Kent, Comm. 44; Story, Confl. Laws, § 48; Wheat. Int. Law (8th Ed.) § 249; The Anne (1818) 3 Wheat. 435, 445, 446; Gittings v. Crawford (1838) Taney, 1, 10, Fed. Cas. No. 5,465; In re Baiz (1890) 135 U. S. 403, 424.

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The only adjudication that has been made by this court upon the meaning of the clause, "and subject to the jurisdiction thereof," in the leading provision of the Fourteenth Amendment, is Elk v. Wilkins, 112 U. S. 94, in which it was decided that an Indian born a member of one of the Indian tribes within the United States, which still existed and was recognized as an Indian tribe by the United States, who had voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a state, but who did not appear to have been naturalized or taxed or in any way recognized or treated as a citizen, either by the United States or by the state, was not a citizen of the United States, as a person born in the United States, "and subject to the jurisdiction thereof," within the meaning of the clause in question.

That decision was placed upon the grounds that the meaning of those words was, "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance"; that by the Constitution, as originally established, "Indians not taxed" were excluded from the persons according to whose numbers representatives in congress and direct taxes were apportioned among the several states, and Congress was empowered to regulate commerce, not only "with foreign nations," and among the several states, but "with the Indian tribes"; that the Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states, but were alien nations, distinct political communities, the members of which owed immediate allegiance to their several tribes, and were not part of the people of the United States; that the alien and dependent condition of the members of one of those tribes could not be put off at their own will, without the action or assent of the United States; and that they were never deemed citizens, except when naturalized, collectively or individually, under explicit provisions of a treaty, or of an act of congress; and, therefore, that "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more 'born in the United States, and subject to the jurisdiction thereof,' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States of ambassadors or other public ministers of foreign nations." And it was observed that the language used, in defining citizenship, in the first section of the Civil Rights Act of 1866, by the very Congress which framed the Fourteenth Amendment, was "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed." 112 U. S. 99-103. * * *

The decision in Elk v. Wilkins concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country.

The real object of the Fourteenth Amendment of the Constitution, in qualifying the words "all persons born in the United States" by the addition "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases,—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state,—both of which, as has already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country. Calvin's Case, 7 Rep., 1, 18b; Cockburn on Nationality, 7; Dicey, Conflict of Laws, 177; Inglis v. Sailors' Snug Harbor, 3 Pet. 99; 2 Kent. Comm. 39, 42. * * *

In the great case of The Exchange (1812) 7 Cranch, 116; the grounds upon which foreign ministers are, and other aliens are not, exempt from the jurisdiction of this country, were set forth by Chief Justice Marshall in a clear and powerful train of reasoning, of which it will be sufficient, for our present purpose, to give little more than the outlines. The opinion did not touch upon the anomalous case of the Indian tribes, the true relation of which to the United States was not directly brought before this court until some years afterwards, in Cherokee Nation v. Georgia (1831) 5 Pet. 1, 8 L. Ed. 25; nor upon the case of a suspension of the sovereignty of the United States over part of their territory by reason of a hostile occupation, such as was also afterwards presented in U. S. v. Rice, [4 Wheat. 246] above cited. But in all other respects it covered the whole question of what persons within the territory of the United States are subject to the jurisdiction thereof.

The Chief Justice first laid down the general principle: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory." 7 Cranch, 136.

He then stated, and supported by argument and illustration, the propositions that "this full and absolute territorial jurisdiction, being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power," has "given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation,"—the first of which is the exemption from arrest or detention of the person of a foreign sovereign entering its territory with its license, because "a foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation"; "a second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers"; "a third case, in which a sovereign is understood to cede a portion of his territorial jurisdiction, is where he allows the troops of a foreign prince to pass through his dominions"; and, in conclusion, that "a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country." 7 Cranch, 137-139, 147. * * *

The reasons for not allowing to other aliens exemption "from the jurisdiction of the country in which they are found" were stated as follows: "When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption." 7 Cranch, 144. * * *

These considerations confirm the view, already expressed in this opinion, that the opening sentence of the Fourteenth Amendment is throughout affirmative and declaratory, intended to allay doubts and to settle controversies which had arisen, and not to impose any new restrictions upon citizenship. * * *

This sentence of the Fourteenth Amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed,—"born in the United States," "naturalized in the United States," and "subject to the jurisdiction thereof"—in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization.[5]

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[5] Query, since naturalization as a mode of acquiring citizenship or nationality is ordinarily contrasted with acquisition at birth (though naturalization may be without the consent of the person who is made citizen or national, as is common in "collective naturalization"), so Rev. St. § 1994 (now repealed) which declared an alien woman to be a citizen upon her marriage to a citizen regardless of her desire was a naturalization statute in this sense. Would not the provision of the

The effect of the enactments conferring citizenship on foreign-born children of American parents has been defined, and the fundamental rule of citizenship by birth within the dominion of the United States, notwithstanding alienage of parents, has been affirmed, in well-considered opinions of the executive departments of the government, since the adoption of the Fourteenth Amendment of the Constitution. * * * [Here follow quotations from these opinions, to the effect] that such statutes cannot, consistently with our own established rule of citizenship by birth in this country, operate extraterritorially so far as to relieve any person born and residing in a foreign country, and subject to its government, from his allegiance to that country. * * *

The foregoing considerations and authorities irresistibly lead us to these conclusions: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States[6] of all other persons, of whatever race or color, domiciled[7] within the United States. Every citizen, or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remain within our territory, is yet, in the words of Lord Coke in Calvin's Case, 7 Rep. 6a, "strong enough to make a natural subject, for, if he hath issue here, that issue is a natural-born subject"; and his child, as said by Mr. Binney in his

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Act of 1855 above referred to, if not a naturalization statute, nevertheless be valid as an exercise of the power "resulting" to Congress from the grant to the central government of control of foreign relations, on the reasoning of United States v. Arjona, ante, p. 304, Nishimura Ekiu v. United States (1892) 142 U. S. 651, 35 L. ed. 1146? And see the reasoning in Mackenzie v. Hare, infra, p. 418.

[6] Birth on an American merchant vessel while on the high seas is not birth in the United States and if the parents, though domiciled in the United States, are aliens, the child is not by such birth a citizen of the United States. In re Lam Mow (1927) 19 Fed. (2d) 951.

[7] "S is the son of French citizens [who are] domiciled and living in France. They come over to Dover to stay there but a few hours. S is born at Dover. S is a natural-born British subject." A. B. Keith, Dicey's Conflict of Laws, 4th ed. 160, and see 2d ed. p. 167. In Lynch v. Clarke (N. Y. 1844) 1 Sandf. Ch. 583, 638, it was held that birth in the United States is sufficient to confer American citizenship though parents are aliens not domiciled here, only temporarily sojourning here

essay before quoted, "if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle." It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides, seeing that, as said by Mr. Webster, when secretary of state, in his report to the president on Thrasher's Case in 1851, and since repeated by this court: "Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance, or of renouncing any former allegiance,—it is well known that by the public law an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulations." Executive Documents H. R. No. 10, 1st Sess. 32d Cong. p. 4; 6 Webster's Works, 526; Carlisle v. United States, 16 Wall. 147, 155; Calvin's Case, 7 Rep. 6a; Ellesmere, Postnati, 63; 1 Hale, P. C. 62; 4 Bl. Comm. 74, 92. * * *

It is true that Chinese persons born in China cannot be naturalized, like other aliens, by proceedings under the naturalization laws. But this is for want of any statute or treaty authorizing or permitting such naturalization, as will appear by tracing the history of the statutes, treaties, and decisions upon that subject, always bearing in mind that statutes enacted by Congress, as well as treaties made by the president and senate, must yield to the paramount and supreme law of the Constitution.

The power, granted to Congress by the Constitution, "to establish an uniform rule of naturalization," was long ago adjudged by this court to be vested exclusively in Congress. Chirac v. Chirac (1817) 2 Wheat. 259. For many years after the establishment of the original Constitution, and until two years after the adoption of the Fourteenth Amendment, Congress never authorized the naturalization of any one but "free white persons." * * * By the act of July 14, 1870, c. 254, § 7, for the first time, the naturalization laws were "extended to aliens of African nativity and to persons of African descent." 16 Stat. 256. This extension, as embodied in the Revised Statutes, took the form of providing that those laws should "apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent"; and it was amended by the act of Feb. 18, 1875, c. 80, by inserting the words above printed in brackets. Rev. St. (2d Ed.) § 2169, 18 Stat. 318 [U. S. C. Title 8, § 359].[8] Those statutes were held, by the Circuit Court of the United States in California, not to embrace Chinese aliens. In re Ah Yup (1878) 5 Sawy. 155, Fed. Cas. No. 104. And by the act of May 6, 1882, c. 126, § 14, it was expressly enacted that, "hereafter no state court or court of the United States shall admit Chinese to citizenship." 22 Stat. 61. * * *

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[8] See D. O. McGovney, Race Discrimination in Naturalization (1923) 8 Iowa Law Bul. 129-161 (attempting to collect all the cases as to races or peoples eligible and ineligible). The leading United States Supreme Court cases on the subject are: Takao Ozawa v. United States (1922) 260 U. S. 178, 67 L. ed. 199 (Japanese ineligible under any of our naturalization statutes); United States v.

The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. * * * Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship. * * *

VII. Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by congress, "the right of expatriation is a natural and inherent right of all people," and "any declaration, instruction, opinion, order or direction of any officer of the United States, which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic." Rev. St. § 1999, re-enacting Act of July 27, 1868, c. 249, § 1, 15 Stat. 223, 224.[9] Whether any act of himself, or of

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Bhagat Singh Thind (1923) 261 U. S. 204, 67 L. ed. 616 (Hindus, or native peoples of British India, likewise ineligible). See United States v. Cartozian (1925) 6 Fed. (2d) 919 (Armenians held eligible, as "white persons"). See also Toyota v. United States (1925) 268 U. S. 402, 69 L. ed. 1016, conflicting with the view expressed at page 155 of the essay above cited as to the eligibility in general of Malay Filipinos who are "residents of any state or organized Territory of the United States" under the Act of June 29, 1906, c. 3592, § 30, 34 Stat. 606, U. S. C. Title 8, § 360. *Semble* that Act is to be read as restricted to "white" and "African" persons, and *semble* Malay Filipinos are eligible only after three years service in, and honorable discharge from, United States navy, marine or naval-auxiliary service. Act of May 9, 1918, c. 69, § 1, 40 Stat. 542, U. S. C. Title 8, § 388.

[9] See the annotations to this statute in U. S. C. A. Title 8, § 15, especially note 3 to the effect that prior to this statute the American courts held that the common law doctrine of inalienable allegiance applied to citizenship of the United States, and note 4 to the effect that the odd phraseology of the statute has been held to create a power in a citizen to expatriate himself. This power has been qualified as follows: "No American citizen shall be allowed to expatriate himself when the country is at war." Act of Mar. 2, 1907, c. 2534, § 2, 34 Stat.

his parents, during his minority, could have the same effect, is at least doubtful. But it would be out of place to pursue that inquiry. * * * Order affirmed.

[A dissenting opinion by FULLER, C. J., concurred in by HARLAN, J., is omitted.]

DRED SCOTT v. SANDFORD.

1857. Supreme Court of the United States. 19 How. 393.

[Scott, held in Missouri as a slave by the defendant, brought suit in the circuit court of the United States to establish his freedom. He alleged that he was a citizen of Missouri and the defendant a citizen of New York. Defendant pleaded lack of jurisdiction alleging that plaintiff was a negro born of slave ancestry, asserting in effect that no such negro could be a citizen of a state within the diversity of citizenship clause, though born in the United States and free at time of suit. After judgment for plaintiff on this plea, defendant had judgment below on the merits, namely, that Scott was a slave, and the latter appealed. On the question of citizenship raised by the plea to the jurisdiction:]

MR. CHIEF JUSTICE TANEY. * * * In discussing this question, we must not confound the rights of citizenship which a state may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a state, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a state, and yet not be entitled to the rights and privileges of a citizen in any other state. For, previous to the adoption of the Constitution of the United States, every state had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the state, and gave him no rights or privileges in other states beyond those secured to him by the laws of nations and the comity of states. Nor have the several states surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each state may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other states. The rights which he would acquire would be restricted to the state

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1228, U. S. C. Title 8, § 16. As to what acts amount to expatriation see U. S. C. A. Title 8, § 16, notes 8 to 17, and § 17.

which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no state, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a state under the federal government, although, so far as the state alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the state attached to that character.

It is very clear, therefore, that no state can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a state should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any state; and to put it in the power of a single state to make him a citizen of the United States, and endue him with the full rights of citizenship in every other state without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a state, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other state, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several states, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several state communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his state which he did not before possess, and placed him in every other state upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several states when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognized as the people or citizens of a state, whose rights and liberties had been outraged by the English government; and who declared their independence and assumed the powers of government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument. * * *

The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen states by which that instrument was framed; and it is hardly consistent with the respect due to these states, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the state sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or, that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed that they intended to secure to them rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion. More especially, it cannot be believed that the large slaveholding states regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another state. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one state of the Union, the right to enter every other state whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak, to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the state.

It is impossible, it would seem, to believe that the great men of the slaveholding states, who took so large a share in framing the Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.

Besides, this want of foresight and care would have been utterly inconsistent with the caution displayed in providing for the admission of new members into this political family. For, when they gave to the citizens of each state the privileges and immunities of citizens in the several states, [Art. IV, Sec. 2] they at the same time took from the several states the power of naturalization, and confined that power exclusively to the federal government. No state was willing to permit another state to determine who should or should not be admitted as one its citizens, and entitled to demand equal rights and privileges with their own people, within their own territories. The right of naturalization was therefore, with one accord, surrendered by the states, and confided to the federal government. And this power granted to Congress to establish an uniform rule of *naturalization* is, by the well-understood meaning of the word, confined to persons born in a foreign country, under a foreign government. It is not a power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class. And when we find the states guarding themselves from the indiscreet or improper admission by other states of emigrants from other countries, by giving the power exclusively to Congress, we cannot fail to see that they could never have left with the states a much more important power—that is, the power of transforming into citizens a numerous class of persons, who in that character would be much more dangerous to the peace and safety of a large portion of the Union, than the few foreigners one of the states might improperly naturalize. The Constitution upon its adoption obviously took from the states all power by any subsequent legislation to introduce as a citizen into the political family of the United States any one, no matter where he was born, or what might be his character or condition; and it gave to Congress the power to confer this character upon those only who were born outside of the dominions of the United States. And no law of a state, therefore, passed since the Constitution was adopted, can give any right of citizenship outside of its own territory. * * *

But it is said that a person may be a citizen, and entitled to that character, although he does not possess all the rights which may belong to other citizens; as, for example, the right to vote, or to hold particular offices; and that yet, when he goes into another state, he is entitled to be recognized there as a citizen, although the state may measure his rights by the rights which it allows to persons of a like character or class resident in the state, and refuse to him the full rights of citizenship.

This argument overlooks the language of the provision in the Constitution of which we are speaking.

Undoubtedly, a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens.

So, too, a person may be entitled to vote by the law of the state, who is not a citizen even of the state itself. And in some of the states of the Union foreigners not naturalized are allowed to vote. And the state may give the right to free negroes and mulattoes, but that does not make them citizens of the state, and still less of the United States. And the provision in the Constitution [Art. IV, Sec. 2, Cl. 1] giving privileges and immunities in other states, does not apply to them.

Neither does it apply to a person who, being the citizen of a state, migrates to another state. For then he becomes subject to the laws of the state in which he lives, and he is no longer a citizen of the state from which he removed. And the state in which he resides may then, unquestionably, determine his *status* or condition and place him among the class of persons who are not recognized as citizens, but belong to an inferior and subject race; and may deny him the privileges and immunities enjoyed by its citizens.

But so far as mere rights of person are concerned, the provision in question is confined to citizens of a state who are temporarily in another state without taking up their residence there. It gives them no political rights in the state, as to voting or holding office, or in any other respect. For a citizen of one state has no right to participate in the government of another. But if he ranks as a citizen in the state to which he belongs, within the meaning of the Constitution of the United States, then, whenever he goes into another state, the Constitution clothes him, as to the rights of person, with all the privileges and immunities which belong to citizens of the state. And if persons of the African race are citizens of the state, and of the United States, they would be entitled to all of these privileges and immunities in every state, and the state could not restrict them; for they would hold these privileges and immunities under the paramount authority of the federal government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the state to the contrary notwithstanding. And if the states could limit or restrict them, or place the party in an inferior grade, this clause of the Constitution would be unmeaning, and could have no operation; and would give no rights to the citizen when in another state. He would have none but what the state itself chose to allow him. This is evidently not the construction or meaning of the clause in question. It guaranties rights to the citizens, and the state cannot withhold them. And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a state, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other states. * * *

Mr. Justice Curtis dissenting.

I dissent from the opinion pronounced by the Chief Justice. * * *

The answer is obvious. The Constitution has left to the states the determination what persons, born within their respective limits, shall acquire by birth citizenship of the United States; it has not left to them any power to prescribe any rule for the removal of the disabilities of alienage. This power is exclusively in Congress. * * *

Under the Constitution of the United States, each state has retained this power of determining the political status of its native-born inhabitants, and no exception thereto can be found in the Constitution. * * * But it does not allow to the states the power to make aliens citizens, or permit one state to take persons born on the soil of another state, and, contrary to the laws and policy of the state where they were born, make them its citizens, and so citizens of the United States. * * * The conclusions at which I have arrived on this part of the case are:

First. That the free native-born citizens of each state are citizens of the United States.

Second. That as free colored persons born within some of the states are citizens of those states, such persons are also citizens of the United States.

Third. That every such citizen, residing in any state, has the right to sue and is liable to be sued in the federal courts as a citizen of that state in which he resides. * * *

I dissent, therefore, from that part of the opinion of the majority of the court, in which it is held that a person of African descent cannot be a citizen of the United States. * * *[10]

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[10] Extracts on the citizenship question only are given above. A majority refrained from expressing opinions on this subject. Wayne and Daniel, JJ., concurred in the above remarks of Taney, C. J., and Curtis, J., alone expressed views contrary to them. Notwithstanding that both Taney and Curtis referred to Taney's opinion as that of the court or of the majority it seems that on the citizenship question it must be regarded as the opinion of three judges. Only the concluding summary of Curtis' discussion is printed above.

Chief Justice Taney did not say that he regarded free negroes born in the United States as aliens, although he so regarded American born tribal Indians (see his opinion in the above case, 19 How. (U. S.) 404, 420). He did say, "The African race, however, born in the country, did owe allegiance to the government, whether they were slave or free." Ib. p. 420.

The storm of abuse directed at the Supreme Court (see Warren, The Supreme Court in United States History, ch. 26) was a protest against its holding in this decision that the Missouri Compromise Act of 1820 was unconstitutional, that is, the Act of Congress which forbade slavery in that part of the Louisiana purchase which lay north of thirty-six degrees thirty minutes north latitude not including Missouri. The opinion that free negroes were not citizens did not excite much comment. In fact several northern states in the decade 1850-1860 prohibited migration of free negroes into their territory, assuming that they were not citizens within Art. IV, § 2, Cl. 1 of the Constitution.

If Justice Curtis was right in his view that (prior to Amendment XIV) state law determined acquisition of citizenship by birth, as distinguished from naturalization of alien born persons, and that persons became by birth in the United States citizens of the United States only if born in states that recognized them as acquiring state citizenship by such birth, then nearly all free negroes were not citizens as had been held in Amy v. Smith (Ky. 1822) 1 Litt. 326; State v. Claiborne (Tenn. 1838) Meigs 331; Pendleton v. State (1844) 6 Ark. 509; Cooper et al. v. Mayor (1848) 4 Ga. 68; Bryan v. Walton (1853) 14 Ga. 185; and see Crandall v. State (1834) 10 Conn. 339; Donovan v. Pitcher (1875) 53 Ala. 411, 25 Am. Rep. 634; Mitchell v. Nancy Wells (1859) 37 Miss. 235. Contra: State v. Manuel (1838) 4 Dev. & B. 26, 20 N. C. 144. In State v. Claiborne, *supra*, the court said:

"By whatever appellation we may designate free negroes, whether as perpetual inhabitants, or citizens of an inferior grade, we feel satisfied, that they are not citizens in the sense of the Constitution," i. e. in the sense of Art. IV, § 2, Cl. 1.

"At the close of the Civil war, when the problem of the emancipated slaves was before the nation, it might have left them in a condition of alienage, or established them as wards of the government like the Indian tribes, and thus retained for the nation jurisdiction over them, or it might, as it did, give them citizenship." Brewer, J., in Hodges v. United States (1906) 203 U. S. 1, 19, 51 L. ed. 65.

GONZALES v. WILLIAMS.

1904. Supreme Court of the United States. 192 U. S. 1.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This is an appeal by Isabella Gonzales from an order of the Circuit Court of the United States for the Southern District of New York, dismissing a writ of habeas corpus issued on her behalf, and remanding her to the custody of the United States Commissioner of Immigration at the Port of New York. 118 Fed. Rep. 941.

Isabella Gonzales, an unmarried woman, was born and resided in Porto Rico, and was an inhabitant thereof on April 11, 1899, the date of the proclamation of the Treaty of Paris; she arrived at the Port of New York from Porto Rico, August 24, 1902, when she was prevented from landing and detained by the Immigration Commissioner at that port as an "alien immigrant," in order that she might be returned to Porto Rico if it appeared that she was likely to become a public charge.

If she was not an alien immigrant within the intent and meaning of the act of Congress * * * approved March 3, 1891, 26 Stat. 1084, c. 551, the commissioner had no power to detain or deport her, and the final order of the Circuit Court must be reversed.

The act referred to contains these provisions:

"That the following classes of aliens shall be excluded from admission into the United States, in accordance with the existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers or persons likely to become a public charge * * * ."

* * * The treaty ceding Porto Rico to the United States was ratified by the Senate, February 6, 1899; Congress passed an act to carry out its obligations, March 2, 1899; and the ratifications were exchanged and the treaty proclaimed, April 11, 1899, 30 Stat. 1754. Then followed the act entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," approved April 12, 1900. 31 Stat. 77, c. 191. The treaty provided:

"Article II.

"Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.

"Article III.

"Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line. * * *"

"Article IX.

"Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."

By the constitution of the Spanish monarchy, and the Spanish Civil Code, in force in Porto Rico when the treaty was proclaimed, persons born in Spanish territory were declared to be Spaniards, but Porto Ricans who were not natives of the Peninsula, remaining in Porto Rico, could not, according to the terms of the treaty, elect to retain their allegiance to Spain. By the cession their allegiance became due to the United States, which was in possession and had assumed the government, and they became entitled to its protection. The nationality of the island became American instead of Spanish, and by the treaty, Peninsulars, not deciding to preserve their allegiance to Spain, were to be "held to have renounced it and to have adopted the nationality of the territory in which they may reside."

Thereupon Congress passed the act of April 12, 1900. That act created a civil government for Porto Rico, with a Governor, Secretary, Attorney General, and other officers, appointed by the President, by and with the advice and consent of the Senate, who, together with five other persons, likewise so appointed and confirmed, were constituted an executive council, at least five of whom should be "native inhabitants of Porto Rico"; and local legislative powers were vested in a legislative assembly, consisting of the executive council and a house of delegates to be elected. * * *

By section 7[11] the inhabitants of Porto Rico, who were Spanish subjects on the day the treaty was proclaimed, including Spaniards of the Peninsula who had not elected to preserve their allegiance to the Spanish Crown, were to be deemed citizens of Porto Rico, and they and citizens of the United States residing in Porto Rico were constituted a body politic under the name of The People of Porto Rico.

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[11] "All inhabitants continuing to reside therein who were Spanish subjects on April 11, 1899, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before April 11, 1900, in accordance with the provisions of the treaty of peace between the United States and Spain entered into on April 11, 1899; and they, together with such citizens

Gonzales was a native inhabitant of Porto Rico and a Spanish subject, though not of the Peninsula, when the cession transferred her allegiance to the United States, and she was a citizen of Porto Rico under the act. And there was nothing expressed in the act, nor reasonably to be implied therefrom, to indicate the intention of Congress that citizens of Porto Rico should be considered as aliens, and the right of free access denied to them.

Counsel for the Government contends that the test of Gonzales' rights was citizenship of the United States and not alienage. We do not think so, and, on the contrary, are of opinion that if Gonzales were not an alien within the act of 1891, the order below was erroneous.

Conceding to counsel that the general terms "alien," "citizen," "subject," are not absolutely inclusive, or completely comprehensive, and that, therefore, neither of the numerous definitions of the term "alien" is necessarily controlling, we, nevertheless, cannot concede, in view of the language of the treaty and of the act of April 12, 1900, that the word "alien," as used in the act of 1891, embraces the citizens of Porto Rico.

We are not required to discuss the power of Congress in the premises; or the contention of Gonzales' counsel that the cession of Porto Rico accomplished the naturalization of its people; or that of Commissioner Degetau, in his excellent argument as *amicus curiae,* that a citizen of Porto Rico, under the act of 1900, is necessarily a citizen of the United States. The question is the narrow one whether Gonzales was an alien within the meaning of that term as used in the act of 1891.

The act excludes from admission into the United States, "in accordance with the existing acts regulating immigration other than those concerning Chinese laborers," certain classes of "aliens" and of "alien immigrants" arriving at any place within the United States, in respect of all of whom it is required that the commanding officer and agents of the vessel by which they come shall report the name, nationality, last residence and destination before any are landed.

The decisions of the inspection officers adverse to the right to land are made final unless an appeal is taken to the Superintend-

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of the United States as may reside in Porto Rico, shall constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such." Act April 12, 1900, c. 191, § 7, 31 Stat. 79.

ent of Immigration, whose action is subject to review by the Secretary of the Treasury; and all aliens who unlawfully come into the United States in violation of law shall be immediately, if practicable, sent back, or may be returned as by law provided.

We think it clear that the act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens or subjects thereof; and that citizens of Porto Rico, whose permanent allegiance is due to the United States; who live in the peace of the dominion of the United States; the organic law of whose domicil was enacted by the United States, and is enforced through officials sworn to support the Constitution of the United States, are not "aliens," and upon their arrival by water at the ports of our mainland are not "alien immigrants," within the intent and meaning of the act of 1891. * * *

And in the present case, as Gonzales did not come within the act of 1891, the commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary; and she was not obliged to resort to the Superintendent or the Secretary. * * *

Final order reversed and cause remanded with a direction to discharge Gonzales.[12]

TOYOTA v. UNITED STATES.

1925. Supreme Court of the United States. 268 U. S. 402.

Questions certified by the Circuit Court of Appeals, arising upon an appeal by Toyota from a decree of the District Court (290 Fed. 971) canceling his certificate of naturalization in a proceeding brought by the government for that purpose under the Naturalization Act.

Mr. Justice Butler delivered the opinion of the Court.

Hidemitsu Toyota, a person of the Japanese race, born in Japan, entered the United States in 1913. He served substantially all the time between November of that year and May, 1923, in the United

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[12] The present status of Porto Ricans is defined by Act of March 2, 1917, c. 145, § 5, 39 Stat. 953, U. S. C. Title 8, § 5, as follows: "All citizens of Porto Rico as defined by section 7 of the Act of April 12, 1900 [supra, p. 410, footnote 11] * * * and all natives of Porto Rico who were temporarily absent from that island on April 11, 1899, and have since returned and are permanently residing in that island, and are not citizens of any foreign country, are declared and shall be deemed and held to be, citizens of the United States * * *."

Hawaiians: "All persons who were citizens of the Republic of Hawaii on August 12, 1898, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii. And all citizens of the United States resident in the Hawaiian Islands who were resident there on or since August 12, 1898, and all the citizens of the United States who shall hereafter reside in the Territory of Hawaii for one year shall be citizens of the Territory of Hawaii." Act April 30, 1900, c. 339, § 4, 31 Stat. 141.

States Coast Guard Service. This was a part of the naval force of the United States nearly all of the time the United States was engaged in the recent war. He received eight or more honorable discharges, and some of them were for service during the war. May 14, 1921, he filed his petition for naturalization in the United States District Court for the District of Massachusetts. The petition was granted, and a certificate of naturalization was issued to him. This case arises on a petition to cancel the certificate on the ground that it was illegally procured. Section 15, Act of June 29, 1906, c. 3592, 34 Stat. 596, 601 [U. S. C. Title 8, § 405]. It is agreed that if a person of the Japanese race, born in Japan, may legally be naturalized under the seventh subdivision of section 4 of the Act of June 29, 1906, as amended by the Act of May 9, 1918, c. 69, 40 Stat. 542 [U. S. C. Title 8, § 388] or under the Act of July 19, 1919, c. 24, 41 Stat. 222, Toyota is legally naturalized. The District Court held he was not entitled to be naturalized, and entered a decree canceling his certificate of citizenship. 290 Fed. 971. An appeal was taken to the Circuit Court of Appeals, and that court under section 239, Judicial Code [U. S. C. Title 28, § 346] certified to this court the following questions: (1) Whether a person of the Japanese race, born in Japan, may legally be naturalized under the seventh subdivision of section 4 of the Act of June 29, 1906, as amended by the Act of May 9, 1918; and (2) whether such subject may legally be naturalized under the Act of July 19, 1919. The material provisions of these enactments are printed in the margin.[13]

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[13] "Seventh. Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment; or any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, * * * or in the United States Navy or Marine Corps, or in the United States Coast Guard, or who has served for three years on board of any vessel of the United States government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service on a reenlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve after honorable service, may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States if upon examination * * * it is shown that such residence cannot be established; any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States; * * * § 2 * * * Nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined. * * *" Act of May 9, 1918, c. 69, 40 Stat. 542, 547.

"Any person of foreign birth who served in the military or naval forces of the United States during the present war, after final examination and acceptance by

Until 1870, only aliens being free white persons were eligible to citizenship. In that year, aliens of African nativity and persons of African descent were made eligible. See Ozawa v. United States, 260 U. S. 178, 192. The substance of prior legislation is expressed in section 2169, Revised Statutes, which is:

"The provisions of this title [Naturalization] shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent

A person of the Japanese race, born in Japan, is not eligible under that section. Ozawa v. United States, supra, 198.

It has long been the rule that in order to be admitted to citizenship an alien is required, at least two years prior to his admission, to declare his intention to become a citizen, and to show that he has resided continuously in the United States for at least five years immediately preceding his admission. Revised Statutes, §§ 2165, 2170 [U. S. C. Title 8, § 361]; subdivision 1, § 4, c. 3592, 34 Stat. 596. But at different times, as to specially designated aliens serving in the armed forces of the United States, Congress modified and lessened these requirements. Section 2166, Revised Statutes (Act of July 17, 1862, § 21, c. 200, 12 Stat. 594, 597); Act of July 26, 1894, c. 165, 28 Stat. 123, 124; Act of June 30, 1914, c. 130, 38 Stat. 392, 395. In each of the first two of these acts, the phrase "any alien" is used as a part of the description of the person for whose benefit the act was passed. In the last, the language is "any alien * * * who may, under existing law, become a citizen of the United States." Prior to this act, it had been held that the phrase "any alien," used in the earlier acts, did not enlarge the classes defined in section 2169. In re Buntaro Kumagai (D. C. 1908) 163 Fed. 922; In re Knight (D. C. 1909) 171 Fed. 299; Bessho v. United States (1910) 178 Fed. 245; In re Alverto (D. C. 1912) 198 Fed. 688. The language used in the Act of 1914 merely expresses what was implied in the earlier provisions.

The seventh subdivision of section 4 of the Act of 1918 permits "any native-born Filipino" or "any alien, or any Porto Rican not a citizen of the United States" belonging respectively to the classes there described, on presentation of the required declaration of intention, to petition for naturalization without proof of five years' residence within the United States; and the act permits "any alien" serving in the forces of the United States "during the time this country is engaged in the present war" to file his petition for naturalization without making the preliminary declaration of in-

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the said military or naval authorities, and shall have been honorably discharged after such acceptance and service, shall have the benefits of the seventh subdivision of section 4 of the Act of June 29, 1906, * * * as amended, and shall not be required to pay any fee therefor; and this provision shall continue for the period of one year after all of the American troops are returned to the United States." Act of July 19, 1919, c. 24, 41 Stat. 222.

tention and without proof of five years' residence in the United States. The Act of 1919 gave "any person of foreign birth," there mentioned, the benefits of the seventh subdivision of section 4. Evidently, a principal purpose of these acts was to facilitate the naturalization of service men of the classes specified. There is nothing to show an intention to eliminate from the definition of eligibility in section 2169 the distinction based on color or race. Nor is there anything to indicate that, if the seventh subdivision stood alone, the words "any alien" should be taken to mean more than did the same words when used in the Acts of 1862 and 1894. But section 2 of the Act of 1918 [included in effect in U. S. C. Title 8, § 359] provides that nothing in the act shall repeal or in any way enlarge section 2169 "except as specified in the seventh subdivision of this act and under the limitation therein defined." This implies some enlargement of section 2169 in respect of color and race; but it also indicates a purpose not to eliminate all distinction based on color and race so long continued in the naturalization laws. If it was intended to make such change and to extend the privilege of naturalization to all races, the provision of section 2 so limiting the enlargement of section 2169 would be inappropriate. And if the phrase "any alien" in the seventh subdivision is read literally, the qualifying words "being free white persons" and "of African nativity" in section 2169 are without significance. See In re Geronimo Para (D. C.) 269 Fed. 643, 646; Petition of Easurk Emsen Charr (D. C.) 273 Fed. 207, 213.

When the Act of 1918 was passed, it was doubtful whether section 30 of the Act of 1906 [quoted in the next paragraph] extended the privilege of naturalization to all citizens of the Philippine Islands. They were held eligible for naturalization in Re Bautista (D. C.) 245 Fed. 765, and in Re Mallari (D. C.) 239 Fed. 416. And see 27 Op. Attys. Gen. 12. They were held not eligible in Re Alverto (D. C.) 198 Fed. 688, in Re Lampitoe (D. C.) 232 Fed. 382, and in Re Rallos (D. C.) 241 Fed. 686. But we hold[14] that until the passage of that act, Filipinos not being "free white persons" or "of African nativity" were not eligible, and that the effect of the Act of 1918 was to make eligible, and to authorize the naturalization of, native-born Filipinos of whatever color or race having the qualifications specified in the seventh subdivision of section 4.

Under the treaty of peace between the United States and Spain, December 10, 1898, 30 Stat. 1754, Congress was authorized to determine the civil rights and political status of the native inhabitants of the Philippine Islands. And by the Act of July 1, 1902, § 4, c. 1369, 32 Stat. 691, 692, it was declared that all inhabitants continuing to reside therein who were Spanish subjects on April 11, 1899, and then resided in the Islands and their children born subsequent thereto, "shall be deemed and held to be citizens of the Philippine Islands and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain," according to the treaty. The citizens of the Philippine Islands are not aliens.[15] See Gonzales v.

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[14] What facts in the case made this a question for decision?

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[15] NATIVE PEOPLES OF THE PHILIPPINES: Subsequent to the legislation referred to above Congress has made no declaration as to the status of the native peoples of the Philippines except the Act of Aug. 29, 1916, c. 416, § 2, 39 Stat. 546, which reiterates that they shall be deemed to be "citizens of the Philippine Islands."

The attitude of the executive and legislative departments of the United States doubtless remains the same as that stated by Attorney General Griggs on Feb. 19, 1901: "As to the native inhabitants of the Philippine Islands, no action has as yet been taken by Congress, and therefore those people remain in the same condition, in this respect, as they were when the treaty was ratified. * * * It may be taken, therefore, as undisputed that the executive, the treaty-making, and the legislative branches of the Government, regard these native inhabitants, * * * as not vested with the rights or admitted to the status of citizens of the United States in a domestic sense.

"With the correctness of this view, and this course of executive and legislative action, I fully agree; and until that view is judicially declared to be erroneous, all official action by the Executive Departments should conform to the same course heretofore followed. * * * That is to say, from the standpoint of our government they are not citizens of the United States in any sense. They are persons who are not subjects of any foreign power, and are, from an international standpoint, subjects of the United States, or, to use a term that has been suggested, 'nationals.' " * * * (1901) 23 Op. Atty. Gen. 401, 402. This opinion received some judicial confirmation in the individual opinion of Mr. Justice Brown in Downes v. Bidwell (1901) 182 U. S. 244, 279-280, 45 L. ed. 1088: "We are also of opinion that the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American Empire.' There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions and modes of life, shall become at once citizens of the United States. In all its treaties hitherto the treaty-making power has made special provision for this subject; in the cases of Louisiana and Florida, by stipulating that 'the inhabitants shall be incorporated into the Union of the United States and admitted as soon as possible * * * to the enjoyment of all the rights, advantages and immunities of citizens of the United States;' in the case of Mexico, that they should 'be incorporated into the Union, and be admitted at the proper time, (to be judged of by the Congress of the United States), to the enjoyment of all the rights of citizens of the United States;' in the case of Alaska, that the inhabitants who remained three years, 'with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights,' etc.; and in the case of Porto Rico and the Philippines, 'that the civil rights and political status of the native inhabitants * * * shall be determined by Congress.' In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto." See also Frederic R. Coudert, Jr., 3 Col. Law Rev. (1903) 13-32. Compare 11 Col. Law Rev. (1911) pp. 337-347, where the native peoples of the Philippines were characterized as having qualified or partial citizenship. Perhaps it is better to say that they have American nationality but not citizenship. See the last cited essay for suggested answers to these questions:—Is a child born in the Philippines since American acquisition, of parents who were born in continental United States or who were naturalized citizens of the United States, merely an American national,—not a citizen? Is a child born

Williams, 192 U. S. 1, 13. They owe no allegiance to any foreign government. They were not eligible for naturalization under section 2169 because not aliens and so not within its terms. By section 30 of the Act of 1906, it is provided:

"That all the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any state or organized territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law." 34 Stat. 606.

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in continental United States of parents who are "native inhabitants" of the Philippines merely a national or is he in addition a citizen of the United States?

AMERICAN INDIANS: See the statement of the case of Elk v. Wilkins (1884) 112 U. S. 94, 28 L. ed. 643, in the opinion in United States v. Wong Kim Ark, supra, p. 395. That statement cautiously confines the decision to the facts of Elk's case. It followed that members of existing tribes, in the absence of special legislation, were not citizens. What was the status of these non-citizen native-born Indians? A tribe as such, that is, a tribe collectively, was characterized as a "domestic dependent nation." The Cherokee Nation v. Georgia (U. S. 1831) 5 Pet. 1, 17, 8 L. ed. 25. There was some slight *dicta* that tribal Indians individually were aliens. Elk v. Wilkins, *supra,* and see Cherokee Nation v. Georgia (U. S. 1831) 5 Pet. 1, 16, 8 L. ed. 25; Taney, C. J., in Dred Scott v. Sandford (U. S. 1857) 19 How. 393, 404, 15 L. ed. 691. A favorite and vague designation of the relation between the United States and individual tribal Indians was that of guardian and ward. By special acts of Congress from time to time the members of particular tribes were declared citizens of the United States. See Van Dyne, Citizenship of the United States (1904) 235 ff. Did this naturalization convert persons who had been nationals into citizens, or was this a change from alienage to citizenship? Note that Indians whether native or foreign born were not and are not eligible to naturalization upon petition under our general naturalization statute because they are neither "white" nor of "African descent." 1 Moore's Dig. of Inter. Law 33; In re Camille (1880) 6 Fed. 256; In re Burton (1900) 1 Alaska 111; In re Geronimo Para (1919) 269 Fed. 643. In 1905, Brewer, J., said: "Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward." Matter of Heff (1905) 197 U. S. 488, 499, 49 L. ed. 848. He referred particularly to the Lands in Severalty Act of Feb. 8, 1887, § 6, 24 Stat. 390, for breaking up tribal land and its allotment to the members severally. Each Indian allottee was declared to become a citizen. Citizenship was also conferred by that Act upon the following Indians other than allottees: "Every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life." The remnants left by this and other piece-meal legislation have been definitely given citizen status. "All non-citizen Indians born within the territorial limits of the United States be, and they are hereby declared to be citizens of the United States." Act of June 2, 1924, c. 233, 43 Stat. 253.

Section 26 of that act repeals certain sections of title 30 of the Revised Statutes, but leaves section 2169 in force. It is to be applied as if it were included in the Act of 1906. Plainly, the element of alienage included in section 2169 did not apply to the class made eligible by section 30 of the Act of 1906. The element of color and race included in that section is not specifically dealt with by section 30, and, as it has long been the national policy to maintain the distinction of color and race, radical change is not lightly to be deemed to have been intended. "Persons not citizens who owe permanent allegiance to the United States, and who may become residents of any state," may include Malays, Japanese, and Chinese, and others not eligible under the distinction as to color and race. As under section 30 all the applicable provisions of the naturalization laws apply, the limitations based on color and race remain; and the class made eligible by section 30 must be limited to those of the color and race included by section 2169. As Filipinos are not aliens and owe allegiance to the United States, there are strong reasons for relaxing as to them the restrictions which do not exist in favor of aliens who are barred because of their color and race. And in view of the policy of Congress to limit the naturalization of aliens to white persons and to those of African nativity or descent the implied enlargement of section 2169 should be taken at the minimum. The legislative history of the act indicates that the intention of Congress was not to enlarge section 2169, except in respect of Filipinos qualified by the specified service. Senate Report No. 388, pp. 2, 3, 8; House Report No. 502, pp. 1, 4, Sixty-Fifth Congress, Second Session. See, also, Congressional Record, vol. 56, part 6, pp. 6000-6003. And we hold that the words "any alien" in the seventh subdivision are limited by section 2169 to aliens of the color and race there specified. We also hold that the phrase "any person of foreign birth" in the Act of 1919 is not more comprehensive than the words "any alien" in the Act of 1918. It follows that the questions certified must be answered in the negative.

The answer to the first question is: No.

The answer to the second question is: No.

The CHIEF JUSTICE [Taft] dissents.

MACKENZIE v. HARE.

1915. Supreme Court of the United States. 239 U. S. 299.

[On writ of error to review a judgment of the Supreme Court of California, 165 Cal. 776, which denied Mrs. Mackenzie's application made in 1913 for a writ of mandate to be directed to the Board of

Election Commissioners of the City and County of San Francisco to register her as a voter of the city and county. She was born in and ever since had resided in California. In 1909 she married Gordon Mackenzie, a British subject. She and her husband continued to reside in California to the date of her application and there was no evidence that either intended a change of residence. It was admitted that she had done no act to terminate her American citizenship unless the marriage so operated. The state court based its denial on the ground that she was not a citizen of the United States and therefore ineligible to vote under the constitution and statutes of the state.]

MR. JUSTICE MCKENNA delivered the opinion of the court. * * *

The constitution of the state gives the privilege of suffrage to "every native citizen of the United States," and it is contended that under the Constitution of the United States every person born in the United States is a citizen thereof. The latter must be conceded, and if plaintiff has not lost her citizenship by her marriage she has the qualification of a voter prescribed by the constitution of the state of California. The question then is, Did she cease to be a citizen by her marriage?

On March 2, 1907, c. 2534, 34 Stat. 1228, that is, prior to the marriage of plaintiff in error. Congress enacted a statute the third section of which provides "That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registration as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

Plaintiff contends that "such legislation, if intended to apply to her, is beyond the authority of Congress." * * *

An earnest argument is presented to demonstrate its invalidity. Its basis is that the citizenship of plaintiff was an incident to her birth in the United States, and, under the Constitution and laws of the United States, it became a right, privilege and immunity which could not be taken away from her except as a punishment for crime or by her voluntary expatriation.

The argument to support the contention and the argument to oppose it take a wide range through the principles of the common law and international law and their development and change. Both plaintiff and defendants agree that under the common law originally allegiance was immutable. They do not agree as to when the rigidity of the principle was relaxed. Plaintiff in error contests the proposition which she attributes to defendants in error "that the doctrine of perpetual allegiance maintained by England was accepted by the United States," but contends "that the prevalent doctrine of this country always has been that a citizen had a right to expatriate himself," and cites cases to show that expatriation is a natural and inherent right. * * *

But plaintiff says, "Expatriation is evidenced only by emigration, coupled with other acts indicating an intention to transfer one's allegiance." And all the acts must be voluntary, "the result of a fixed determination to change the domicile and permanently reside elsewhere, as well as to throw off the former allegiance, and become a citizen or subject of a foreign power."

The right and the condition of its exercise being thus defined, it is said that the authority of Congress is limited to giving its consent. This is variously declared and emphasized. "No act of the legislature," plaintiff says, " 'can denationalize a citizen without his concurrence,' " citing Burkett v. McCarty, 73 Kentucky (10 Bush), 758. "And the sovereign cannot discharge a subject from his allegiance against his consent except by disfranchisement as a punishment for crime," citing Ainslie v. Martin, 9 Mass. 454. "The Constitution does not authorize Congress to enlarge or abridge the rights of citizens," citing Osborn v. Bank of United States, 9 Wheat. 737. "The power of naturalization vested in Congress by the Constitution is a power to confer citizenship, not a power to take it away. * * * The Fourteenth Amendment, while it leaves the power where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth declared by the Constitution to constitute a complete right of citizenship," citing United States v. Wong Kim Ark, 169 U. S. at p. 703.

It will thus be seen that plaintiff's contention is in exact antagonism to the statute. Only voluntary expatriation, as she defines it, can divest a woman of her citizenship, she declares; the statute provides that by marriage with a foreigner she takes his nationality.

It would make this opinion very voluminous to consider in detail the argument and the cases urged in support of or in attack upon the opposing conditions [positions]. Their foundation principles, we may assume, are known. The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary and worked in many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy. And this was the dictate of the act in controversy. Having this purpose, has it not the sanction of power?

Plaintiff contends, as we have seen, that it has not, and bases her contention upon the absence of an express gift of power. But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers. But monition is not necessary in the present case. There need be no dissent from the cases cited by plaintiff; there need be no assertion of very extensive power over the right of citizenship or of the imperative imposition of conditions upon it. It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences. We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and in her earnest assertion of it. But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. And this is an answer to the apprehension of counsel that our construction of the legislation will make every act, though lawful, as marriage, of course, is, a renunciation of citizenship. The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. It is as voluntary and distinctive as expatriation and its consequence must be considered as elected.

Judgment affirmed.[16]

MR. JUSTICE MCREYNOLDS is of opinion that this court is without jurisdiction, and that, therefore, this writ of error should be dismissed.

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[16] An Act of February 10, 1855, 10 Stat. 604, declared that marriage of an alien woman to an American citizen made her a citizen provided she was a person who was racially eligible to naturalization, Kelly v. Owen (U. S. 1869) 7 Wall. 496, 19 L. ed. 283, but prior to the Act of March 2, 1907 (considered in the above case) there was no statute to determine the effect of marriage of a citizen woman to an alien. The courts assumed that the common law controlled and the weight of authority was that such marriage of itself did not terminate the woman's American citizenship. Shanks v. Dupont (U. S. 1830) 3 Pet. 242, 246, 7 L. ed. 666; Comitis v. Parkerson (1893) 56 Fed. 556, 22 L. R. A. 148; Moore v. Ruckgaber (1902) 114 Fed. 1020, adopting the opinion in Ruckgaber v. Moore (1900) 104 Fed. 947; Wallenburg v. Missouri Pac. Ry. Co. (1908) 159 Fed. 217

Section 3.—Alienage.

TRUAX AND THE ATTORNEY GENERAL OF THE STATE OF ARIZONA v. RAICH.

1915. Supreme Court of the United States. 239 U. S. 33.

[See *ante,* pp. 84-85, for the facts and statute in this case.]

MR. JUSTICE HUGHES * * *. The question then is whether the act assailed is repugnant to the Fourteenth Amendment. Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the federal law. He was thus admitted with the privilege of en-

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Contra: Pequignot v. City of Detroit (1883) 16 Fed. 211; State v. Succession of the Marquise de Circé, Man. Unrep. Cas. (La. 1880) 412. Even marriage with alien husband and residence in his country would not terminate her American citizenship. Beck v. McGillis (N. Y. 1850) 9 Barb. 35. *Contra* (semble) Ruckgaber v. Moore, supra.

The present statutory law is as follows:

"A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens: Provided, That any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States. If at the termination of the marital status she is a citizen of the United States she shall retain her citizenship regardless of her residence. If during the continuance of the marital status she resides continuously for two years in a foreign State of which her husband is a citizen or subject, or for five years continuously outside the United States, she shall thereafter be subject to the same presumption as is a naturalized citizen of the United States under section 17 of this title. Nothing herein shall be construed to repeal or amend the provisions of section 15 of this title or of section 17 with reference to expatriation." [And further to the effect that the repeal of the statute quoted in Mackenzie v. Hare "shall not restore citizenship lost thereunder, nor terminate citizenship resumed thereunder."] U. S. C. Title 8, § 9. (Act of Sept. 22, 1922, c. 411, §§ 3, 7, 42 Stat. 1022.) See U. S. C. Title 8, § 369 for short cut to naturalization of women embraced within the bracketed clause, provided they are racially eligible to naturalization and married racially eligible husbands.

"The right of any woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman." U. S. C. Title 8, § 367 (Act of Sept. 22, 1922, c. 411, § 1, 42 Stat. 1021).

"Any woman who marries a citizen of the United States after September 22, 1922, or any woman whose husband is naturalized after that date, shall not become a citizen of the United States by reason of such marriage or naturalization; but, if eligible to citizenship, she may be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions:

(a) No declaration of intention shall be required;

(b) In lieu of the five-year period of residence within the United States and the one-year period of residence within the State or Territory where the naturalization court is held, she shall have resided continuously in the United States, Hawaii, Alaska, or Porto Rico for at least one year immediately preceding the filing of the petition." U. S. C. Title 8, § 368 (Act of Sept. 22, 1922, c. 411, § 2, 42 Stat. 1022).

"No woman whose husband is not eligible to citizenship shall be naturalized during the continuance of the marital status." U. S. C. Title 8, § 370 (Act of Sept. 22, 1922, c. 411, § 5, 42 Stat. 1022).

tering and abiding in the United States, and hence of entering and abiding in any state in the Union. See Gegiow v. Uhl, Commissioner, 239 U. S. 3. Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws. The description—"any person within its jurisdiction"—as it has frequently been held, includes aliens. "These provisions," said the court in Yick Wo v. Hopkins, 118 U. S. 356, 369 (referring to the due process and equal protection clauses of the Amendment), "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." See also Wong Wing v. United States, 163 U. S. 228, 242; United States v. Wong Kim Ark, 169 U. S. 649, 695. The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states. Thus in McCready v. Virginia, 94 U. S. 391, 396, the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the state, and an analogous principle was involved in Patsone v. Pennsylvania, 232 U. S. 138, 145, 146, where the discrimination against aliens upheld by the court had for its object the protection of wild game within the states with respect to which it was said that the state could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (Hauenstein v. Lynham, 100 U. S. 483; Blythe v. Hinckley, 180 U. S. 333, 341, 342); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise.

The act, it will be observed, provides that every employer (whether corporation, partnership, or individual) who employs more than five workers at any one time "regardless of kind or class of work, or sex of workers" shall employ "not less than eighty per cent. qualified electors or native born citizens of the United States or some subdivision thereof." It thus covers the entire field of industry with the exception of enterprises that are relatively very small. Its application in the present case is to employment in a restaurant the business of which requires nine employees. The purpose of an act must be found in its natural operation and effect (Henderson v. Mayor, 92 U. S. 259, 268; Bailey v. Alabama, 219 U. S. 219, 244), and the purpose of this act is not only plainly shown by its provisions, but it is frankly revealed in its title. It is there described as "An act to protect the citizens of the United States in their employment against non-citizens of the United States, in Arizona." As the appellants rightly say, there has been no subterfuge. It is an act aimed at the employment of aliens, as such, in the businesses described. Literally, its terms might be taken to include with aliens those naturalized citizens who by reason of change of residence might not be at the time qualified electors in any subdivision of the United States, but we are dealing with the main purpose of the statute, definitely stated, in the execution of which the complainant is to be forced out of his employment as a cook in a restaurant, simply because he is an alien.

It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 762; Barbier v. Connolly, 113 U. S. 27, 31; Yick Wo v. Hopkins, supra; Allgeyer v. Louisiana, 165 U. S. 578, 589, 590; Coppage v. Kansas, 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that "the employment of aliens unless restrained was a peril to the public welfare." The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government.[1] Fong Yue Ting v. United States, 149

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[1] EXCLUSION AND DEPORTATION OF ALIENS: "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. * * * In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes

U. S. 698, 713. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.

It is insisted that the act should be supported because it is not "a total deprivation of the right of the alien to labor"; that is, the restriction is limited to those businesses in which more than five workers are employed, and to the ratio fixed. It is emphasized that the employer in any line of business who employs more than five workers may employ aliens to the extent of twenty per cent. of his employees. But the fallacy of this argument at once appears. If the state is at liberty to treat the employment of aliens as in itself a peril requiring restraint regardless of kind or class of work, it cannot be denied that the authority exists to make its measures to that end effective. Otis v. Parker, 187 U. S. 606; Silz v. Hesterburg, 211 U. S. 31; Purity Co. v. Lynch, 226 U. S. 192. If the restriction to twenty per cent. now imposed is maintainable the state undoubtedly has the power if it sees fit to make the percentage less. We have nothing before us to justify the limitation to twenty per cent. save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only ten per cent. of the employees to be aliens or even a less percentage, or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five. We have frequently said that

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enacted by Congress." Gray, J., in Nishimura Ekiu v. United States (1892) 142 U. S. 651, 659, 35 L. ed. 1146.

In Fong Yue Ting v. United States (1893) 149 U. S. 698, 707, 711, 37 L. ed. 905, it was said that the national government on like grounds has power to expel or deport aliens, "to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace." Prior to the Act of May 6, 1882, c. 126, Chinese laborers might lawfully enter and settle in the United States. That act prohibited further immigration of such persons. An act of May 5, 1892, c. 60, provided for the deportation of alien Chinese laborers who were found to be in the United States unlawfully, and as an aid in enforcement of this provision, the statute further provided (section 6) that "All Chinese laborers within the limits of the United States at the time of the passage of this act, and who are entitled to remain" should obtain within a year certificates of residence and identification under penalty of deportation if found in the United States thereafter without such certificates. In the cited case section 6 was sustained. There has been much subsequent legislation increasing the classes of aliens ineligible to immigration and the causes for which aliens shall be deported, and much litigation over the methods prescribed for enforcement but the powers of the national government to exclude and to deport by proper methods were settled in the above cases.

the legislature may recognize degrees of evil and adapt its legislation accordingly (St. Louis Consol. Coal Co. v. Illinois, 185 U. S. 203, 207; McLean v. Arkansas, 211 U. S. 539, 551; Miller v. Wilson, 236 U. S. 373, 384); but underlying the classification is the authority to deal with that at which the legislation is aimed. The restriction now sought to be sustained is such as to suggest no limit to the state's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for as we have said it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises and in our opinion it clearly falls under the condemnation of the fundamental law.

The question of rights under treaties was not expressly presented by the bill, and, although mentioned in the argument, does not require attention in view of the invalidity of the act under the Fourteenth Amendment.

Order affirmed.

ASAKURA v. CITY OF SEATTLE ET AL.

1924. Supreme Court of the United States. 265 U. S. 332.

MR. JUSTICE BUTLER delivered the opinion of the court.

Plaintiff in error is a subject of the emperor of Japan, and since 1904 has resided in Seattle, Washington. Since July, 1915, he has been engaged in business there as a pawnbroker. The city passed an ordinance, which took effect July 2, 1921, regulating the business of pawnbroker, and repealing former ordinances on the same subject. It makes it unlawful for any person to engage in the business unless he shall have a license, and the ordinance provides "that no such license shall be granted unless the applicant be a citizen of the United States." Violations of the ordinance are punishable by fine or imprisonment or both. Plaintiff in error brought this suit in the superior court of King county, Washington, against the city, its comptroller, and chief of police, to restrain them from enforcing the ordinance against him. He attacked the ordinance on the ground that it violates the treaty between the United States and the Empire of Japan, proclaimed April 5, 1911, 37 Stat. 1504; violates the constitution of the State of Washington, and also the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. He declared his willingness to comply with any valid ordinance relating to the business of pawnbroker. It was shown that he had about $5,000 invested in his business, which would be broken up and destroyed by the enforcement of the ordinance. The superior court granted the relief prayed. On appeal, the supreme court of the state held the ordinance valid and reversed the decree. The case is here on writ of error under § 237 of the Judicial Code.

Does the ordinance violate the treaty? Plaintiff in error invokes and relies upon the following provisions: "The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established. * * * The citizens or subjects of each * * * shall receive, in the territories of the other, the most constant protection and security for their persons and property, * * *."

A treaty made under the authority of the United States "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Const. Art. VI, § 2.

The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend "so far as to authorize what the Constitution forbids," it does extend to all proper subjects of negotiation between our government and other nations. Geofroy v. Riggs, 133 U. S. 258, 266, 267; In re Ross, 140 U. S. 453, 463; Missouri v. Holland, 252 U. S. 416. The treaty was made to strengthen friendly relations between the two nations. As to the things covered by it, the provision quoted establishes the rule of equality between Japanese subjects while in this country and native citizens. Treaties for the protection of citizens of one country residing in the territory of another are numerous,[2] and make for good understanding between nations. The treaty is binding within the State of Washington. Baldwin v. Franks, 120 U. S. 678, 682, 683. The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself, without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts. Foster v. Neilson, 2 Pet. 253, 314; Head Money Cases, 112 U. S. 580, 598; Chew Heong v. United States, 112 U. S. 536, 540; Whitney v. Robertson, 124 U. S. 190, 194; Maiorano v. Baltimore & Ohio R. R. Co., 213 U. S. 268, 272.

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[2] See "Handbook of Commercial Treaties," prepared by United States Tariff Commission, 1922.

The purpose of the ordinance complained of is to regulate, not to prohibit, the business of pawnbroker. But it makes it impossible for aliens to carry on the business. It need not be considered whether the state, if it sees fit, may forbid and destroy the business generally. Such a law would apply equally to aliens and citizens, and no question of conflict with the treaty would arise. The grievance here alleged is that plaintiff in error, in violation of the treaty, is denied equal opportunity.

It remains to be considered whether the business of pawnbroker is "trade" within the meaning of the treaty. Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. Hauenstein v. Lynham, 100 U. S. 483, 487; Geofroy v. Riggs, supra, 271; Tucker v. Alexandroff, 183 U. S. 424, 437. The ordinance defines "pawnbroker" to "mean and include every person whose business or occupation it is to take and receive by way of pledge, pawn, or exchange, goods, wares, or merchandise, or any kind of personal property whatever, for the repayment or security of any money loaned thereon, or to loan money on deposit of personal property;" and defines "pawnshop" to "mean and include every place at which the business of pawnbroker is carried on." The language of the treaty is comprehensive. The phrase "to carry on trade" is broad. That it is not to be given a restricted meaning is plain. The clauses "to * * * own or lease * * * shops, * * * to lease land * * * for * * * commercial purposes, and generally to do anything incident to or necessary for trade," and "shall receive * * * the most constant protection and security for their * * * property * * *" all go to show the intention of the parties that the citizens or subjects of either shall have liberty in the territory of the other to engage in all kinds and classes of business that are or reasonably may be embraced within the meaning of the word "trade," as used in the treaty.

By definition contained in the ordinance, pawnbrokers are regarded as carrying on a "business." * * * In this country, the practice of pledging personal property for loans dates back to early colonial times, and pawnshops have been regulated by state laws for more than a century. We have found no state legislation abolishing or forbidding the business. Most, if not all, of the states provide for licensing pawnbrokers and authorize regulation by municipalities. While regulation has been found necessary in the public interest, the business is not, on that account, to be excluded from the trade and commerce referred to in the treaty. Many worthy occupations and lines of legitimate business are regulated by state and federal laws for the protection of the public against fraudulent and dishonest practices. There is nothing in the character of the business of pawnbroker which requires it to be excluded from the field covered by the above-quoted provision, and it must be held that such business is "trade" within the meaning of the treaty. The ordinance violates the treaty. * * * We need not consider other grounds upon which it is attacked.

Decree reversed.

TERRACE v. THOMPSON.

1923. Supreme Court of the United States. 263 U. S. 197.

[A statute of the State of Washington prohibited ownership by aliens (except those who had in good faith declared intention to become citizens of the United States) of any legal or equitable interest in any land (except for a few specified purposes). Terrace, a land owner, and Nakatsuka, an alien Japanese, who desired that the former should lease the land to the latter for farming (a forbidden purpose) joined in a suit in the District Court of the United States to enjoin the attorney general of the state from enforcing the statute, and appealed from a dismissal of the suit.]

Mr. Justice Butler delivered the opinion of the court. * * *

This brings us to a consideration of appellants' contention that the act contravenes the equal protection clause. That clause secures equal protection to all in the enjoyment of their rights under like circumstances. In re Kemmler, supra; Giozza v. Tiernan, 148 U. S. 657, 662. But this does not forbid every distinction in the law of a state between citizens and aliens resident therein. In Truax v. Corrigan, 257 U. S. 312, at page 337, this court said:

"In adjusting legislation to the need of the people of a state, the legislature has a wide discretion and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary. * * * Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand."

The rights, privileges and duties of aliens differ widely from those of citizens; and those of alien declarants differ substantially from those of nondeclarants. Formerly in many of the states the right to vote and hold office was extended to declarants, and many important offices have been held by them. But these rights have not been granted to nondeclarants. By various acts of Congress, declarants have been made liable to military duty, but no act has imposed that duty on nondeclarants. The fourth paragraph of article 1 of the treaty (37 Stat. 1504), invoked by the appellants, provides that the citizens or subjects of each shall be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; also from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions. The alien's formally declared bona fide intention to renounce forever all allegiance and fidelity to the sovereignty to which he lately has been a subject, and to become a citizen of the United States and permanently reside therein markedly distinguishes him from an ineligible alien or an eligible alien who has not so declared.

By the statute in question all aliens who have not in good faith declared intention to become citizens of the United States, as specified in section 1 (a), are called "aliens," and it is provided that they shall not "own" "land," as defined in clauses (d) and (b) of section 1 respectively. The class so created includes all, but is not limited to, aliens not eligible to become citizens. Eligible aliens who have not declared their intention to become citizens are included, and the act provides that unless declarants be admitted to citizenship within seven years after the declaration is made, bad faith will be presumed. This leaves the class permitted so to own land made up of citizens and aliens who may, and who intend to, become citizens, and who in good faith have made the declaration required by the naturalization laws. The inclusion of good faith declarants in the same class with citizens does not unjustly discriminate against aliens who are ineligible or against eligible aliens who have failed to declare their intention. The classification is based on eligibility and purpose to naturalize. Eligible aliens are ✓ free white persons and persons of African nativity or descent. Congress is not trammeled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported by reasonable consideration of public policy.

The state properly may assume that the considerations upon which Congress made such classification are substantial and reasonable. Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not. Appellants' contention that the state act discriminates arbitrarily against Nakatsuka and other ineligible aliens because of their race and color is without foundation. All persons of whatever color or race who have not declared their intention in good faith to become citizens are prohibited from so owning agricultural lands. Two classes of aliens inevitably result from the naturalization laws—those who may and those who may not become citizens. The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act. We agree with the court below (274 Fed. 841, 849) that:

"It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens."

And we think it is clearly within the power of the state to include nondeclarant eligible aliens and ineligible aliens in the same prohibited class. Reasons supporting discrimination against aliens who may but who will not naturalize are obvious.

Truax v. Raich, supra, does not support the appellant's contention. * * *

In the case before us, the thing forbidden is very different. It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the state. The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the state itself.

The Terraces, who are citizens, have no right safeguarded by the Fourteenth Amendment to lease their land to aliens lawfully forbidden to take or have such lease. The state act is not repugnant to the equal protection clause and does not contravene the Fourteenth Amendment.

The state act, in our opinion, is not in conflict with the treaty between the United States and Japan. * * *

The decree of the District Court is affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS think there is no justiciable question involved and that the case should have been dismissed on that ground.

MR. JUSTICE SUTHERLAND took no part in the consideration or decision of this case.

NOTE.

The constitutional requirement of equal protection of the laws (Fourteenth Amendment) does not require the same treatment to be given everyone regardless of circumstances, conditions or personal qualification. A hospital would not be charged with wrongful discrimination if it gave liquid diet to one patient and roast beef to another. That would depend upon the diseases and weaknesses of the patients. This thought has been applied by the courts in getting at the meaning of the equal protection of laws provision. To give the *same* privileges to all or to impose the *same* burdens upon all, regardless of differences of condition, would in fact be denying equal protection. The rich and the poor cannot be taxed equally in amount without the most unjust inequality of burden. The states are permitted to classify persons with reference to privileges and burdens. All persons within a state may be divided into two classes (1) those with color-blind eyes and (2) those whose eyes are not, if the purpose is to determine who may be permitted to drive locomotive engines, because of the use of colors in traffic regulations. So a classification can be made between the educated and the uneducated in determining who may be school teachers, or a state statute may exclude from the practice of medicine all but graduates of approved medical colleges.

The rule is well settled, however, that classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis."[3]

"It must be based on substantial distinctions which make real differences; it must be germane to the purposes of the law."[4]

"Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair."[5]

To what purposes would a classification putting aliens on the one side and citizens on the other be germane? To what purposes would such a distinction bear a reasonable and just relation? Obviously the Supreme Court of the United States does not consider such a classification a just one for the purpose of determining who may pursue any of the common callings.

The Court of Appeals of New York and the Supreme Court of the United States have sustained[6] a New York statute which reads as follows:

"In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the State of New York."

The reasons assigned for these decisions would equally justify exclusion from employment on the public works of a state the citizens of another state, that is, citizens of the United States who have their homes in other states.[7]

The dominant thought in both courts was that the state in contracting for work is like any private contractor entitled to choose its employees.

In one of the opinions it is said, "It must also be evident that nothing in this opinion gives countenance to the view that the government may deny to aliens the right to engage in any private trade or calling."[8]

Two of the New York judges could not restrain themselves from commenting adversely upon the policy of the statute, though that was, as they said, for the legislature to determine.

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[3] Gulf, C. & S. F. Ry. Co. v. Ellis (1897) 165 U. S. 150, 41 L. ed. 666.

[4] Borgnis v. Falk Co. (1911) 147 Wis. 327, 353, 133 N. W. 209, 217.

[5] State v. Loomis (1893) 115 Mo. 307, 314, 22 S. W. 350, 351.

[6] People v. Crane (1915) 214 N. Y. 154, 108 N. E. 427, affirmed in Crane v. New York (1915) 239 U. S. 195, 60 L. ed. 218; Heim v. McCall (1915) 214 N. Y. 629, 108 N. E. 1095, affirmed in Heim v. McCall (1915) 239 U. S. 175, 60 L. ed. 206.

[7] The invalidity of the act under Art. IV, § 2 (the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states) was pleaded in Heim v. McCall (1915) 239 U. S. 180, 60 L. ed. 209, though no specific comment is made on it in the Supreme Court's opinion. See the reasoning of Cardozo, J., 214 N. Y. at pp. 161-162, and of Seabury, J., at pp. 177-178.

[8] People v. Crane (1915) 214 N. Y. 154, 168, 108 N. E. 427.

It seems to the present writer that a forceful point against holding such a statute constitutional is the discrimination involved between two tax-payers, resident alien and resident citizen. It seems that both should be equally eligible for employment, non-political in its nature, where the work is paid for from a fund contributed to by both. This contention seems not to have been made by counsel.

Of course it is undoubted law that aliens may be denied political rights, the privilege of voting and eligibility to office. It has been said that the equal protection of laws clause was intended to embrace only civil, not political rights.[9] Even from the standpoint of reasonable classification, however, it is apparent that alienage is a just basis for these discriminations. It is also universally considered sound constitutionally to exclude aliens from jury service, which is a sort of public office; and to exclude aliens from the practice of law, lawyers being considered officers of the courts, a quasi-public participation in the administration of the law.[10]

A rather extraordinary decision of the United States Supreme Court should not be overlooked. Mischievous inferences might be drawn from it if not properly understood. It held that resident aliens may be forbidden shooting wild game within the state.[11] It rests partly upon the view that wild game is the common property of the citizens of the state, as is recognized in decisions holding that even citizens of other states[12] may be forbidden to kill or capture it, or subjected to discriminating fees for hunting and fishing licenses; and partly on the idea that the state may forbid the killing or capturing of it absolutely and hence, it is said, may exercise an arbitrary power to permit without any reason one class of persons and deny others, a "special power of the state over the subject-matter."[13]

The last reason was relied upon by state courts in holding valid statutes that made aliens ineligible to sell intoxicating liquor.[14]

This technically logical reasoning, that where a state has power to prohibit without qualification it may handle the matter in a manner that otherwise would be obnoxious to constitutional limitations, has recently received a severe jolt in the Supreme Court. In one line of cases it has been finally repudiated.[15]

It should be noted that the justice who delivered the opinion of the court in the Patsone Case was long the stalwart supporter of the repudiated doctrine. Whether or not the Patsone Case will survive for the narrow point ruled upon, it is highly likely that the Supreme Court of the United States will narrowly restrict its implications.

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[9] Field, J., Ex parte Virginia (1880) 100 U. S. 339, 367, 25 L. ed. 676, 685.

[10] In re Admission to the Bar (1900) 61 Nebr. 58, 84 N. W. 611; In the Matter of O'Neill (1882) 90 N. Y. 584; Ex parte Thompson, 10 N. C. 355 (1824); In re Yamashita (1902) 30 Wash. 234, 70 Pac. 482.

[11] Patsone v. Pennsylvania (1914) 232 U. S. 138, 58 L. ed. 539. In accord is State v. Kofines (1911) 33 R. I. 211, 80 Atl. 432, lobster fishing.

[12] Geer v. Connecticut (1896) 161 U. S. 519, 40 L. ed. 793; Silz v. Hesterberg (1908) 211 U. S. 31, 40 L. ed. 793; and see the comment on the Patsone Case in Truax v. Raich (1915) 239 U. S. 33, 40, 60 L. ed. 131. See the cases collected in 60 L. R. A. 481, 26 L. R. A. (N. S.) 794, 40 L. R. A. (N. S.) 285.

[13] As explained in Heim v. McCall (1915) 239 U. S. 175, 194, 60 L. ed. 206.

[14] Bloomfield v. State (1912) 86 Ohio St. 253, 99 N. E. 309; Trageser v. Gray (1890) 73 Md. 250, 20 Atl. 905.

[15] Terral v. Burke Const. Co. (1922) 257 U. S. 529, 66 L. ed. 352, overruling Doyle v. Continental Ins. Co. (1877) 94 U. S. 535, 24 L. ed. 148 and Security Mut. Life Ins. Co. v. Prewitt (1906) 202 U. S. 246, 50 L. ed. 1013. See 7 Iowa Law Bulletin 258,

Other decisions by state courts hold that a state may not discriminate against aliens in issuing peddlers' licenses,[16] or licenses to sell fish,[17] or licenses to practice the barber trade,[18] or impose unequal tax burdens on resident aliens,[19] or discriminate against them in the amount recoverable by them under workmen's compensation laws;[20] nor is a state law valid which would permit theatres to practice against alien patrons discriminations which the statute forbids them to practice against citizen patrons.[21] On the other hand, state statutes have been held valid which deny to aliens licenses to operate public motor-busses,[22] and forbid aliens to possess fire-arms without obtaining from a public officer written permits therefor.[23]

Section 4.—State Citizenship: Acquisition and Loss.

GASSIES v. BALLON.

1832. United States Supreme Court. 6 Pet. 761.

Error to the district court of the United States for the eastern district of Louisiana, by an alien, a citizen of France.

The defendant was described on the record as "now residing in the parish of West Baton Rouge, where the said Pierre Gassies caused himself to be naturalized an American citizen."

The defendant prosecuted this writ of error.

Marshall, C. J., delivered the opinion of the court.

In this case, the court is of opinion that the jurisdiction can be sustained. The defendant in error is alleged in the proceedings to be a citizen of the United States, naturalized in Louisiana, and residing there. This is equivalent to an averment that he is a citizen of that state. A citizen of the United States, residing in any state of the Union, is a citizen of that state. * * *

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[16] State v. Montgomery (1900) 94 Maine 192, 47 Atl. 165. Contra: Commonwealth v. Hana (1907) 195 Mass. 262, 81 N. E. 149.

[17] Poon v. Miller (1921 Tex. Civ. App.) 234 S. W. 573, 576.

[18] Templar v. State Board of Examiners (1902) 131 Mich. 254, 90 N. W. 1058.

[19] In re Kotta (1921) 187 Cal. 27, 200 Pac. 957.

[20] Vietti v. Geo. K. Mackie Fuel Co. (1921) 109 Kans. 179, 197 Pac. 881.

[21] Prowd v. Gore (1922) 57 Cal. App. 458, 207 Pac. 490.

[22] Gizzarelli v. Presbrey (1922) 44 R. I. 333, 117 Atl. 359. This case refers to Commonwealth v. Hana, supra, for its reliance upon the police power, and upon the Patsone Case, supra note 11. In so far as these and the case cited in the next footnote rest upon the thought that classification in exercise of the police power may be arbitrary, that is, not germane to their purposes they can not be supported; and in so far as they find germaness in the circumstances they seem far-fetched.

[23] State v. Rheaume (1922) 80 N. H. 319, 116 Atl. 758.

CITY OF MINNEAPOLIS v. REUM.

1893. Circuit Court of Appeals, Eighth Circuit. 56 Fed. 576.

On October 7, 1891, Frederick Reum, the defendant in error, brought this action against the city of Minneapolis, the plaintiff in error, for a personal injury that resulted from its negligence. He recovered judgment, to reverse which this writ of error was sued out. In his complaint he alleged that he was an alien, and a subject of the king of Saxony, and this allegation was denied by the defendant. The evidence disclosed these facts: The plaintiff was born in the kingdom of Saxony in 1859. His father and mother were natives of that kingdom, and the former resided there until he died, in the infancy of the plaintiff. In 1863, after his father's death, the plaintiff and his mother came to the state of Minnesota, where they have since resided. In 1885 he was married, and has since that time owned and occupied a farm in that state. On October 25, 1890, he made a declaration of his intention to become a citizen of the United States in the circuit court for the district of Minnesota; but he has never been admitted, or applied to be admitted, to citizenship under the second and third paragraphs of section 2165 of the Revised Statutes of the United States, or under any provision of the acts of Congress. The State of Minnesota has conferred upon all foreign subjects resident within its borders who have declared their intention to become citizens the elective franchise, the privilege of holding any office within its gift, and practically all of the privileges of citizenship in the power of that state to confer. In November, 1890, the plaintiff voted for a member of Congress and for state and county officers in Minnesota. At the close of the evidence the defendant moved the court to dismiss the action for want of jurisdiction, on the ground that the evidence failed to establish the allegation that the plaintiff was an alien. The court denied the motion, and this ruling is the supposed error assigned.

SANBORN, CIRCUIT JUDGE, (after stating the facts as above.) In Lanz v. Randall, 4 Dill. 425, Mr. Justice Miller, who was then presiding in the circuit court for the district of Minnesota, held that a state could not make the subject of a foreign government a citizen of the United States, and that a resident of Minnesota who was born a subject of the grand duke of Mecklenburg, had declared his intention to become a citizen of the United States many years before he brought his suit, had resided in the State of Minnesota for 15 years, had several times voted at elections held in that state where the constitution of the state authorizes such residents to do so without naturalization, but had never applied to be or been admitted to citizenship under the federal naturalization laws, was still an alien, and a subject of the grand duke of Mecklenburg. This decision has been followed by the courts, and acquiesced in by the profession. It is now vigorously challenged by counsel for plaintiff in error.

Section 2, Art. III, of the Constitution of the United States provides that the judicial power of the nation shall extend to "controversies between a state or the citizens thereof and foreign states, citizens, or subjects;" and the acts of congress of March 3, 1887, 24 Stat. 552, and of August 13, 1888, 25 Stat. 433, confer jurisdiction of all these controversies in cases involving over $2,000 upon the circuit courts. Every person at his birth is presumptively a citizen or subject of the state of his nativity, and where, as in the case at bar, his parents were then both subjects of that state, the presumption is conclusive. To the land of his birth he owes support and allegiance, and from it he is entitled to the civil and political rights and privileges of a citizen or subject. This relation, imposed by birth, is presumed to continue until a change of nationality is proved. Minor v. Happersett, 21 Wall. 162, 167; Vatt. Law Nat. p. 101; Morse, Nat. 61, 125. A change of nationality cannot be made by the individual at will. Each nation has the right to refuse to grant the rights and privileges of citizenship to all persons not born upon its soil, and, if it determines to admit them to those rights and privileges, it may fix the terms on which they shall be conferred upon them. Naturalization is the admission of a foreign subject or citizen into the political body of a nation, and the bestowal upon him of the quality of a citizen or subject.

The Fourteenth Amendment to the Constitution of the United States provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." As the plaintiff was born in the kingdom of Saxony, of parents who at the time of his birth were subjects of the king of Saxony, he is not a citizen of the United States unless he has been naturalized therein. The United States, in the exercise of their undoubted right, have prescribed the conditions upon compliance with which an alien may become a citizen of this nation. * * * The plaintiff has complied with none of these terms. He has not even applied to any court to be admitted to citizenship. * * * The conclusive answer to the argument here urged is that the declaration of an intention to enter into a new relation for which parties are qualified does not establish the relation. * * *

A single argument remains to be noticed, and that is that the State of Minnesota has conferred on plaintiff the elective franchise, the right to hold any office in its gift, and, in reality, all the rights and privileges of citizenship in its power to bestow; and therefore it is said he is a citizen of that state, and not a foreign subject, and the federal court has no jurisdiction of this action. It may be conceded that a state may confer on foreign citizens or subjects all the rights and privileges it has the power to bestow, but, when it has done all this, it has not naturalized them. They are foreign citizens or subjects still, within the meaning of the Constitution and laws of the United States, and the jurisdiction of the federal courts over controversies between them and citizens of the states is neither enlarged nor restricted by the acts of the state. The power to naturalize foreign subjects or citizens was one of the powers expressly granted by the states to the national government. By Section 8, Art. 1, of the constitution of the United States, it was provided that "the Congress shall have the power to establish a uniform rule of naturalization." Congress has exercised this power, established the rule, and expressly declared that foreign-born residents may be naturalized by a compliance with it, and not otherwise. This power, like the power to regulate commerce among the states, was carved out of the general sovereign power held by the states when this nation was formed and granted by the Constitution to the Congress of the United States. It thus vested exclusively in Congress, and no power remained in the states to change or vary the rule of naturalization Congress established, or to authorize any foreign subject to denationalize himself, and become a citizen of the United States, without a compliance with the conditions Congress had prescribed. Dred Scott v. Sandford, 19 How. 393, 405; Slaughter House Cases, 16 Wall. 36, 73; Minor v. Happersett, 21 How. 162; Boyd v. Nebraska, 143 U. S. 135, 160, 12 Sup. Ct. Rep. 375.

In like manner, the states granted to the judiciary of the nation the power to determine a controversy between a state or citizens thereof and foreign states, citizens, or subjects, (Const. U. S. Art. III, Sec. 2,) and Congress conferred that power upon the circuit courts. The extent of the jurisdiction of those courts is measured by the Constitution and the acts of Congress. A foreign-born resident, who has not been naturalized according to the acts of Congress, is not a "citizen" of the United States or of a state, within the definition given by the Fourteenth Amendment to the Constitution, but remains a foreign subject or citizen; and any controversy between him and a citizen of a state which involves a sufficient amount is thus clearly within the jurisdiction of the circuit courts, under any fair construction of the Constitution and laws of the United States. The jurisdiction thus conferred it is not in the power of any state, by its legislative or other action, to take away, restrict, or enlarge, and the action of the state of Minnesota regarding the citizenship of the plaintiff was not material in this case. Toland v. Sprague, 12 Pet. 300, 328; Cowles v. Mercer Co., 7 Wall. 118; Railway Co. v. Whitton, 13 Wall. 270, 286; Phelps v. Oaks, 117 U. S. 236, 239, 6 Sup. Ct. Rep. 714; O'Connell v. Reed, 56 Fed. Rep. 531.

The result is that the power granted to Congress by Article I, Sec. 8, of the Constitution of the United States, to establish a uniform rule of naturalization, is exclusive; and the naturalization laws enacted by Congress in the exercise of this power constitute the only rule by which a foreign subject may become a citizen of the United States or of a state, within the meaning of the federal Constitution and laws. It is not in the power of a state to denationalize a foreign subject who has not complied with the federal naturalization laws, and constitute him a citizen of the United States or of a state, so as to deprive the federal courts of jurisdiction over a controversy between him and a citizen of a state, conferred upon them by Article III, Sec. 2, of the Constitution of the United States, and the acts of Congress. * * *

The court below was right in denying the motion to dismiss this action for want of jurisdiction, and the judgment below is affirmed, with costs.

GILBERT v. DAVID.

1915. United States Supreme Court. 235 U. S. 561.

Mr. Justice Day delivered the opinion of the court.

This case is here upon writ of error and certificate presenting the question of jurisdiction of the District Court. It comes under Sec. 238 of the judicial code, and presents to this court the question of jurisdiction only. The suit was begun on November 5, 1904, in the United States Circuit Court for the District of Connecticut. * * * The object of the suit was to recover for alleged breaches of a certain indemnity contract set forth in the complaint. * * * After the taking effect of the Judicial Code on January 1, 1912, the case was transferred to the District Court of the United States for the District of Connecticut. On August 26, 1912, a jury was impanelled, and the case came on for trial. The court directed that the trial should proceed upon the question of jurisdiction. Thereupon the parties proceeded to offer testimony upon the question of plaintiff's residence. At the conclusion of this testimony, the court found that the plaintiff and defendants were citizens of the State of Connecticut at the time the action was begun, and accordingly dismissed the suit upon the sole ground of want of jurisdiction, and ordered the jury discharged from further consideration of the case. * * *

It is also insisted that the court erred in itself considering the testimony and in not submitting the issue to the jury. But while the court might have submitted the question to the jury, it was not bound to do so, the parties having adduced their testimony, pro and con, it was the privilege of the court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon that subject. Wetmore v. Rymer, 169 U. S. 115. * * *

As the record brings up the testimony upon which the court below decided the question, it becomes the duty of this court to consider it and determine whether the court rightly found that the plaintiff at the beginning of the suit was not a citizen of the State of Michigan. Wetmore v. Rymer, supra. If the plaintiff was domiciled in the State of Michigan when this suit was begun, he was a citizen of that state within the meaning of the Judicial Code. Morris v. Gilmer, 129 U. S. 315. Williamson v. Osenton, 232 U. S. 619, 624. In this case it clearly appears that for some years prior to 1890 the plaintiff lived in Menominee, in the State of Michigan. He had there a home, and exercised the ordinary duties and privileges of citizenship. In February, 1890, his uncle died in Connecticut, and the plaintiff immediately went to Danbury, in that state, where he remained practically all the time until his death in 1911.

The question is, Had he lost his domicile in Michigan and acquired one in Connecticut, so that he was at the beginning of the suit in 1904 in reality a citizen of the last-mentioned State?

This matter of domicile has been often before this court, and was last under consideration in the case of Williamson v. Osenton, 232 U. S. 619, supra. In that case the definition of domicile, as defined by Mr. Dicey, in his book on "Conflict of Laws," 2d ed., 111, is cited with approval. There change of domicile is said to arise where there is a change of abode and "the absence of any present intention to not reside permanently or indefinitely in the new abode." Or, as Judge Story puts it in his work on "Conflict of Laws," 7th ed., 346, page 41, "If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future period." "The requisite animus is the present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely." Price v. Price, 156 Pa. St. 617, 626.

Applying these definitions to the conduct of plaintiff, we have no doubt that the court was right in holding that he had acquired a new domicile in the State of Connecticut. He removed there with his family, and occupied a house to which he held the title. He owned other real estate in Connecticut, inherited from his uncle. He took a letter from his church in Michigan to a church in Danbury, Connecticut. For about ten years he was not back in Michigan, except for a short time, and then for a temporary purpose. The Michigan homestead and much of the furniture used there were sold upon the removal to Connecticut. For more than ten years he resided continuously with his family in the same house in Danbury, Connecticut. While the plaintiff did not vote in Connecticut, as far as the record shows, it is in evidence that he declared to another his intention of becoming a voter there. To some witnesses he declared his purpose to reside in Connecticut. As against this testimony, it appears that he left his desk with his brother-in-law in Michigan, which he declared was for the purpose of "holding his residence there." To some witnesses he declared his intention to live in Michigan and expressed his preference for that state as a dwelling-place. He continued to pay membership dues to orders to which he belonged in Michigan.

It is apparent from all the testimony that the plaintiff may have had, and probably did have, some floating intention of returning to Michigan after the determination of certain litigation and the disposition of his property in Connecticut should he succeed in disposing of it for what he considered it worth. But as we have seen, a floating intention of that kind was not enough to prevent the new place, under the circumstances shown, from becoming his domicile. It was his place of abode which he had no present intention of changing, that is the essence of domicile.

We find no error in the conclusion of the District Court upon the question of jurisdiction, and its judgment is therefore

Affirmed.

HAMMERSTEIN v. LYNE.

1912. District Court, W. D. Missouri, W. D. 200 Fed. 165.

[In equity to restrain the defendant from appearing in musical and operatic productions in violation of a contract to perform exclusively under the management of the plaintiff. The bill alleged that plaintiff was a citizen of the United States and resided in New York, and that defendant was a citizen of the United States and resident of the Western Division of the Western District of Missouri.]

Van Valkenburgh, District Judge: From these proofs it appears that the defendant was born at Slater, in this division and district of Missouri; that she subsequently lived in Kansas City with her parents; that on or about August 12, 1907, she disposed of all her property and effects, except such as she took with her, and left Kansas City, with her mother, for Paris, France, for the purpose of completing her musical education and entering upon an operatic career; that she remained in Paris three years, revisiting this country in August, 1910, during which time she sang under the management of the complainant in New York and Philadelphia, and made a brief visit to her grandparents in Kansas City; that she returned to Paris, where she remained until the 20th of September of the same year, and then she went to London and took up her residence there, where she still lives, her address being No. 1 Hay Hill, Berkely Square; that she remained there continuously until September 12, 1912, when she sailed for the United States for the purpose of giving the concert in Kansas City referred to in the bill of complaint. On the occasion of her first visit, she signed, at the port of New York, a nonresident's declaration and entry, declaring herself to be a resident of Paris. On her second visit she signed a similar nonresident's declaration and entry, declaring herself to be a resident of England. Her mother has been with her continuously, and her father now resides in Pennsylvania. None of the family have either home or property in the state of Missouri, but have relatives living in Kansas City. The defendant declares that, when she left Kansas City in August, 1907, she did so with the purpose of changing her domicile, and with no intention of returning here to live. On the contrary, it was her intention to take up a residence abroad in the pursuit of her chosen profession; that she first established a residence in Paris, and afterwards her present residence in London, with the intention of remaining there for an indefinite period, and that such should be her principal and permanent residence; that she has not now, and has not had since her departure, any intention of returning to Missouri. She has not, however, taken any steps to alter her status as a national citizen of this country, nor is it her intention so to do. On the contrary, she explicitly asserts that she is, and considers herself to be, a citizen of the United States. Under this state of facts, defendant submits that this court has no jurisdiction over her in this case. The complainant contends that she is still a citizen of the state of Missouri, and a resident of the Western division of the Western district thereof.

The Constitution of the United States (Article III, Sec. 2) provides: "The judicial power shall extend to * * * controversies * * * between citizens of different states * * *."

Defining the jurisdiction of the District Courts, the Judicial Code (chapter 2, sec. 24) provides:

"The District Courts shall have original jurisdiction as follows: First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens or subjects."

The jurisdiction of this court must exist, if at all, because the case at bar belongs to one of the classes named, and more specifically to "b" or "c" above described. The complainant is admitted to be a citizen of the state of New York. Then, to confer jurisdiction upon this court, in any view, the defendant must be a citizen of some other state, or she must be an alien. It is not and cannot be claimed that she is a citizen of any state other than Missouri.

It is first necessary to inquire whether, upon the testimony before us, the defendant can be held to be a citizen of any state, and in determining this we must remember that the citizenship with which we are now concerned is that contemplated by the Judiciary Act. Citizenship in this country is a dual one—national and state—and the distinction between national and state citizenship has been frequently pointed out.

The first section of the fourteenth article of amendment to the federal Constitution provides that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

Concerning the definition of citizenship therein contained, the Supreme Court of the United States has said: "The distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual." Slaughter-house Cases, 16 Wall. 36, 73, 74, 21 L. ed. 394.

In Cooper v. Galbraith, No. 3193, 6 Fed. Cas. 473, Mr. Justice Washington said: "Citizenship, when spoken of in the Constitution in reference to the jurisdiction of the courts of the United States, means nothing more than residence. The citizens of each state are entitled to all the privileges and immunities of citizens in the several states; but to give jurisdiction to the courts of the United States, the suit must be between citizens residing in different states, or between a citizen and an alien."

Of course, the residence here spoken of means permanent residence *animo manendi*. This appears from his language used in Butler v. Farnsworth, No. 2240, 4 Fed. Cas. 902, wherein he says: "In order to give jurisdiction to the courts of the United States, the citizenship of the party must be founded on a change of domicile and permanent residence in the state to which he may have removed from another state. Mere residence is prima facie evidence of such change, although, when it is explained and shown to have been for temporary purposes, the presumption is destroyed."

* * * What constitutes citizenship in another state, in the sense of the Constitution and Judiciary Act, with reference to the jurisdiction of the federal courts was discussed by Circuit Justice Marshall in Prentiss v. Barton, No. 11,384, 19 Fed. Cas. 1276. He said: "In the sense of the Constitution and of the Judiciary Act, he who is incorporated into the body of the state, by permanent residence therein, so as to become a member of it, must be a citizen of that state, although born in another. Or, to use the phrase more familiar in the books, a citizen of the United States must be a citizen of that state in which his domicile is placed."

He points out that state citizenship cannot depend entirely upon birth; that the rights so conferred, as respects suits in the courts of the United States, may be changed by a change of residence.

In Prentiss v. Brennan, No. 11,385, 19 Fed. Cas. 1278, Mr. Justice Nelson says: "A person may be a citizen of the United States, and not a citizen of any particular state. This is the condition of citizens residing in the District of Columbia, and in the territories of the United States, or who have taken up a residence abroad, and others that might be mentioned. A fixed or permanent residence or domicile in a state is essential to the character of citizenship that will bring the case within the jurisdiction of the federal courts."

It is apparent that state citizenship, under our system and as used in the Constitution and Judiciary Act, is essentially different from national citizenship. The latter is defined to be the relation of allegiance and protection between individuals and their country. It is the antithesis of alienage, and involves a national right or condition. As was said in Lynch v. Clarke, 1 Sandf. Ch. (N. Y.) 583: "It pertains to the confederated sovereignty—the United States—and not to the individual states."

A citizen of the United States owes his primary and highest allegiance to the general government, and not to his particular state. On the other hand, state citizenship is the practical equivalent of domicile.

"That place is properly the domicile of a person in which he has voluntarily fixed his abode, not for a mere special or temporary purpose, but with a present intention of making it his permanent home." 14 Cyc. 833.

Generally speaking, and especially with reference to the Judiciary Act, it must involve national citizenship. Although a state may, by its Constitution and laws, confer certain privileges of citizenship on foreign subjects, it cannot make them citizens within the meaning of this act. City of Minneapolis v. Reum, 6 C. C. A. 31, 56 Fed. 576. Nevertheless, such state citizenship or domicile is not at all essential to national citizenship.

It would appear conclusively from the facts presented, from the uniform views expressed by the courts, and from the definitions universally accepted, that the defendant in this case has established a domicile in London, England. She lives there. She declares it to be her home, and that it is her intention to remain there indefinitely. She has abandoned her former home in Missouri for an indefinite and uncertain period, with no present intention of returning. Her present visit is a temporary one. It is her purpose to return to England, and she would have executed that purpose before this, had it not been for the pendency of this suit. Ennis et al. v. Smith et al., 14 How. 400-423, 14 L. Ed. 472; Morris v. Gilmer, 129 U. S. 315-328, 9 Sup. Ct. 289, 32 L. Ed. 690; 14 Cyc. 833. Under such circumstances she is not and cannot be a citizen of Missouri within the meaning of the Judiciary Act conferring jurisdiction upon the federal courts of controversies between citizens of different states.

Is she, then, a citizen of the United States, or is she an alien? Because, if the latter, she can be sued in this court, if found in this jurisdiction, by the complainant, who is a citizen of the state of New York. It being admitted that she is by birth a citizen of the United States, the burden is upon the complainant to show that she has renounced or otherwise abandoned or lost that citizenship. She herself asserts it. What must we conclude from the facts appearing in testimony?

There has been no act of naturalization, nor any step in that direction. If she has lost her citizenship at all, it must be through some act of expatriation. What is essential to bring about that result? It will hardly be contended that mere change of residence, even with intention never to return, can have that effect. Miller, Circuit Justice, in Lanz v. Randall, No. 8,080, 14 Fed. Cas. 1131. * * * We have seen that citizens and subjects of one country may acquire a domicile in a foreign country without such forfeiture. There has been in this case no such act, coupled with intention, as would operate to convert this defendant into an alien within the meaning of the law now under consideration.

It follows that, inasmuch as Miss Lyne is neither a citizen of a state, nor an alien, within the meaning of the Judiciary Act, this court is without original jurisdiction to entertain this action. That this may have the practical effect of denying complainant the right to litigate the differences between himself and the defendant in any federal court cannot alter the situation. * * *

The plea to the jurisdiction must be sustained; and it is so ordered.

PANNILL v. ROANOKE TIMES CO.

1918. District Court, W. D. Virginia. 252 Fed. 910.

At law. Actions by one Pannill and by one Jerrick against the Roanoke Times Company, consolidated for trial. Action by plaintiff Pannill dismissed for want of jurisdiction, and plaintiff Jerrick permitted to take a voluntary nonsuit.

McDowell, District Judge: 1. These actions for libel were consolidated for trial, without objection from any party, as both cases grew out of the same publication. The first case was, after some of the plaintiffs' evidence had been heard, dismissed without prejudice for want of diversity of citizenship, which ruling was excepted to by both Pannill and the defendant. The defendant is a corporation created by the state of Virginia. The plaintiff was born in West Virginia, and in his early manhood went to Oklahoma, where he bought a farm near Lawton, and was living there with the intention of residing in that state permanently. In 1910 he met with an accident which resulted in almost entire paralysis. His own means were shortly exhausted in efforts to be cured, and as he was and had been before his injury a member of the Lawton local lodge of Elks, he applied through his local lodge to the Grand Lodge of Elks for assistance. It developed that the Grand Lodge had no fund applicable to the relief of any but superannuated members, and Pannill is even now apparently under 40 years of age. He then undertook to visit a number of the local lodges of Elks in several of the Western states in an effort to have them send delegates to the next Grand Lodge convention instructed to have a fund created for the assistance of members in his condition. In undertaking this journey, according to his own evidence, Pannill left Oklahoma with no intention of returning to that state, but with the expectation of living in California if he succeeded in his endeavor. The result of this campaign was temporarily successful. The Grand Lodge agreed to pay a certain sum monthly for Pannill's support, on condition that the Lawton lodge would also pay a specified part of the expense. This arrangement having been made, Pannill went to California, intending to stay there, as he said, "for the remainder of my life."

Some few months after Pannill had established himself in California, the Lawton lodge found itself unable to raise from its few members the share of the expenses it had undertaken to contribute, which resulted in a refusal by the Grand Lodge to continue its contributions. Thereupon Pannill left California and commenced a tour of the United States in an effort to induce the Elks to establish a fund for his support without reference to contributions from the Lawton lodge, which had surrendered its charter. Pannill testified that when he left California he had the intention of never returning to that state at any time, and all the facts adduced substantiated this statement. His intention was, if successful in his quest, to take up his abode in Florida or Texas. He had no plans based on the possibility of entire want of success of this last campaign among the Elks. He left Calfornia in 1915, and had been traveling since then, making short stops in many cities and towns, and had covered about 40,000 miles. The expenses of Pannill and his nurse had been mainly obtained from local lodges of Elks, from individual members of that order, and in some cases transportation had been obtained from other charitable organizations. The plaintiffs had come to Virginia a few weeks before these actions were instituted, not intending to stay permanently, but only to stay long enough to institute, and possibly to bring to a conclusion, a suit by Pannill against the Grand Lodge on what he conceives to be a valid cause of action against that body.

As has been said, Pannill's case was ordered dismissed for want of jurisdiction. As the term at which the order of dismissal was made has not been brought to an end, and as the question of Pannill's citizenship is to me novel and rather perplexing, I have taken advantage of the first opportunity to give it further consideration.

(a) It would seem that Pannill cannot be regarded as a citizen of Virginia. He was at the institution of this action residing in this state, but with no intention of remaining here permanently. His intent was and is to stay here only long enough to finish the business which brought him here and to then go to some other state. As Virginia is not the state of his birth, as his residence here is not *animo manendi,* I cannot satisfactorily class him as a citizen of this state. It is true that he is not here with intent to return to either California or to West Virginia, and he intends to stay here for a somewhat indefinite time. But the fact which is necessary to convert mere residence into citizenship is the intent to remain permanently.

(b) It is, I take it, entirely settled that a domicile of choice, once acquired, is not lost until a new domicile has been acquired. Story, Conflict of Laws (2d ed.) Sec. 47; Wharton, Conflict of Laws (2d ed.) Sec. 55; 14 Cyc. 851; Mitchell v. United States, 21 Wall. 350, 352, 353; Desmare v. United States, 93 U. S. 605, 610.

If ascertaining the domicile of a citizen of the United States always ascertains his state citizenship, we have arrived at a simple solution of the question before us. However, domicile and citizenship are, as I think, not always synonymous. Where domicile means home, where it describes the state in which a citizen of the United States has his home, or what he regards as his home, and to which he intends to return, if absent therefrom, it is usually, if not always, equivalent to state citizenship. But when (no new domicile in fact having been acquired) domicile exists only by legal fiction, and describes the state in which a citizen of the United States once had his home, but to which he intends never to return, I cannot see that domicile and citizenship are synonymous. It has in some cases been said that domicile is synonymous with state citizenship. But in every case in which this has been said, so far as I have found, the court had in mind a domicile, to which the party, if absent therefrom, intended ultimately to return. In Williamson v. Osenton, 232 U. S. 619, 624, the agreed facts, as construed by the court, showed an actual domicile in Virginia—a residence with intent to remain permanently. In Prentiss v. Barton, Fed. Cas. No. 11384, Chief Justice Marshall said:

"In the sense of the Constitution and of the Judicial Act, he who is incorporated into the body of the state, by permanent residence therein, so as to become a member of it, must be a citizen of that state, although born in another. Or, to use the phrase more familiar in the books, a citizen of the United States must be a citizen of that state in which his domicile is placed."

But here, also, the court was dealing with a case of actual domicile and an intent to return to it. In Collins v. City of Ashland (D. C.) 112 Fed. 175, 177, it is said that "citizenship depends upon domicile." But in that case the evidence showed a domicile in Ohio, a merely temporary residence in Kentucky, and a clear intent to return to Ohio. In Harding v. Standard Oil Co. (C. C.) 182 Fed. 421, 426, it is said that domicile is usually coextensive in meaning with citizenship; but in this case also (pages 428 and 430) the court finds that the plaintiff, after his departure from Illinois, always had the intention to return to that state, and consequently the case is not one in which, as in the case at bar, the departure from the state of domicile was with intent never to return there. In Hammerstein v. Lyne (D. C.) 200 Fed. 165, 170, it is said that state citizenship is the practical equivalent of domicile. But here again the court had in view an actual domicile animo revertendi.

It must be borne in mind that the grant of jurisdiction to the federal courts is not of controversies between citizens of the United States domiciled in different states, but of controversies between citizens of different states. Beyond any doubt a question of domicile (in fact) is often determinative of the question of citizenship (Morris v. Gilmer, 129 U. S. 315, 328); but it is a very different thing to assert that a mere theoretical domicile, existing with intent never to return to it, is the same thing as citizenship. In the case before us the plaintiff at the institution of the suit did not reside in California, he had no place of abode there, and he intended never to return there. Assuredly it is very difficult to reconcile any theory of citizenship or any definition of the word "citizen" with such facts. Citizenship implies membership in a political society, the relation of allegiance and protection, identification with the state, and a participation in its functions. While a temporary absence may suspend the relation between a state and its citizen, the latter's identification with the former remains because of his intention to return. If A, a citizen of California, sells his home and with his family takes up his residence in Virginia, for a temporary purpose, intending to return to California, he undoubtedly retains his domicile and citizenship in California; and his case may bear close resemblance to the case at bar. A may also be said to have only a theoretical domicile in California. But the essential difference between A's status and that of Pannill is that A intends to return to California and Pannill does not; California is A's home, and it is not in any sense Pannill's home. A has only temporarily surrendered his membership in the political society of California and his participation in its functions; while Pannill has permanently ended his connection with that state.

It is true that a citizen of the United States, who is a mere homeless wanderer and not a citizen of any state, would encounter the same risk of local prejudice in the state courts that would be encountered by citizens of other states. But so would citizens of the District of Columbia. The latter are not included in the grant of jurisdiction, and the most satisfactory conclusion I can reach is that Pannill is not included. In both cases the exclusion is due simply to the wording of the grant. Its language is not broad enough to include a citizen of the District of Columbia or a citizen of the United States who is not a citizen of any state. In Prentiss v. Brennan, 2 Blatchf. 162, 19 Fed. Cas. 1279, 1280, Mr. Justice Nelson said:

"A person may be a citizen of the United States, and not a citizen of any particular state. This is the condition of citizens residing in the District of Columbia, and in the territories of the United States, or who have taken up a residence abroad, and others that might be mentioned. A fixed and permanent residence or domicile in a state is essential to the character of citizenship that will bring the case within the jurisdiction of the federal courts."

As has been said, citizens of the District of Columbia were not granted the privilege of litigating in the federal courts on the ground of diversity of citizenship. Possibly no better reason for this fact exists than that such citizens were not thought of when the judiciary article of the federal Constitution was drafted. It is even more probable that citizens of the United States, occupying the very unusual status that Pannill does, were also not thought of; but in any event a citizen of the United States, who is not a citizen of any state, is not within the language of the Constitution. And to my mind Pannill is not a citizen of California, simply because he never intends to return to that state, and has finally severed his connection with that state. The theoretical domicile which is equivalent to state citizenship is always one which exists animo revertendi. The theoretical domicile which clings to a homeless wanderer, who never intends to return, has its uses in deciding rights of succession to property, in respect to taxation and to the administration of pauper laws, but is not, I think, equivalent to citizenship in the sense in which the word "citizen" is used in the Judiciary Act. While domicile, in some sense, may not be lost by mere departure with intent not to return, state citizenship is thus lost. In other words, where the word "domicile" is used as meaning home, where absence from domicile is animo revertendi, domicile may be equivalent to state citizenship; but where domicile exists merely by legal fiction, and absence is accompanied by intent never to return to the state of domicile, the word is not synonymous with citizenship.

Section 5.—Interstate Privileges and Immunities of State Citizens. Art. IV, Sec. 2, Cl. 1.

BARRELL v. BENJAMIN.

1819. Supreme Judicial Court of Massachusetts. 15 Mass. 354.

This was an action of assumpsit; and while on trial before the jury, the question arose whether this court had jurisdiction of the suit. In order to have this question settled by the whole court, the parties agreed on the following statement of facts:—

Barrell, the plaintiff, is a native citizen of the United States, having been born within this commonwealth but at the time when this action was commenced, and long before, he lived in the town of Norwich in the State of Connecticut.

The defendant, Benjamin, is a native citizen of the State of Connecticut; but more than twenty years past has had, and still has, his domicile in Demerara; although when this action was commenced, he ~~was in Boston~~, on his way to Demerara; and the plaintiff's writ was served by arresting his body.

The plaintiff and defendant were partners in a house in Demerara, jointly carrying on commerce there as partners for many years before the year 1807, when their copartnership was dissolved. This action was commenced and prosecuted to recover the balance supposed to be due, from the defendant to the plaintiff, on settlement of their accounts. When the British took possession of the colony of Demerara, in the year 1803, the said Benjamin took an oath of allegiance to that government.

If the court should be of opinion that they ought to hold jurisdiction of the action, it was agreed that the defendant should be holden to render his account, and that auditors should be appointed to audit the same. But if the court should be of a different opinion, the plaintiff was to become nonsuit, and the defendant recover his costs.

Hubbard, for the defendant, contended that the plaintiff was to be considered merely as a foreigner, having no other rights than any alien friend, anything in the Constitution or laws of the United States notwithstanding. The defendant is also a foreigner and in the event of a war between the United States and Great Britain he would be an alien enemy. Both parties being foreigners, their being accidentally in this commonwealth cannot give jurisdiction to its courts, who were not appointed to determine controversies in which its citizens have no interest.

The court cannot take cognizance of the contract attempted to be enforced in this action, which was not made here, nor to be executed or performed here, nor with reference to our laws. If the court should entertain jurisdiction of the cause, it must be tried and determined by the law of the country where it was made, and where it was to be executed. * * *

PARKER, C. J., delivered the opinion of the court. * * *

It will be found upon examining the Constitution of the United States that a controversy between two foreigners who are private subjects is not enumerated as within the judicial power of the United States.

But the jurisdiction of this court, as a court of common law, is unlimited; and all cases cognizable by any of the courts of common law in England are cognizable here.

Personal contracts are said to have no situs or locality but follow the person of the debtor wherever he may go and there seems to be no good reason why courts of any country may not lend their aid to enforce such contracts, especially since it is a well-known principle that, in construing such contracts, the law of the place where they are made will be administered. So that the objection made in this case of the possible difference between the laws of Demerara and this commonwealth can have no influence on the question.

It is true that the debtor may be put to inconvenience by being obliged to answer in a foreign country. But the creditor may also be put to inconvenience if he should be denied the privilege of suing in a foreign court for the debtor may withdraw his person and effects from the place of his business and if he cannot be pursued may defraud his creditor of his due.

It seems, however, to be admitted in the argument, that if the defendant resided here there would be no objection to the action, the complaint being that he was arrested within this state when here only for the purpose of embarking for Demerara. But we see no way of upholding the distinction and there is nothing to be found in the books to support it. A debtor coming here merely for the purpose of embarking may be detained several months before he procures a passage; he may have all his effects about him; and he may never return to the place where he transacted his business. If the creditor cannot take him here, he may lose his chance of securing his debt. On the score of inconvenience there is nothing in favor of the defendant's argument.

But, for the decision of this particular case, we need not go into any general reasoning. The plaintiff is a citizen of the United States, having his domicile in Connecticut. By the second section of the Fourth Article of the Constitution of the United States, it is provided that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Since the adoption of the Constitution, the citizens of Connecticut, or any other state in the Union, cannot be considered as foreigners; and indeed are not so considered practically in any courts of law. Citizens of different states may change their domicile from one state to another and enjoy all the privileges of citizenship wherever they may go.

It will be admitted that a citizen of Massachusetts has the privilege to sue any foreigner who may come within this state, whether he come to embark for a foreign country, or to reside here for the purposes of business. If so, a citizen of Connecticut has the same privilege secured to him by the Constitution and arguments, which might be plausible if used against a foreigner, cannot avail against a plaintiff who has none of the disabilities of a foreigner attending him.

According to the agreement of the parties, there must be judgment that the defendant account and auditors must be appointed.[1]

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[1] Accord: Cofrode v. Gardner, Circuit Judge (1890) 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511 (contract, both parties being nonresidents, plaintiff a citizen of another state, and though contract was to be performed in the state the court took no note of this element); State ex rel. Pac. Mut. Life Ins. Co. v. Grimm (1912) 239 Mo. 135, 143 S. W. 483 (contract wholly extraterritorial, parties making performance, but since a citizen of state may sue in like case Art. IV, § 2, Cl. 1, is compelling and deprives the court of discretion to decline where plaintiff is a citizen of another state, two judges dissenting); Deatrick's Admr. v. State Life Ins. Co. (1907) 107 Va. 602, 59 S. E. 489 (same, *semble*); State ex rel. Prall v. District Court (1914) 126 Minn. 501, 148 N. W. 463, Ann. Cas. 1915D, 198 (wholly extraterritorial tort i. e., wrongful act outside the state, both plaintiff and defendant non-resident); Reynolds v. Day (1914) 79 Wash. 499, 140 Pac. 681, L. R. A. 1916A, 432 (same); Eingartner v. Illinois Steel Co. (1896) 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. 859 (same); Reeves v. Southern Ry. Co. (1905) 121 Ga. 561, 563, 49 S. E. 674, 70 L. R. A. 513; 2 Ann. Cas. 207 (same); Hale v. Lawrence (1848) 21 N. J. L. 714, 740, 47 Am. Dec. 190 (same, by three judges, the other five neither opposing nor approving); and see Davis v. Minneapolis, St. Paul &c. Ry. Co. (1916) 134 Minn. 455, 159 N. W. 1084; Southern Pacific Co. v. Dusablon (1908) 48 Tex. Civ. App. 203, 106 S. W. 766 (*semble* and held that "comity at least" should be extended to plaintiff who was a "citizen" of a Territory).

Contra: Hatfield v. Sisson (1899) 28 Misc. 255, 59 N. Y. S. 73 (wholly extraterritorial tort, court has discretion to decline to exercise jurisdiction); Murnan v. Wabash Ry. Co. (1927) 246 N. Y. 244, 158 N. E. 508 ("The practice may be anomalous but [in New York] it is well established"); Collard v. Beach (1904) 93 App. Div. 339, 87 N. Y. S. 884, (same) where the court said, "The calendars of the courts of this state are congested, and, it being difficult to administer speedy justice to litigants who are obliged to submit their con-

LEMMON v. THE PEOPLE.

1860. New York Court of Appeals. 20 N. Y. 562.

[Appeal from a judgment of the Supreme Court (Dec. 1857), affirming an order of a justice of the Superior Court of the city of New York (Nov. 13, 1852) discharging on *habeas corpus* eight negroes claimed as the slaves of Juliet Lemmon.]

Denio, J. The petition upon which the writ of *habeas corpus* was issued, states that the colored persons sought to be discharged from imprisonment were, on the preceding night, taken from the steamer "City of Richmond," in the harbor of New York, and at the time

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troversies to our courts and have no other forum it is eminently proper that we should refuse [to exercise] jurisdiction over actions for tort that properly belong in another forum," and reference is made to the large number of nonresidents visiting New York City and residing in other states in the immediate neighborhood. See also the dissenting opinion of Cassoday, C. J., in Eingartner v. Illinois Steel Co., supra. New York courts have no discretion to decline when plaintiff is a resident. Gregonis v. Philadelphia & Reading Coal & Iron Co. (1923) 235 N. Y. 152, 139 N. E. 223, 32 A. L. R. 1.

In a few instances the refusal to try suits brought by nonresident plaintiffs (though in the particular case the plaintiff is a nonresident who is a citizen of another state) is justified on the ground that discrimination favoring all residents as against all nonresidents is not in fact a discrimination against citizens of other states, see infra, p. 467, n. 7. Robinson v. Oceanic Steam Nav. Co. (1889) 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636; Loftus v. Pennsylvania R. Co. (1923) 107 Ohio St. 352, 140 N. E. 94, where it is said, that the courts of that state are maintained at great expense, only a small fraction of it being charged to litigants, and that taxes should not be "further increased to provide remedies * * * for those who for reasons of their own prefer to reside in other states."

The Supreme Court of the United States has not decided the question though there are broad dicta such as: "This [Article IV, Sec. 2, Cl. 1] secures citizens of one state the right to resort to the courts of another, equally with the citizens of the latter state; but where the citizens of the latter states are not given a process for reaching foreign corporations, it is not apparent how noncitizens can claim it."—Taft, C. J., in Missouri Pac. R. Co. v. Clarendon Boat Oar Co. (1922) 257 U. S. 533, 535, 66 L. ed. 354.

"The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens."—Moody, J., in Chambers v. Baltimore & Ohio R. Co. (1907) 207 U. S. 142, 148, 52 L. ed. 143. See also Blake v. McClung, infra, at p. 465.

See (1903) 17 Harv. L. Rev. 54; (1928) 41 Harv. L. Rev. 387-390; (1928) 37 Yale L. J. 984-985; (1924) 32 A. L. R. pp. 13 ff.

Distinguish the above cases from those in which an alien or a foreign corporation is plaintiff (neither of which is included within Art. IV, § 2, Cl. 1) and courts though having jurisdiction also have a discretion, which they sometimes exercise, to decline to entertain suits, more commonly where the defendant is a nonresident and the cause of action has arisen outside the state. That the action is transitory does not preclude denial in such cases. Distinguish also non-transitory causes of action arising outside the state which the courts of a state ordinarily refuse to try even where a citizen of the state is plaintiff. The situations referred to in this paragraph turn on so-called comity and are discussed in courses and treatises on Conflict of Laws.

of presenting the petition, were confined in a certain house in Carlisle Street in that city. * * *

I understand the effect of these statements to be that Mrs. Lemmon, being the owner of these slaves, desired to take them from her residence in Norfolk to the State of Texas; and, as a means of effecting that purpose, she embarked, in the steamship mentioned, for New York, with a view to secure a passage from thence to her place of destination. As nothing is said of any stress of weather, and no marine casualty is mentioned, the necessity of landing, which is spoken of, refers, no doubt, to the exigency of that mode of prosecuting her journey. If the ship in which she arrived was not bound for the Gulf of Mexico, she would be under the necessity of landing at New York to re-embark in some other vessel sailing for that part of the United States; and this, I suppose, is what it was intended to state. The necessity or accident which is mentioned as having compelled her to embark at Norfolk in the "City of Richmond," is understood to refer to some circumstance which prevented her making a direct voyage from Virginia to Texas. The question to be decided is whether the bringing the slaves into this state under these circumstances entitled them to their freedom.

The intention, and the effect, of the statutes of this state bearing upon the point are very plain and unequivocal. [The revised statutes of 1830 as amended in 1841 read:] "§ 1. No person held as a slave shall be imported, introduced or brought into this state on any pretense whatsoever, * * *. Every such person shall be free. Every person held as a slave who hath been introduced or brought in this state contrary to the laws in force at the time, shall be free."

* * * If, therefore, the legislature had the constitutional power to enact this statute, the law of the state precisely meets the case of the persons who were brought before the judge on the writ of *habeas corpus,* and his order discharging them from constraint was unquestionably correct. Every sovereign State has a right to determine by its laws the condition of all persons who may at any time be within its jurisdiction; to exclude therefrom those whose introduction would contravene its policy, or to declare the conditions upon which they may be received, and what subordination or restraint may lawfully be allowed by one class or description of persons over another. Each State has, moreover, the right to enact such rules as it may see fit respecting the title to property, and to declare what subjects shall, within the State, possess the attributes of property, and what shall be incapable of a proprietary right. These powers may of course be variously limited or modified by its own constitutional or fundamental laws; but independently of such restraints (and none are alleged to exist affecting this case) the legislative authority of the State over these subjects is without limit or control, except so far as the State has voluntarily abridged

her jurisdiction by arrangements with other States. There are, it is true, many cases where the conditions impressed upon persons and property by the laws of other friendly States may and ought to be recognized within our own jurisdiction. These are defined, in the absence of express legislation, by the general assent and by the practice and usage of civilized countries, and being considered as incorporated into the municipal law, are freely administered by the courts. They are not, however, thus allowed on account of any supposed power residing in another State to enact laws which should be binding on our tribunals, but from the presumed assent of the law-making power to abide by the usages of other civilized States. Hence it follows that where the legislature of the State, in which a right or privilege is claimed on the ground of comity, has by its laws spoken upon the subject of the alleged right, the tribunals are not at liberty to search for the rule of decision among the doctrines of international comity, but are bound to adopt the directions laid down by the political government of their own State. We have not, therefore, considered it necessary to inquire whether by the law of nations, a country where negro slavery is established has generally a right to claim of a neighboring State, in which it is not allowed, the right to have that species of property recognized and protected in the course of a lawful journey taken by the owner through the last-mentioned country, as would undoubtedly be the case with a subject recognized as property everywhere; and it is proper to say that the counsel for the appellant has not urged that principle in support of the claim of Mrs. Lemmon.

What has been said as to the right of a sovereign State to determine the status of persons within its jurisdiction applies to the states of this Union, except as it has been modified or restrained by the Constitution of the United States. Groves v. Slaughter, 15 Pet. 419; Moore v. The People of Illinois, 14 How. 13; City of New York v. Miln, 11 Pet. 131, 139. There are undoubtedly reasons, independently of the provisions of the federal Constitution, for conciliatory legislation on the part of the several states, towards the polity, institutions and interests of each other, of a much more persuasive character than those which prevail even between the most friendly States unconnected by any political union; but these are addressed exclusively to the political power of the respective states * * *. The provision respecting the return of fugitives from service [Art. IV, Sec. 2, Cl. 3] * * * declares that no person held to service or labor in one state, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, etc. * * * But the provision of the Constitution extended no further than the case of fugitives. * * * It has been decided that the fugitive clause does not extend beyond the case of the actual escape of a slave from one state to another. Ex parte Simmons, 4 Wash. C. C. R. 396. But the provision is plainly so limited by its own language.

The Constitution declares that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. Art. IV, § 2. No provision in that instrument has so strongly tended to constitute the citizens of the United States one people as this. Its influence in that direction cannot be fully estimated without a consideration of what would have been the condition of the people if it or some similar provision had not been inserted. Prior to the adoption of the Articles of Confederation, the British colonies on this continent had no political connection, except that they were severally dependencies of the British crown. Their relation to each other was the same which they respectively bore to the other English colonies, whether on this continent or in Europe or Asia. When, in consequence of the Revolution, they severally became independent and sovereign states, the citizens of each state would have been under all the disabilities of alienage in every other, but for a provision in the compacts into which they entered whereby that consequence was avoided. The articles adopted during the Revolution formed essentially a league for mutual protection against external force; but in passing them it was felt to be necessary to secure a community of intercourse which would not necessarily obtain even among closely allied states. This was effected by the fourth article of that instrument, which declared that the free inhabitants of each of the states (paupers, vagabonds, and fugitives from justice excepted) should be entitled to all privileges and immunities of free citizens in the several states, and that the people of each state should have free ingress and egress to and from any other state, and should enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof, respectively. The Constitution organized a still more intimate union, constituting the states, for all external purposes and for certain enumerated domestic objects, a single nation; but still the principle of state sovereignty was retained as to all subjects, except such as were embraced in the delegations of power to the general government or prohibited to the states. The social status of the people, and their personal and relative rights as respects each other, the definition and arrangements of property, were among the reserved powers of the states. The provision conferring rights of citizenship upon the citizens of every state in every other state, was inserted substantially as it stood in the Articles of Confederation. The question now to be considered is, how far the state jurisdiction over the subjects just mentioned is restricted by the provision we are considering; or, to come at once to the precise point in controversy, whether it obliges the state governments to recognize, in any way, within their own jurisdiction, the property in slaves which the citizens of states in which slavery prevails may lawfully claim within their own states —beyond the case of fugitive slaves. The language is that they shall have the privileges and immunities of citizens in the several states. In my opinion the meaning is, that in a given state, every citizen of every other state shall have the same privileges and immunities—that is, the same rights—which the citizens of that state possess. In the first place, they are not to be subjected to any of the disabilities of alienage. They can hold property by the same titles by which every other citizen may hold it, and by no other. Again, any discriminating legislation which should place them in a worse situation than a proper citizen of the particular state would be unlawful. * * * But where the laws of the several states differ, a citizen of one state asserting rights in another, must claim them according to the laws of the last-mentioned state, not according to those which obtain in his own.

The position that a citizen carries with him, into every state into which he may go, the legal institutions of the one in which he was born, cannot be supported. A very little reflection will show the fallacy of the idea. Our laws declare contracts depending upon games of chance or skill, lotteries, wagering policies of insurance, bargains for more than 7 per cent per annum of interest, and many others, void. In other states such contracts, or some of them, may be lawful. But no one would contend that if made within this state by a citizen of another state where they would have been lawful, they would be enforced in our courts. Certain of them, if made in another state and in conformity with the laws there, would be executed by our tribunals upon the principles of comity; and the case would be the same if they were made in Europe or in any other foreign country. The clause has nothing to do with the doctrine of international comity. That doctrine, as has been remarked, depends upon the usage of civilized nations and the presumed assent of the legislative authority of the particular state in which the right is claimed; and an express denial of the right by that authority is decisive against the claim. How then, is the case of the appellant aided by the provision under consideration? * * * But my opinion is that she has no more right to the protection of this property than one of the citizens of this state would have upon bringing them here under the same circumstances, and that the clause of the Constitution referred to has no application to the case. * * *

Upon the whole case, I have come to the conclusion that there is nothing in the national Constitution or the laws of Congress to preclude the state judicial authorities from declaring these slaves thus introduced into the territory of this state, free, and setting them at liberty, according to the direction of the statute referred to. For the foregoing reasons, I am in favor of affirming the judgment of the Supreme Court.

[WRIGHT, DAVIES, BACON AND WELLES, JJ., concurred. CLERKE, J., AND COMSTOCK, C. J., dissented. SELDON, J., undecided.][2]

CORFIELD v. CORYELL.

1825. Circuit Court of the United States. 4 Wash. C. C. 371.

This was an action of trespass for seizing * * * a certain vessel, the property of the plaintiff. [The defendant justified by showing seizure in accordance with a statute of New Jersey, as follows:—"it shall not be lawful for any person who is not at the time an actual inhabitant and resident in this state, to rake or gather clams, oysters, or shells, in any of the rivers, bays or waters in this state, on board of any * * * vessel, not wholly owned by some person, inhabitant of and actually residing in this state," under penalty of $10 fine and forfeiture of the vessel. The plaintiff pleaded the invalidity of this statute under Art. IV, Sec. 2, Cl. 1 of the Constitution of the United States.]

Washington, J., delivered the opinion of the court. * * *

2. The next question is, whether this act infringes that section of the Constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states"? The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times,

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[2] In Bank of Augusta v. Earle (U. S. 1839) 13 Pet. 519, 10 L. ed. 274 it was held that a corporation is not a citizen within Art. IV, Sec. 2, Cl. 1, and this has been regarded as settled since Paul v. Virginia (U. S. 1869) 8 Wall. 168, 180-182, 19 L. ed. 357, where it was reasoned that state A is not required by this clause to permit citizens of state B to act as a corporation in state A though in state B they are incorporated in accordance with the laws thereof. Thus this clause does not require a state not to exclude a corporation formed under the laws of another state. This power to exclude "foreign" corporations does not extend to excluding "foreign" corporations from engaging in foreign or interstate commerce in the state, this exception being due to interpretation of the Commerce Clause, Article I, § 8, Cl. 3. "And undoubtedly a corporation of one state, employed in the business of the general government, may do such business in other states without obtaining a license from them. Thus, * * * 'if Congress should employ a corporation of shipbuilders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any state of the Union,' and, we may add, without the permission and against the prohibition of the state. Stockton v. Baltimore and New York Railroad Co., 32 Fed. Rep. 9, 14."—Field, J., in Pembina Mining Co. v. Penn. (1888) 125 U. S. 181, 186, 31 L. ed. 650. The position of a foreign corporation under the Constitution is dealt with in the later chapter on Foreign Corporations.

A state is not required to permit a person to practice law therein merely because he is a citizen of another state in which he is licensed. In re Rodgers (1899) 194 Pa. 161, 46 Atl. 668. See further, Attorney and Client, 6 C. J. p. 6, §§ 19-20.

been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state,[3] for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or Constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old Articles of Confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."

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[3] PROBLEM: If a state may not prevent aliens migrating into it from another state (see Truax v. Raich, ante, p. 422) and can not prevent citizens of other states from so migrating, may it prevent "citizens" of Hawaii, of the Philippines, or citizens of the United States domiciled in the District of Columbia from doing so? (Compare Crandall v. Nevada (U. S. 1868) 6 Wall. 35, 18 L. ed. 745, holding that a state may not make *leaving* the state a taxable privilege). May a state make discriminations against these last three classes of persons that it may not make against citizens of other states?

In Estate of Johnson (1903) 139 Cal. 532, 539, 73 Pac. 424, 96 Am. St. 161, it is said that "citizens of Territories, of the District of Columbia, and of our new possessions, as well as aliens" are not within the protection of Art. IV, § 2, Cl. 1, and that an attempt of a state to tax legacies given to nonresidents while exempting legacies given to residents would be invalid as to legacies to nonresidents who were citizens of other states but valid as to legacies to nonresidents of these four classes.

Compare a converse situation in Haavik v. Alaska Packers Assn. (1924) 263 U. S. 510, 515, 68 L. ed. 414, where McReynolds, J., for the court after referring to Art. IV, § 2, Cl. 1, said that the court found nothing in the Constitution forbidding Congress or a Territorial legislature to give residents of the Territory preferences over citizens of the states.

Consider the possibilities of interpretation. Thus, where a state statute gave an action for damages against anyone who denied to any "citizen" full privileges of, or equal treatment in, a theatre except for good cause applicable alike to "citizens" of every color or race, it was held that "citizen" in this context meant any person and that it was not necessary for plaintiff to show that he was a citizen of the United States or of the state in the technical senses of those expressions. Prowd v. Gore (1922) 57 Cal. App. 458, 207 Pac. 490.

Article IV, § 2, Cl. 1, is not the only anti-discrimination clause in the Constitution. Even if the words, "citizens of each state" in that clause are authoritatively construed not to include "citizens" of the District of Columbia, of the Territories, and of the Philippines, yet as to such persons while they are *within a state's jurisdiction* (meaning geographical limits?) they derive some immunity from discrimination by virtue of Amendment XIV, "nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws." While this clause and Art. IV, § 2, Cl. 1, to some extent overlap they are not coextensive. Also note that the Commerce Clause gives all persons including corporations immunity from state prevention of ingress for the conduct of interstate and foreign commerce within a state.

But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the Constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens. A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, and the like, is as much the property of the individual to whom it belongs, as dry land, or land covered by water; and is equally protected by the laws of the state against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the state. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use. * * *

That this exclusive right of taking oysters in the waters of New Jersey has never been ceded by that state, in express terms, to the United States, is admitted by the counsel for the plaintiff; and having shown, as we think we have, that this right is a right of property, vested either in certain individuals, or in the state, for the use of the citizens thereof; it would, in our opinion, be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a co-tenancy in the common property of the state, to the citizens of all the other states. Such a construction would, in many instances, be productive of the most serious public inconvenience and injury, particularly, in regard to those kind of fish, which, by being exposed to too general use, may be exhausted. The oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other states from taking them, except under such limitations and restrictions as the laws may prescribe.

[The court also concluded that the plaintiff, though owner of the vessel, having leased it for a definite term unexpired at the time of the seizure, did not have possession or immediate right to possession, essential to maintain an action of trespass.]

Judgment for the defendant.[4]

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[4] Accord: State v. Tower (1892) 84 Maine 444, 24 Atl. 898; Commonwealth v. Hilton (1899) 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475; State v. Corson (1901) 67 N. J. L. 178, 50 Atl. 780; State v. Ashman (1911) 123 Tenn. 654, 135 S. W. 325 (fresh water shell fish); Allen v. Wyckoff (1886) 48 N. J. L. 90, 2 Atl. 659, 57 Am. Rep. 548 (wild game), and on wild game see Geer v. Connecticut (1896) 161 U. S. 519, 528-530, 40 L. ed. 793. In McCready v. Virginia (1877) 94 U. S. 391, 24 L. ed. 248, it was held that *planting* of oysters in tidal waters within the state might be confined to citizens of the state, and the court said, "If Virginia had by law provided for the sale of its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other states had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the state had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other states avail themselves of such a privilege."

Compare this concept of "state" ownership of public land, which states have practiced selling to private persons, with the vague "property" in wild game and fish which *semble* the state has no such ownership of as would support sale of it to individual members, its ownership being that of a trustee for its members in common who may become individual owners by capture. Rossmiller v. State (1902) 114 Wis. 169, 181, 89 N. W. 839, 58 L. R. A. 93, 91 Am. St. 910.

See State v. Catholic (1915) 75 Ore. 367, 147 Pac. 372, Ann. Cas. 1917B, 913, for discussion of a compact and legislation based upon the idea that salmon in the Columbia River are common property of all citizens of Oregon, Washington and Idaho to the exclusion of citizens of other states.

In Hess v. Muir (1886) 65 Md. 586, 610, 5 Atl. 540, 6 Atl. 673, it is held that a nonresident may be excluded from oyster planting even though he is an owner of land bordering upon the shore line.

A state may forbid the drawing off of water from lakes or rivers wholly within the state to supply inhabitants of other states. McCarter v. Hudson County Water Co. (1906) 70 N. J. Eq. 695, 65 Atl. 489, 14 L. R. A. (N. S.) 197, 118 Am. St. 754, 10 Ann. Cas. 116, affd. in Hudson County Water Co. v. McCarter (1908) 209 U. S. 349, 52 L. ed. 828, 14 Ann. Cas. 560. As to ice on such waters it has been held that the collectivity called "state" cannot charge its members ten cents a ton for ice cut and shipped out of the state by them, and *semble* every person within the borders of the state (irrespective of citizenship?) share equally in a common right to take ice for personal use or for sale inside or outside the state. Rossmiller v. State, supra.

A state statute has been sustained which restricted the letting by counties of contracts for public printing and stationery to residents of the state. The reasoning of the opinion is that a state may elect with whom it will contract, and that the Commerce Clause, 14th Amendment and Art. IV, § 2, Cl. 1, impose no restraint in respect thereto. State ex rel. Collins v. Senatobia Blank Book & Stationery Co. (1917) 115 Miss. 254, 76 So. 258, Ann. Cas. 1918B, 953. On like grounds was sustained a Colorado statute requiring in all contracts for public work preference to be given to Colorado products. City and County of Denver v. Bossie (1928) 83 Colo. 329, 266 Pac. 214. Would a state statute be valid that required private contractors employed to do public work for the state to hire as laborers only citizens of the state? See the reasoning in People v. Crane (1915) 214 N. Y. 154, 108 N. E. 427, Ann. Cas. 1915B, 1254, and in Heim v. McCall (1915) 239 U. S. 175, 60 L. ed. 206, Ann. Cas. 1917B, 287. See ante, p. 432 and note 7 thereto.

BLAKE ET AL. v. McCLUNG.

1898. Supreme Court of the United States. 172 U. S. 239.

[On writ of error to the Supreme Court of Tennessee. The Embreeville Company, a corporation organized under the laws of the United Kingdom of Great Britain and Ireland for mining and manufacturing purposes complied in 1890 with the requirements of the statutes of Tennessee for doing business in that state and engaged in business therein. In 1893 McClung and other creditors, citizens of Tennessee, applied to a Tennessee court to appoint a receiver of the corporation's property in Tennessee, the corporation being insolvent. Other creditors intervened, among them Blake, a resident of and citizen of Ohio, the firm of Rogers, Brown & Company, the members of which were also residents of and citizens of Ohio, and the Hull Coal and Coke Company, a corporation organized under the laws of Virginia. There also were creditors who were residents of Great Britain. A Tennessee statute provided that the property of foreign mining and manufacturing corporations admitted to do business in the state should be liable for their debts and that "creditors who may be residents of this state shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries." On issues involving priority among the creditors the case went on appeal to the Supreme Court of Tennessee which partly modifying the decree below decreed that all the creditors "who resided in the State of Tennessee" were entitled to priority over all of the other creditors whether residents of other states of the United States or of the Kingdom of Great Britain.]

MR. JUSTICE HARLAN delivered the opinion of the court. * * *

The suggestion is made that, as the statute refers only to "residents," there is no occasion to consider whether it is repugnant to the provision of the national Constitution relating to citizens. We cannot accede to this view. * * * Looking at the purpose and scope of the Tennessee statute, it is plain that the words "residents of this state" refer to those whose residence in Tennessee was such as indicated that their permanent home or habitation was there, without any present intention of removing therefrom, and having the intention, when absent from that state, to return thereto,—such residence as appertained to or inhered in citizenship. And the words, in the same statute, "residents of any other country or countries," refer to those whose respective habitations were not in Tennessee, but who were citizens, not simply residents, of some other state or country. It is impossible to believe that the statute was intended to apply to creditors of whom it could be said that they were only residents of other states, but not to creditors who were citizens of such states. The state did not intend to place creditors, citizens of other states, upon an equality with creditors, citizens of Tennessee, and to give priority only to Tennessee creditors over creditors who resided in, but were not citizens of, other states. The manifest purpose was to give to all Tennessee creditors priority over all creditors residing out of that state, whether the latter were citizens or only residents of some other state or country. Any other interpretation of the statute would defeat the object for which it was enacted. * * *

Beyond question, a state may, through judicial proceedings, take possession of the assets of an insolvent foreign corporation within its limits, and distribute such assets or their proceeds among creditors according to their respective rights. But may it exclude citizens of other states from such distribution until the claims of its own citizens shall have been first satisfied? In the administration of the property of an insolvent foreign corporation by the courts of the state in which it is doing business, will the Constitution of the United States permit discrimination against individual creditors of such corporaton because of their being citizens of other states, and not citizens of the state in which such administration occurs?

These questions are presented for our determination. Let us see how far they have been answered by the former decisions of this court.

This court has never undertaken to give any exact or comprehensive definition of the words "privileges and immunities," in Article IV of the Constitution of the United States. Referring to this clause, Mr. Justice Curtis, speaking for the court in Conner v. Elliot, 18 How. 591, 593, said: "We do not deem it needful to attempt to define the meaning of the word 'privileges' in this clause of the Constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief." Nevertheless, what has been said by this and other courts upon the general subject will assist us in determining the particular questions now pressed upon our attention. * * * [Here Justice Harlan referred to the "observations of Mr. Justice Washington," quoting the long paragraph of the latter's opinion, ante, pp. 457-459. He also referred to McCready v. Virginia, ante, p. 460, n. 4 as resting upon the same common property concept as Corfield v. Coryell, and quoted from Paul v. Virginia, 8 Wall. 168, 180.]

Ward v. Maryland, 12 Wall. 418, 430, involved the validity of a statute of Maryland requiring all traders, not being permanent residents[5] of the state, to take out licenses for the sale of goods, wares, or merchandise in Maryland, other than agricultural products and articles there manufactured. This court said: "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt, those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union, for the purpose of engaging in lawful commerce, trade, or business, without molestation, to acquire personal property, to take and hold real estate, to maintain actions in the courts of the states, and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens. Comprehensive as the power of the states is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution; and, inasmuch as the Constitution provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, it follows that the defendant might lawfully sell or offer or expose for sale within the district described in the indictment, any goods which the permanent residents of the state might sell or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents."

In the Slaughter-House Cases, 16 Wall. 36, 77, the court, referring to what was said in Paul v. Virginia, above cited, in reference to the scope and meaning of Section 2 of Article IV of the Constitution, said: "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

In Cole v. Cunningham, 133 U. S. 107, 113, 114, this court cited with approval the language of Justice Story, in his Commentaries on the Constitution, to the effect that the object of the constitutional guaranty was to confer on the citizens of the several states "a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances, and this includes the right to institute actions."

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[5] Counsel in that case said of the statute involved: "It makes the discrimination rest upon the very fact which alone determines, in the case of citizens of the United States, whether a person is or is not a citizen of one state or another, to wit, *permanent residence in a state.*" 12 Wall. (U. S.) at p. 421.

These principles have not been modified by any subsequent decision of this court.

The foundation upon which the above cases rest cannot, however, stand, if it be adjudged to be in the power of one state, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges connected with that business which it denies to citizens of other states. By the statute in question the British company was to be deemed and taken to be a corporation of Tennessee, with authority to carry on its business in that state. It was the right of citizens of Tennessee to deal with it, as it was their right to deal with corporations created by Tennessee. And it was equally the right of citizens of other states to deal with that corporation. The state did not assume to declare, even if it could legally have declared, that that company, being admitted to do business in Tennessee, should transact business only with citizens of Tennessee, or should not transact business with citizens of other states. No one would question the right of the individual plaintiffs in error, although not residents of Tennessee, to sell their goods to that corporation upon such terms in respect of payment as might be agreed upon, and to ship them to the corporation as its place of business in that state.

But the enjoyment of these rights is materially obstructed by the statute in question; for that statute, by its necessary operation, excludes citizens of other states from transacting business with that corporation upon terms of equality with citizens of Tennessee. By force of the statute alone, citizens of other states, if they contracted at all with the British corporation, must have done so subject to the onerous condition that, if the corporation became insolvent, its assets in Tennessee should first be applied to meet its obligations to residents of that state, although liability for its debts and engagements was "to be enforced in the manner provided by law for the application of the property of natural persons to the payment of their debts, engagements, and contracts." But, clearly, the state could not in that mode secure exclusive privileges to its own citizens in matters of business. If a state should attempt, by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that state over the claims of individual creditors citizens of other states, such legislation would be repugnant to the Constitution, upon the ground that it withheld from citizens of other states, as such, and because they were such, privileges granted to citizens of the state enacting it. Can a different principle apply, as between individual citizens of the several states, when the assets to be distributed are the assets of an insolvent private corporation lawfully engaged in business, and having the power to contract with citizens residing in states other than the one in which it is located? * * *

We hold such discrimination against citizens of other states to be repugnant to the second section of the Fourth Article of the Constitution of the United States, although, generally speaking, the state has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several states by the supreme law of the land. Indeed, all the powers possessed by a state must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States. * * *

We must not be understood as saying that a citizen of one state is entitled to enjoy in another state *every* privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a state to its own people in which citizens of other states may not participate except in conformity to such reasonable regulations as may be established by the state. For instance, a state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people; but it may require a nonresident, although a citizen of another state, to give bond for costs, although such bond be not required of a resident. Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states. So, a state may, by rule uniform in its operation as to citizens of the several states, require residence within its limits for a given time before a citizen of another state, who becomes a resident thereof, shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each state of the privileges and immunities secured by the Constitution to citizens of the several states. The Constitution forbids only such legislation[6] affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the government of the Union was ordained and established.

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[6] Is not the immunity given by this clause broader than immunity from discriminatory legislation? Does it not include also immunity from similar harms emanating from executive, administrative and judicial organs of government? On the other hand it has been said that, like the Fourteenth Amendment (see Civil Rights Cases, ante, at p. 313), this clause gives no immunity from adverse discrimination practiced by unofficial persons acting without authority or color of authority, from government. Consequently it has been held that Congress though it may legislate to punish invasions of immunities given by the Constitution can not provide for punishing private persons who without color of state authority eject from a state citizens of another state. United States v. Wheeler

Nor must we be understood as saying that a state may not, by its courts, retain within its limits the assets of a foreign corporation, in order that justice may be done to its own citizens, nor, by appropriate action of its judicial tribunals, see to it that its own citizens are not unjustly discriminated against by reason of the administration in other states of the assets there of an insolvent corporation doing business within its limits. For instance, if the Embreeville Company had property in Virginia at the time of its insolvency, the Tennessee court administering its assets in that state could take into account what a Virginia creditor, seeking to participate in the distribution of the company's assets in Tennessee, had received or would receive from the company's assets in Virginia, and make such an order touching the assets of the company in Tennessee as would protect Tennessee creditors against wrongful discrimination arising from the particular action taken in Virginia for the benefit of creditors residing in that commonwealth.

It may be appropriate to observe that the objections to the statute of Tennessee do not necessarily embrace enactments that are found in some of the states requiring foreign insurance corporations, as a condition of their coming into the state for purposes of business, to deposit with the state treasurer funds sufficient to secure policy holders in its midst. Legislation of that character does not present any question of discrimination against citizens forbidden by the Constitution. Insurance funds set apart in advance for the benefit of home policy holders of a foreign insurance company doing business in the state are a trust fund of a specific kind, to be administered for the exclusive benefit of certain persons. Policy holders in other states know that those particular funds are segregated from the mass of property owned by the company, and that they cannot look to them to the prejudice of those for whose special benefit they were deposited. The present case is not one of that kind. The statute of Tennessee did not make it a condition of the right of the British corporation to come into Tennessee for purposes of business that it should, at the outset, deposit with the state

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(1920) 254 U. S. 281, 65 L. ed. 270. While thus denying that there is any constitutional immunity from *such* ejection, the court added, "Nothing that we have stated must be considered as implying a want of power in the United States to restrain acts which, although involving ingress or egress into or from a state, have for their direct and necessary effect an interference with the performance of duties which it is incumbent upon the United States to discharge, as illustrated in the Crandall Case." [Crandall v. Nevada (U. S. 1868) 6 Wall. 35, 18 L. ed. 745. See infra, p. 496.]

a fixed amount, to stand exclusively or primarily for the protection of its Tennessee creditors. * * *

We adjudge that when the general property and assets of a private corporation lawfully doing business in a state are in course of administration by the courts of such state, creditors who are citizens of other states are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such state, and cannot be denied equality of right simply because they do not reside in that state, but are citizens residing in other states of the Union. The individual plaintiffs in error were entitled to contract with this British corporation, lawfully doing business in Tennessee, and deemed and taken to be a corporation of that state; and no rule in the distribution of its assets among creditors could be applied to them as resident citizens of Ohio, and because they were not residents of Tennessee, that was not applied by the courts of Tennessee to creditors of like character who were citizens of Tennessee. * * *

[The court held that the decree below was not invalid in so far as it adversely affected the Hull Coal and Coke Company, a Virginia corporation. See ante, p. 457, n. 2, and, in due course, the chapter on Foreign Corporations.]

MR. JUSTICE BREWER, with whom MR. CHIEF JUSTICE FULLER concurred, dissenting. * * * Neither the statute, the pleadings nor the decree [below] raise any question of citizenship, or give any priority of right to the citizens of Tennessee over citizens of other states, but only discriminate between residents,[7] and give residents

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[7] In some cases courts have upheld statutes which in terms discriminate between "residents" and "non-residents" purporting to find that the word "resident" as thus used in the statute does not mean permanent resident and that, since in the favored class there may be some citizens of other states who are temporarily "residing" in the state and in the disfavored class some citizens of the state temporarily "residing" out of the state, the statute does not discriminate between citizens of the state and citizens of other states. Cummings v. Wingo (1889) 31 S. Car. 427, 435-436, 10 S. E. 107; Robinson v. Oceanic Steam Nav. Co. (1889) 112 N. Y. 315, 324, 19 N. E. 625, 2 L. R. A. 636. So in holding valid a state inheritance tax law which gave a larger exemption where the decedent was a "resident" than where he was a "non-resident," a court has said: "This classification * * * is not based on citizenship, but on residence, and embraces all who come within it, whether citizens of this state or of other states. Citizenship (of a state) is synonymous with domicile, but not with residence, and a person may be a resident of one state and a citizen of another." Enochs v. State ex rel. Roberson (1923) 133 Miss. 107, 144, 97 So. 534.

In La Tourette v. McMaster (1919) 248 U. S. 465, 469, 63 L. ed. 362, involving the validity of a South Carolina statute which discriminated between "residents" and "nonresidents" in granting licenses to act as insurance brokers in the state, the Supreme Court of the United States accepted an interpretation of the above sort put upon the statute by the Supreme Court of North Carolina, and concluded that as so interpreted the statute did not discriminate between citizens of the state and citizens of other states. But in holding that New York could not collect income taxes from "nonresidents" which were assessed under a state statute allowing them lesser exemptions than it allowed residents in otherwise like circumstances, the court by Pitney, J., said, "Of course the terms 'resident' and 'citizen' are not synonymous, and in some cases the distinction is important (La Tourette v. McMaster, 248 U. S. 465, 470); but a of the state a priority. * * * It is not necessary in this court to refer to the difference between residence and citizenship. Neither is synonymous with the other, and neither includes the other. A British subject or a citizen of Ohio may be a resident of Tennessee, and entitled to the benefit of this statute. A citizen of Tennessee may, like these plaintiffs in error, be a resident of and doing business in Ohio and not entitled to its benefit. It will be time enough to consider the question discussed in the opinion when it appears that a state has attempted to discriminate between its own citizens and citizens of other states, and the courts of the state have affirmed the validity of such discrimination. * * *

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general taxing scheme such as the one under consideration, if it discriminates against all non-residents, has the necessary effect of including in the discrimination those who are citizens of other states; and, if there be no reasonable ground for the diversity of treatment, it abridges the privileges and immunities to which such citizens are entitled." Travis v. Yale & Towne Mfg. Co. (1920) 252 U. S. 60, 78-79, 64 L. ed. 460.

An Ohio statute fixed the venue of tort actions against railroads in the county in which the tort occurred or in the county where the plaintiff resided when the tort occurred. Plaintiff, a citizen of Pennsylvania, brought an action in the common pleas court of Cuyahoga County, Ohio, alleging an injury by the defendant through a wrongful act done in Pennsylvania. Held, that the above statute though construed to prevent plaintiff from maintaining his suit in any Ohio court was valid, notwithstanding Art. IV, § 2, Cl. 1. The court said: "A state statute does not violate this constitutional mandate if there be no manifest intent to discriminate in favor of a particular class of citizens to the exclusion of others similarly circumstanced and the provisions of the restrictive act be in fact open alike to all citizens who may bring themselves within its terms. Thus, if a citizen of Pennsylvania is a resident of Ohio, or if such citizen is sojourning in or traveling through the state of Ohio, and is injured in person or property within the state, the courts are open to him; and, on the other hand, if a citizen of Ohio is a resident of Pennsylvania and is injured in person or property in that state, the courts of Ohio are denied to him. The statute is based upon residence without regard to citizenship." Loftus v. Pennsylvania R. Co. (1923) 107 Ohio St. 352, 363, 140 N. E. 94. See also Douglas v. New York, N. H. &c. R. Co. (1929) 279 U. S. —, 73 L. ed. 25.

Compare the above classification with the following: The Supreme Court of Tennessee described a statute of that state as follows: "The determining feature in the legislation quoted is the having of one's chief office in this state. Any citizen of this state, as well as any citizen of a foreign state, who has his chief office out of the state, must pay the $100 tax; so of any domestic corporation, as well as foreign corporation, having its chief office out of the state. Any foreign corporation or citizen of another state, or firm, as well as domestic corporations, citizens of this state, and firms of this state having its or their chief office in this state, are all alike entitled to carry on a railroad construction business here on the payment of $25. There is no discrimination at all." The Supreme Court of the United States, in holding the statute invalid as applied to a natural person who was a citizen and resident of Alabama with his chief office therein, said: "As the chief office of an individual is commonly in the state of which he is a citizen, Tennessee citizens engaged in constructing railroads in that state will ordinarily have their chief offices therein, while citizens of other states so engaged will not. Practically, therefore, the statute under consideration would produce discrimination against citizens of other states by imposing higher charges against them than citizens of Tennessee are required to pay. We can find no adequate basis for taxing individuals according to the location of their chief office—the classification, we think is arbitrary and unreasonable. Under the federal Constitution a citizen of one state is guaranteed the right to enjoy in all other states equality of commercial privileges with their citizens; but he cannot have his chief office in every one of them." Chalker v. Birmingham & N. W. Ry. Co. (1919) 249 U. S. 522, 526, 527, 63 L. ed. 748.

SMITH v. LOUGHMAN.

1927. Court of Appeals of New York. 245 N. Y. 486.

[In accordance with the transfer tax law of New York the state tax commission assessed the gifts by will made by Mary J. Smith to her four children of personal and real property located in New York at the time of her death. At that time she was a resident of Connecticut. The amount assessed was $589.98. If she had been a resident of New York the assessment would have been $94.90. The statute contained separate schemes, one applicable to estates of "residents," the other to estates of "nonresidents," which would produce the diversities set forth in the opinion. The validity of the statute was challenged with reference to U. S. Const. Art. IV, Sec. 2, Cl. 1.]

Cardozo, Ch. J. * * * True, of course, it is that with changes in the class of donees or in the value of the gift, the comparative results will differ. For illustration, the tax on a legacy of $5,000 to a father, mother, husband, wife, or child is $100 for a nonresident, and for a resident nothing; on a legacy of $10,000, $200 for a nonresident, and for a resident $50; on one of $50,000, $1,000 for a nonresident, and for a resident $650; on one of $100,000, $2,000 for a nonresident, and $1,650 for a resident; on one of $250,000, $4,000 for a nonresident, and $4,600 for a resident. On the other hand, the tax on a legacy of $500 to a friend is $10 for a nonresident, and nothing for a resident; on one of $10,000, $200 for a nonresident, and $500 for a resident; on one of $100,000, $2,000 for a nonresident, and for a resident $5,750. The nonresident suffers in the intimate and lower schedules and gains in the remote and upper ones. Such is the setting of fact in which the legal problem is imbedded.

The state does not establish the validity of this act by showing that from certain points of view or in aid of certain purposes a classification discriminating between residents or nonresidents has a basis, not wholly illusory, in policy or reason. There is no occasion to inquire whether such a showing would suffice if we were dealing with the equal protection clause of the Fourteenth Amendment, and nothing else. We deal in fact with something more. "The power of a state to make reasonable and natural classifications for purposes of taxation is clear and not questioned; but neither under form of classification nor otherwise can any state enforce taxing laws which in their practical operation materially abridge or impair the equality of commercial privileges secured by the federal Constitution, to citizens of the several states." Chalker v. Birmingham & N. W. Ry. Co., 249 U. S. 522, 526. Classification may be supported by many considerations of expediency or fairness and, none the less, may be illegal if it denies to the citizens of any state the privileges and immunities that belong to citizens of another. To put it differently, equality in such circumstances is itself the highest policy, to which other policies must bow. The Constitution so commands. Few of its commands, if any, have had an influence more profound upon the attainment and preservation of the unity of the nation. Paul v. Virginia, 8 Wall. 168, 180; Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 78. Cf. Hanover Fire Ins. Co. v. Carr, 272 U. S. 494.

By the Tax Law of this state, an act that in any case is one and the same—the transfer of a parcel of real estate by will—is subjected to burdens of taxation that differ fundamentally, and not occasionally or in points of detail, according as the doer of the act is a citizen of one state or another. The distinction in form is between resident and nonresident; "but a general taxing scheme such as the one under consideration, if it discriminates against all nonresidents, has the necessary effect of including in the discrimination those who are citizens of other states" (Travis v. Yale & Towne Mfg. Co., supra, at page 79), and will stand or fall accordingly. In some instances, the burden for the nonresident is vastly heavier than for the resident. It is so in this case. It is so, as we have seen, whenever the gift is to a child or a parent or a husband or wife, unless the value is very high. In other instances, as in many where the gift is to a stranger to the blood, the burden for the nonresident may be lower than for the resident. Whether these inequalities will balance one another in the long run as applied to nonresidents generally, we can do little more than guess. What is certain is that the inequalities will not balance, but will inevitably persist, whenever certain classes of nonresidents—e. g., children or parents—are compared with like classes of residents. What is also certain is that nonresidence without more has been made the basis for the divergent burdens of one class and another. The citizen of New Jersey or Connecticut who is the owner of property in New York, and who wishes to dispose of it by will, finds a body of law in New York applicable to citizens of New Jersey or Connecticut fundamentally at variance with the body applicable in like conditions to citizens of New York. He may not act upon equal terms with his neighbor who lives on the other side of the state line. The exactions for the two classes have a different operation as to each, not by accident, but of set purpose. At times heavier and at times lighter, they are never the same.

A state is not at liberty to establish varying codes of law, one for its own citizens and another, governing the same conduct, for citizens of sister states. Of course, one may not press this principle to "a drily logical extreme." Noble State Bank v. Haskell, 219 U. S. 104, 110. At times, the character of the act may be so affected by the residence of the actor as to call for varying regulation with a view to the attainment in the end of a truer level of equality. Thus, nonresidents resorting to our courts may be compelled to give security for costs[8] (Canadian Northern Ry. Co. v. Eggen, 252 U. S. 553, 561, 562; Robinson v. Oceanic Steam Nav. Co., 112 N. Y. 315, 324, 325), and travelers using our highways for motor cars may be required to submit to appropriate regulations for the service of process if accident results as an incident of travel (Hess v. Pawloski, 274 U. S. 352). In these and like cases, the effect of the apparent discrimination is not to cast upon the nonresident a burden heavier in its ultimate operation than the one falling upon residents, but to restore the equilibrium by withdrawing an unfair advantage.[9] "It makes no hostile discrimination against nonresidents, but tends to put them on the same footing as residents. Literal and precise equality in respect of this matter is not attainable; it is not required." Hess v. Pawloski, supra. Instances of a like order can be found in statutes prescribing the form and measure of taxation. Resident stockholders in Connecticut were paying a tax upon the value of their shares with deduction allowed for the value of real estate. Such a deduction was not allowed to nonresidents. The inequality was only apparent, for the residents were taxed in other ways. Travelers' Ins. Co. v. Connecticut, 185 U. S. 364. Domestic corporations in Louisiana paid a tax upon oil. Nonresidents paid a heavier tax. Again the discrimination was only apparent, for the tax upon the foreign corporation was declared to be in lieu of others. General American Tank Car Corp. v. Day, 270 U. S. 367, a case involving, however, the Fourteenth Amendment rather than the guaranty under Article IV of the equal privileges of citizens. In these and like cases, the difference in treatment, whatever it may have been, was made necessary by conditions inseparably interwoven with difference of residence, and was proportioned to the necessity. Only for this was it upheld.

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[8] So held in Nease v. Capehart (1879) 15 W. Va. 299; Bracken v. Dinning (1910) 140 Ky. 348, 131 S. W. 19; Holt v. Tennallytown &c. Co. (1895) 81 Md. 219, 31 Atl. 809; Cummings v. Wingo (1889) 31 S. Car. 427, 10 S. E. 107.

[9] Some differentiations in judicial procedure have been held valid not all of which fall clearly within the above principle. Campbell v. Morris (1797) 3 Har. & McH. (Md.) 491, 1 Am. Dec. 380 (attachment of property of nonresident debtors only); Pyrolusite Manganese Co. v. Ward (1884) 73 Ga. 491 (same); Manley v. Mayer (1904) 68 Kans. 377, 75 Pac. 550, 1 Ann. Cas. 825 (attachment of decedent's property in suit against executor only if latter is a nonresident); Marsh v. Steele (1879) 9 Nebr. 96, 1 N. W. 869, 31 Am. Rep. 406 (judgment creditor attaching property in execution must give bond only in attaching property of resident); Head v. Daniels (1887) 38 Kans. 1, 15 Pac. 911 (same); Frost v. Brisbane (1837) 19 Wend. 11 (transiently present and temporarily resident persons only arrestable for debt); Baker v. Wise (1861) 16 Grat. (57 Va.) 139 (departing vessels of nonresidents only searchable for escaping slaves); Kincaid v. Francis (1812) 3 Tenn. 49 (only citizens may attach non-citizens' property); Pratt v. Hawley (1921) 297 Ill. 244, 250, 130 N. E. 793 (notice of probate in common form given residents only); White v. Walker (1915) 136 La. 464, 67 So. 332 (suit in forma pauperis allowed only to citizens of the state). See also Canadian Northern R. Co. v. Eggen, infra, p. 487, and Chemung Canal Bank v. Lowery, infra, p. 489, n. 18.

Cf. State ex rel. Cronkhite v. Belden (1927) 193 Wis. 145, 211 N. W. 916, 214 N. W. 460 (holding invalid a discrimination in the length of time for which continuances may be granted).

The statute now before us does not use its discriminations to establish measure and proportion, its discords as a means to harmony. Something more is here than a failure to attain equality "with mathematical exactness" (per Stone, J., in General American Tank Car Corp. v. Day, supra); more than an "occasional or accidental inequality due to circumstances personal to the taxpayer" (Pitney, J., in Travis v. Yale & Towne Mfg. Co., supra, at p. 80). What is here is an inequality that is purposed and pervasive. The Supreme Court held in Travis v. Yale & Towne Mfg. Co., supra, that a state income tax was void in its application to nonresidents for failure to accord to them the exemption of $2,000 accorded by the same state to residents. Deeper by far and wider is the difference of treatment here. To discrimination in respect of exemption there is added discrimination in respect of rates. A special burden laid upon the members of a group as the price of a given act does not cease to be discrimination because a special privilege is granted in connection with another and unrelated act. One who wishes to do the first may never wish to do the second. It is small comfort to a parent who plans a gift of land of the value of $5,000 for the benefit of his child to learn that he would be a gainer by the new tax if he were giving land of the value of a million dollars to a cousin or a friend. No doubt a taxing system may be upheld though "occasionally and incidentally" (Maxwell v. Bugbee, 250 U. S. 525, 543) individuals may suffer. In the case cited the formula of apportionment was framed to produce equality. The court let it stand though there was evidence that in a few instances it resulted in inequality. What was general prevailed over what was unintended and exceptional. The inequalities wrought by this enactment have not been kept within those limits. Great classes of persons, all or nearly all who bear a close relation to those who take the gift, many, though not all, whose relation is more distant, must pay a penalty to the taxgatherer because of their nonresidence. This is hostile discrimination, however generous the profession of benevolent paternalism.

The state does not contend that the new system was adopted as a check upon evasion. Evasion as to subject-matter is impossible when the thing to be transferred is land. Evasion as to deductions is a danger almost equal whether the transfer is the act of nonresident or of resident. * * *

The principle of equal treatment for the citizens of all the states is a good more precious than the gain of revenue in one year or another. We are not to whittle it down by refinement of exception, or by the implication of a reciprocal advantage that is merely trivial or specious. The principle is put in jeopardy—there is set in it an entering wedge that may be the beginning of its destruction—if this statute is upheld.

The order of the Appellate Division should be reversed and the determination of the state tax commission annulled, with costs in all courts.

Pound, Crane, Andrews, Lehman, Kellogg, and O'Brien, JJ., concur.

Ordered accordingly.

QUONG HAM WAH CO. v. INDUSTRIAL ACCIDENT COMMISSION.

1920. Supreme Court of California. 184 Cal. 26.

[Proceedings on certiorari to review an award against an employer made by the state Industrial Accident Commission in favor of an employee who was a citizen of California. The employer contended that Section 58 of the statute, the sole authority for the award, was wholly invalid. The court so held at the first hearing and decided to annul the award but now on rehearing:]

Lennon, J.—Section 58 of the Workmen's Compensation Act reads as follows: "The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act." (Stats. 1917, p. 870.) * * *

Since the act assumes that at the time of the injury the employee will be beyond the boundaries of the state, the word "residents" must necessarily have been used to designate "persons domiciled in" California. Citizens of the United States domiciled in California are citizens of the state. (Cal. Pol. Code, Sec. 51.) The benefits of the act are therefore extended solely to citizens of California and to aliens domiciled within the state. It follows that there is a direct discrimination against aliens not domiciled in California, with which we are not concerned, and against citizens of other states of the union which, if without legal justification, renders the statute unconstitutional. Blake v. McClung, 172 U. S. 239, 247; 176 U. S. 56, 67. * * *

The statute * * * assumes to extend its effect only to those cases where the contract of hire was made in this state. * * * The right of the legislature to impose reasonable regulations upon contracts subject to its sovereignty is unquestioned. When, however, the legislature attempts to provide that a substantial privilege shall be incident to certain contracts of employment when entered into in this state by citizens of this state and that that privilege shall not be incident to identical contracts of employment when entered into in this state by citizens of other states of our Union, the enactment is clearly in contravention of Section 2 of Article IV of the federal Constitution. * * *

The Constitution provides that "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The provision appears without qualification. Its effect is not limited to those cases where its operation will not interfere with the internal policy of the state or with considerations which appear to affect the general welfare. Its mandate is absolute. It is true that a state may, in the valid exercise of its police power, limit the right of individuals to engage in certain professions or callings. Such regulations will be upheld even though their effect is indirectly to place noncitizens at a disadvantage, but the regulation must be inherently reasonable. Ex parte Spinney, 10 Nev. 323; La Tourette v. McMaster, 248 U. S. 465. The principles applied in these cases cannot be invoked under the facts presented here. No reasonable ground can be found for the classification. Respondents make the contention that the court should uphold the right of the state to require compulsory compensation for its citizens alone, inasmuch as it is only citizens or their families who are likely to become a public charge upon the state as a result of injuries sustained abroad. The argument expresses a very excellent reason for requiring compulsory compensation for citizens, but it expresses no reason at all for denying the same right to citizens of other states. In the cases of which Ex parte Spinney and La Tourette v. McMaster, supra, are examples, *restraints* upon engaging in certain occupations which bore more heavily upon citizens of other states were upheld upon the ground that the public good required that the occupations in question be opened only to those having had business or professional experience within the state, the general safety and welfare necessitating the exclusion of others. In none of these cases was the rule sanctioned that a *privilege* could be granted to a citizen of one state and denied to citizens of other states for the reason that public policy did not require that the privilege be extended to the latter class of persons. Such a rule would be manifestly unsound and altogether in conflict with the constitutional provision here in question. No consideration of public policy requires that citizens of sister states be excluded from the benefits of the act here under consideration. The fact that considerations of public policy do not affirmatively require the extension of the benefits in question to citizens of sister states as strongly as they require their extension to citizens of this state furnishes absolutely no sound reason for the exclusion of the former and affords no reasonable basis for the discrimination.

It follows that the discrimination made in Section 58 of the Workmen's Compensation Act contravenes the provisions of the federal Constitution.

It is contended, however, and correctly, that the provisions of the federal Constitution do not have the effect of rendering invalid that portion of the Workmen's Compensation Act providing for an extension of its benefits to residents who are injured abroad, but that it allows this portion of the act to stand as effective and valid and automatically and without regard to the intent of the state legislature extends the benefits created by the act to nonresidents, or rather to such nonresidents as are citizens of sister states. In support of this contention respondents rely upon Estate of Johnson, 139 Cal. 532.[10] No good reason has been advanced for departing from the doctrine therein declared as follows: "It will be noted not only that the constitutional provision is not restrictive, but that it is neither penal nor prohibitory. It nowhere intimates that an immunity conferred upon citizens of a state, because not in terms conferred upon citizens of sister states, shall therefore be void. Some force might be given to such an argument were the constitutional provision couched in appropriate language for the purpose. If, for example, it had said, 'No citizen of any state shall be granted any immunity not granted to every citizen of every state,' or had it begun its declaration by saying that 'It shall be unlawful to grant to citizens of any state any privilege or immunity not granted to citizens of every state,' it might then have been argued that a legislative attempt so to do would be declared violative of the express mandate of the Constitution, and therefore void. But such is neither the scope, purpose, nor intent of the provision under consideration. It leaves to the state perfect freedom to grant such privileges to its citizens as it may see fit, but secures to the citizens of all the other states, by virtue of the constitutional enactment itself, the same rights, privileges, and immunities. So that, in every state law conferring immunities and privileges upon citizens, the constitutional clause under consideration, *ex proprio vigore*, becomes an express part of such statute. * * * The Constitution itself becomes a part of the law. And this, in giving operation to that constitutional provision, is what the courts have always done. They have never stricken down the immunity and the privilege which a state may have accorded to its own citizens. They have never annulled the exemption. They have always construed the law so as to relieve the citizens of other states, and place all upon equal footing." This is in harmony with and declaratory of the principle laid down by the United States Supreme Court in the Slaughter-House Cases,

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[10] The cited case held that under a collateral inheritance tax which specified as exempt property passing to "nieces or nephews when a resident of this state" property passing to nieces and nephews who were citizens of other states was also exempt.

16 Wall. 36, 77, in the following words: "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. * * * Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

The discrimination complained of in the instant case is to be found in the fact that the state statute under consideration confers upon the citizens of the state privileges and immunities which are not extended by the terms of the statute, either expressly or impliedly, to nonresidents of the state, and clearly the statute in question does not impose ~~nor attempt~~ to impose upon non-citizens of the state burdens or exactions not imposed upon citizens of the state. This difference is all-important in controlling the construction and application of that provision of the federal Constitution which declares that "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." For, where a state endeavors to place a burden upon non-citizens of the state which is not put upon citizens of the state, obviously the effect of the federal constitutional provision is to abort the endeavor of the state. On the other hand, however, where a state by statute endeavors to confer and does confer upon its citizens privileges and immunities not accorded by the statute to citizens of other states, the federal Constitution operates, by the very force of its own language, to place citizens of other states in the same category and upon the same footing as citizens of the state in so far as concerns the right to have and enjoy the privileges and immunities conferred by the state upon its own citizens. In other words, the federal constitutional provision was designed for the protection of non-citizens and, therefore, in any given case calling for its application, the case and the application must be considered from the viewpoint and in the light of the welfare of the non-citizen. Viewed in this light, it is clear that, when a state statute imposes a burden on a non-citizen which is not imposed on the citizen of the state, the non-citizen may have relief from the burden thus imposed by invoking the provision of the federal Constitution for the nullification of the discriminatory legislation. But, when a privilege is granted to a citizen and withheld from a non-citizen, the latter finds relief in the provision of the federal Constitution which, by operation of law, so to speak, extends the privilege to him. The obvious resulting difference in the operation and effect of the federal constitutional provision under discussion, is the paramount point of the decision in the Estate of Johnson, supra, and it cannot be said that the extension to non-citizens of a statutory privilege granted only to citizens is judicial legislation, for clearly it is the federal Constitution itself, and not the courts, which declares that, if citizens of a state are by statute granted privileges and immunities, non-citizens of the state shall likewise be "entitled" to them. The case of Spraigue v. Thompson, 118 U. S. 90, which enunciates the principle that the courts cannot eliminate a discriminatory statutory exception and thereby make the statute effective as to a class which the legislature did not have in mind, has application only to that class of cases where it is attempted by the state to put a burden upon nonresidents. That case has no application to the extension to nonresidents of a privilege granted to residents, and, apparently, has never been applied to the latter situation.

The very recent case of Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, is relied upon in support of the contention that Estate of Johnson, supra, has been overruled by the Supreme Court of the United States. [Here reasons are assigned for rejecting this contention.]

In any event, it cannot be said from anything contained, either expressly or impliedly, in the Travis decision that the court there went so far as to say that the act in its entirety was invalid and could not be enforced against residents of the state of New York. Therefore it seems that the Travis case in no way contravenes the rule and the reason for the rule enunciated in Estate of Johnson, supra, and, bound as this court is by the authority of the decision in that case until definitely overruled by the Supreme Court of the United States, it must apply the rule thereof to the instant case. It follows that, despite the invalidity of the discrimination, the statute itself is valid and may be made to apply uniformly to citizens of California and the citizens of the other states.

The award is affirmed.[11]

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[11] Compare the two views of the dissenters in Chambers v. Baltimore & Ohio R. R. Co. (1907) 207 U. S. 142, 52 L. ed. 143, a statute of Ohio provided that whenever a *citizen of the state* was killed by wrongful act outside the state, in a jurisdiction which allowed an action therefor the right of action could be enforced in Ohio. This was the only statute on the subject. A widow sued in Ohio for the wrongful death of her husband (both being citizens of Pennsylvania) alleging it to have been caused outside of Ohio by the defendant. The United States Supreme Court affirmed a judgment of the Supreme Court of Ohio which had reversed the lower Ohio court's judgment for the plaintiff. Five of the justices held that the statute created a new right of action unknown to the common law, that this action was for the killing of Ohio citizens and that the statute did not discriminate, because persons suffering loss from such a killing might sue in Ohio regardless of *their* citizenship. Holmes, J., concurred specially on the ground that the statute made a forbidden discrimination, was wholly invalid, and no one could sue under it. Harlan, White, and McKenna, JJ., dissented, on the ground that the distinction based upon citizenship of the deceased produced a forbidden discrimination, for example, the statute accorded to an Ohio widow of an Ohio citizen a privilege which it with-

[Lawlor and Sloane, JJ., concurred in the above opinion. Olney, Shaw and Wilbur, JJ., severally delivered opinions in substantial accord with the parts of the opinion of Lennon, J., that are printed above. Angelotti, C. J., concurred in the opinion of Shaw, J.]

STATE v. STEVENS.

1916. Supreme Court of New Hampshire. 78 N. H. 268.

Appeal from conviction and sentence by the municipal court of Portsmouth upon a complaint for offering for sale and selling without a license lightning rods and material for the protection of buildings from damage by lightning, in violation of c. 128, Laws 1915. * * * July 29, 1915, the defendant, then a resident of Massachusetts, as the agent of the National Standard Company of Michigan, —the company being duly licensed to do business in this state,— at North Hampton, sold lightning rods without having a license as such agent. The defendant and the company had previously applied to the insurance commissioner for an agent's license for the defendant, which was refused for the sole reason that the defendant was not a resident of this state.

Parsons, C. J.—Chapter 128, Laws 1915, is entitled, "An Act to regulate the sale of lightning rods." * * * Section 3 is, "Upon written notice from a licensed manufacturer under this act of the appointment of a suitable person to act as his agent in this state, and upon the presentation of a certificate of his good reputation and moral character, signed by the mayor or selectmen of the city or town of which he is a resident, the insurance commissioner may, if he is satisfied that the appointee is a suitable person, issue to him a license as such agent, upon the receipt of a fee of two dollars. Such license shall continue in force one year from date of issue, but may be revoked at any time by the insurance commissioner for good cause and after a hearing. Such agents shall be residents of the state." * * *

The restriction of the statute applies equally whether at the time of license the agent is a citizen of New Hampshire or of some other state. The citizen of New Hampshire while claiming the benefit of the license cannot abandon his residence here, nor can the citizen of another state claim the rights of a licensee without establishing and maintaining such a residence here as will comply with the law. It

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held from a Pennsylvania widow of a Pennsylvania citizen. These three justices voted for reversal of the judgment of the Supreme Court of Pennsylvania.

A Wisconsin statute giving "all persons, residents of this state," exemption from civil process while in military service of the United States during the "present war" was held not to offend Art. IV, § 2, Cl. 1, because by implication the exemption extended to citizens of other states "in the absence of language expressly limiting the Act to citizens of this state." Konkel v. State (1919) 168 Wis. 335, 170 N. W. 715.

was not required that the Massachusetts citizen taking out a license should become a citizen of the state, but only that he should reside here. Although the Fourteenth Amendment of the federal Constitution declares that citizens of the United States are citizens of the states in which they reside, there may be a temporary residence in one state, with intent to return to another, which will not create citizenship in the former. Bradwell v. State, 16 Wall. 130, 138. This seems a sufficient answer to the claim of discrimination against the citizens of other states. The provision does not differ from legislative and constitutional provisions requiring a certain term of residence as an essential to holding office or exercising the electoral franchise. As such provisions bear equally upon the citizens of the state and upon those who may come from other states there is no discrimination.

But it is unnecessary to rest the decision upon so narrow a ground or to take time to discuss the distinctions between residence, citizenship and inhabitancy. * * * It is clear that the statute abridges the right of sale both of the manufacturer of lightning-rod material and of those who otherwise might represent him as agents. If authority for such abridgment does not exist in the state despite the federal law, the whole statute is invalid. But, as was said in Giozza v. Tiernan, 148 U. S. 657, 662, of the Fourteenth Amendment, "The Amendment does not take from the states those powers of police that were reserved at the time the original Constitution was adopted. * * * It was not designed to interfere with the power of the state to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order." In re Kemmler, 136 U. S. 436, 449; Barbier v. Connolly, 113 U. S. 27, 31; Maxwell v. Dow, 176 U. S. 581, 604. Neither the article of the Constitution relied upon, nor the Amendment, abridges the right of protection inherent in the state and reserved when the constitution was adopted. DeGrazier v. Stephens, 101 Tex. 194, 16 L. R. A. (N. S.) 1033; Kohn v. Melcher (Shiras, J.) 29 Fed. Rep. 433, 437; Commonwealth v. Hana, 195 Mass. 262, 265; Slaughter-House Cases, 16 Wall. 36. "The police power of the state extends to the protection of the lives, health, comfort and quiet of all persons and the protection of all property within the state; and persons and property are subjected to such restraints and burdens as are reasonably necessary to secure the general comfort, health, and prosperity. * * * The state has authority to make regulations as to the time, mode, and circumstances under which parties shall assert, enjoy, or exercise their rights without coming in conflict with any of those constitutional principles which are established for the protection of private rights and private property." State v. White, 64 N. H. 48, 50. Conflict with Section 2, Art. IV, of the Constitution of the United States has been claimed in cases where the law limited licenses for the sale of liquor to residents of the state. In all these cases it has been considered that the state having power to regulate the sale of liquor, the limitation being intended to effect such regulation and not merely to secure a special privilege to citizens of the state was not rendered void by any provisions of the federal Constitution or Amendments thereof. DeGrazier v. Stephens, 101 Tex. 194, * * *.[12]

The same principles are now involved. Is the legislation restricting the sale of lightning rods an exercise of the police power for the protection of the lives and property of the people of the state, and if so, is the restriction complained of a reasonable regulation made in good faith for the execution of the legislative purpose? 40 L. R. A.

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[12] "The question then arises, is the provision as to the residence of an applicant for a liquor dealer's license a mere guise for a discrimination against non-residents, or does it tend to further the object of the statute regulating the liquor traffic? We think it should be answered that it is not a mere guise to evade the effect of the constitutional provisions under consideration; but that it is calculated to promote the objects of the act in substantial respects. In the first place, there are numerous acts forbidden under the statute in question and numerous penalties prescribed as against liquor dealers for their infringement. Also actions are authorized upon the bonds they are required to give as a condition precedent to their carrying on the business. It is reasonable therefore that they should be required to reside in the county in which the business is carried on, to the end that they may be arrested in case of an infringement of the law, or subject to the process of the court in case suit may be brought on the bond. In the second place, the act requires that the licensee shall be 'a law-abiding, tax-paying, male citizen of the State of Texas.' If the character of the applicant enters into the question, what more reasonable, than that he should be required to be a resident of the county for a sufficient length of time to establish the necessary qualifications in that respect. The statute allows a contest by any resident tax-paying citizen or owner in the block or square where said business is to be conducted or by any County Attorney or District Attorney, to determine whether the applicant is qualified; and it seems reasonable that some qualifications as to continued residence would be helpful in enabling them to ascertain the facts and to maintain the contest." De Grazier v. Stevens (1907) 101 Tex. 194, 196, 105 S. W. 992, annotated in 16 L. R. A. (N. S.) 1033, and in 16 Ann. Cas. 1059, 1060. Accord, as to licenses for sale of intoxicants: Austin v. State (1847) 10 Mo. 591; Welsh v. State (1890) 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; Kohn v. Melcher (1887) 29 Fed. 433; Mette v. McGuckin (1885) 18 Nebr. 323, 25 N. W. 338, affirmed in Mette v. McGuckin (1892) 149 U. S. 781, 37 L. ed. 934, by a divided court without opinion.

Upon reasoning similar to that quoted above it has been held that a state may require an individual conducting a bank or one member of a firm of bankers to be a resident of the state. State v. Richcreek (1906) 167 Ind. 217, 77 N. E. 1085, 5 L. R. A. (N. S.) 874, 119 Am. St. 491, 10 Ann. Cas. 899. So also a statute is valid which requires a license to be obtained by any person lending money at a rate of interest over 10 per cent., and provides that only bona fide residents of the state are eligible. State v. Ware (1916) 79 Ore. 367, 154 Pac. 905, 155 Pac. 364. But citizens of other states are entitled to engage in the business of insurance upon the same terms with citizens of the state. State ex rel. Hoadley v. Board of Insurance Comrs. (1896) 37 Fla. 564, 20 So. 772, 33 L. R. A. 288; Barnes v. People ex rel. Moloney (1897) 168 Ill. 425, 430, 48 N. E. 91, where the court said, "If, as contended, the provision is intended as a police regulation for the protection of the citizens of this state from irresponsible underwriters acting individually and without incorporation or organization under any law, the same necessity applies in the case of the irresponsible and conscienceless underwriter who is a citizen of this state. If the business of insurance, on account of its importance and nature, is a proper subject for the exercise of the police power, such power must extend to and operate upon the citizens of this state and other states equally. A discrimination directed only against underwriters residing without the state is invalid."

(N. S.) 284, note. "It must be conceded that a state cannot under the guise of the police power make a discrimination for which no good reason can be assigned." DeGrazier v. Stephens, supra, p. 196. [Various prior statutes attempting to regulate the sale of lightning rods in the state are here summarized.]

A comparison of these provisions [of the present statute] with the earlier law shows that it was not the purpose to prohibit the use of lightning rods,—an intention which might be ascribed to the previous statute. P. S., c. 123, §§ 5, 6, 7. Instead of requiring a license fee of $300 of whoever might go about to sell, principal or agent, the total license fee to manufacturer and agent is $52. While the insurance commissioner is required to approve the manufacturer's product, he is not required to be satisfied that the proposed material will protect against lightning but only of the good faith and solvency of the manufacturer. The object is plain to protect from fraud and the dangers which might arise from unrestricted sale of a material which might increase the risk of, instead of preventing damage by lightning. As such protection is within the legislative power, the question is, not whether some provision of the act restricts to some extent private rights, but whether the purpose of the provision is the execution of the protective purpose, and whether, if enacted for such purpose, such provision unreasonably limits private right. Carter v. Craig, 77 N. H. 200. It cannot be urged that the purpose of the restriction was to preserve for residents of this state a monopoly of acting as agents for lightning-rod manufacturers. The language of Section 3 in reference to the appointment of agents proves that the draftsman of the act had in mind the provisions of the statute, requiring the agents of foreign insurance companies to be residents of the state, which has been the law of the state since 1889. P. S., c. 169, §§ 7, 8; Laws 1889, c. 86, § 2. The respondent as a citizen of Massachusetts does not come here to exercise an ordinary trade or calling, but to act as agent for another, to exercise a sort of office.

"Whenever the legislature prohibits any calling or profession, it ceases to be a lawful pursuit; and when the legislature do [*sic*] not prohibit it, but allow it to be exercised by certain persons, having certain qualifications specified in the law, it then becomes a municipal privilege, which may be only exercised by those persons who have the qualifications, and pursue the steps required by the law. It would be strange indeed, that the moment a citizen of another state sets his foot on our soil, he is to be considered as entitled to all the political,[13] and municipal privileges enjoyed by our own citizens, without regard to the constitution and laws of this state. And yet the words of the federal Constitution are without qualification. If we agree to exclude political privileges from the number of privileges and immunities which the Constitution of the United States declares citizens of other states shall be entitled to, there is the same reason for extending the limitation to municipal privileges. And selling spirituous liquors in quantities less than one quart, is in this state a privilege granted only to those having the qualifications pointed out in the act. A residence of two years in the state, is one of the qualifications which the legislature have thought proper to require in the city of St. Louis; and this qualification, we consider, is no more liable to constitutional objections than a residence of one year before a citizen from another state is allowed to vote, or a residence of five years before he can be elected to the legislature." Austin v. State, 10 Mo. 591, 594. The legislature thought it wise that one desiring to act as the agent of another in the sale of lightning rods should at least take up such a residence here, as would render him amenable to the process of, and bring him within the jurisdiction of the courts of the state. The provision does not so unreasonably affect the defendant's common law right to act as agent of a lightning-rod manufacturer, which he claims is preserved to him by the Constitution of the United States, that the court can declare it void. State v. Prince, 77 N. H. 581. It is said that the business of retailing liquor is one peculiar to itself, which the legislature might wholly prohibit, or as to which it might confine the license to a limited number. Templar v. State Board, 131 Mich. 254, 258, 100 Am. St. Rep. 610. But the difference is one of degree, not of principle, and no reason is perceived why the legislature, convinced by scientific investigation or the general sense of the community that lightning rods were more dangerous than useful, might not wholly prohibit their sale. There can be no natural inalienable right to sell lightning rods any more than there is to sell liquor, consequently there can be no natural right to sell as agent. It is to be conceded that a citizen of another state cannot be taxed a greater sum for a privilege allowed him here than is levied upon the citizens of the state. State v. Wiggin, 64 N. H. 508; State v. Lancaster, 63 N. H. 267; Ward v. Maryland, 12 Wall. 418, 430. It is argued that to deny the privilege of an occupation is a greater discrimination than an inequality of burden. State v. Montgomery,

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[13] "A nonresident cannot vote, hold office, practice law, or enjoy school and many other privileges simply because he is a citizen and has those rights in another state." Stiness, J., in Chambers Bros. v. Church & Co. (1884) 14 R. I. 398, 400, 51 Am. Rep. 410.

A state statute is valid which restricts to residents eligibility to act as administrator or executor because supervision of the distribution of decedents'

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property is a governmental function and these capacities are a sort of public office. In re Mulford (1905) 217 Ill. 242, 75 N. E. 345, 1 L. R. A. (N. S.) 341, 108 Am. St. 249; and see In re Barnes' Estate (1921) 187 Cal. 566, 203 Pac. 100. So state citizen next of kin may be preferred as nominators of administrators. In re Estate of McWhirter (1908) 235 Ill. 607, 85 N. E. 918. Compare Duryea v. Muse (1903) 117 Wis. 399, 94 N. W. 365 (eligibility or capacity to act as assignee for the benefit of creditors may be restricted to residents of the state). But compare Shirk v. City of La Fayette (1892) 52 Fed. 857 (statute forbidding appointment of nonresidents as trustees in deeds, mortgages, etc., is invalid.)

94 Me. 192, 80 Am. St. Rep. 386. The inequality of burden, invalid as an exercise of the taxing power, cannot be sustained under the police power because admission to the privilege on some terms concedes the inapplicability of the police power. In Bliss' Petition, 63 N. H. 135, the question presented was considered as presenting a question of inequality of taxation. Whether upon any grounds a state could confine the privilege of itinerant salesman to citizens of the county in which they reside was not considered and need not now be discussed. See Commonwealth v. Hana, 195 Mass. 262, 265.

The conclusion is that the statute does not discriminate against citizens of other states and that if it could be construed to do so, the discrimination is one that the state could lawfully make.[14]

Judgment for the state.

FERRY v. SPOKANE, PORTLAND AND SEATTLE RY. CO.

1922. Supreme Court of the United States. 258 U. S. 314.

Mr. Justice McKenna delivered the opinion of the court.

By a bill filed in the district court of the United States for the district of Oregon, appellant asserted a dower right in one half part of certain land in possession of the railway company.

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[14] A statute of Nevada provided that no person should thereafter practice medicine in the state without a diploma from a medical school or unless he had practiced medicine *in the state* for ten years next preceding the passage of the statute. This statute was sustained. The court admitted that citizens of other states were entitled to practice medicine in Nevada "on precisely the same terms and subject only to the same restrictions" as Nevada citizens, and said that the statute made "no distinction in terms between our own and citizens of other states. It merely prescribes the qualifications that practitioners are required to possess and admits all to practice who can bring themselves within the rule, whether they are citizens of this state or other states. But it is argued that one of the sorts of qualifications recognized is such, that of necessity none but citizens of this state can possess it. This is so, but it does not follow, therefore, that the law is unconstitutional; for if the qualification is in itself reasonable, and such as tends to subserve public interests, the legislature had a right to exact it, and the circumstance that citizens of other states can not possess it may be a misfortune to them, but is no reason why a precaution, proper in itself, should be dispensed with." Elsewhere in the opinion the court stated that the reasonableness of the discrimination might be found in that physicians who had had ten years' experience outside the state might "be reasonably safe advisers in the locality and among the diseases they are accustomed to" yet "might be very unsafe advisers in another locality and climate, among a population mainly employed in other avocations, and where as a consequence different diseases prevail." Ex parte Spinney (1875) 10 Nev. 323. With less show of reasoning many other courts have sustained nearly identical statutes, among these: State ex rel. Walker v. Green (1887) 112 Ind. 462, 14 N. E. 352; People v. Phippin (1888) 70 Mich. 6, 37 N. W. 888; State v. Creditor (1890) 44 Kans. 565, 24 Pac. 346, 21 Am. St. 306; State v. Rosenkrans (1910) 30 R. I. 374, 75 Atl. 491, 19 Ann. Cas. 824. Contra: State v. Hinman (1889) 65 N. H. 103, 105, 18 Atl. 194, 23 Am. St. 22.

A Wisconsin statute required both a diploma and an examination by a state board as pre-requisites to license to practice medicine, except that "any stu-

The bill was dismissed on motion of the railway company, and the company was awarded judgment for costs. On appeal by the complainant in the suit, the judgment was affirmed. Against the affirmance this appeal is prosecuted.

The law of Oregon provides: "The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of one half of the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof." Lord's Oregon Laws, § 7286.

"A woman being an alien shall not on that account be barred of her dower; and any woman residing out of the state shall be entitled to dower of the lands of her deceased husband lying in this state of which her husband died seised, and the same may be assigned to her, or recovered by her, in like manner as if she and her deceased husband had been residents within the state at the time of his death." § 7306.

Appellant adduces against the validity of § 7306, the provision of § 2 of Article IV of the Constitution of the United States that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and the provisions of the Fourteenth Amendment which declare that no state shall "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" or "deprive any person of life, liberty or property without due process of law" or "deny to any person within its jurisdiction the equal protection of the laws."

Dower is not a privilege or immunity of citizenship, either state or federal, within the meaning of the provisions relied on. At most it is a right which, while it exists, is attached to the marital contract or relation; and it always has been deemed subject to regulation by each state as respects property within its limits. Connor v. Elliott, 18 How. 591.[15] Neither Section 2 of Article IV nor the

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dent who is now matriculated in any medical college of this state" which required specified courses should be admitted on diploma only. Held that this statute made no discrimination between citizens of that and other states. State ex rel. Kellog v. Currans (1901) 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252.

[15] In the cited case it appears that the Louisiana Code confined the community property regime to spouses who married within that state and to spouses married outside the state who became domiciled in the state and in the latter case only with respect to property acquired after arrival of the spouses in the state. A married B in Mississippi where they were domiciled throughout the marriage. B, the husband, acquired property in Louisiana during the marriage. It was held that Art. IV, § 2, Cl. 1, did not entitle the "Mississippi widow" to community rights in the Louisiana property. The court said, "The laws of Louisiana affix certain incidents to a contract of marriage there made, or there partly or wholly executed, not because those who enter into such contracts are citizens of the state, but because they there make or perform the contract. And they refuse to affix these incidents to such contracts, made and executed elsewhere, not because the married persons are not citizens of Louisiana, but because their contract being made and performed under the laws of some other state or country, it is deemed proper not to interfere, by Louisiana laws, with the relations of married persons out of that state. Whether persons contracting marriage in Louisiana are citizens of that or some other state, or aliens, the law equally ap-

Fourteenth Amendment takes from the several states the power to regulate this subject; nor does either make it a privilege or immunity of citizenship. Maxwell v. Bugbee, 250 U. S. 525, 537, 538, and cases cited; United States v. Wheeler, 254 U. S. 281, 296.

The further contention based on the Fourteenth Amendment necessarily is, as counsel urge, that dower is "fundamental and substantial"—"a property right, being while inchoate, a chose in action, of which no citizen of the United States, wherever he [she] may be resident can be deprived without 'due process of law,' and as to which every person is entitled to the 'equal protection of the laws' as provided in the Fourteenth Amendment of the Constitution."

The Court of Appeals considered this contention, and it is difficult to add anything to its opinion. It pointed out that the Oregon statute was taken from the laws of Michigan adopted in 1846 and sustained.[16] The example of Michigan was followed in Wisconsin, Kansas and Nebraska and sustained by the courts of those states.[17]

To the decisions of those courts we may add Thornburn v. Doscher, U. S. Circuit Court for Oregon, 32 Fed. 810, which sustained the Oregon statute as did the Supreme Court of Oregon in Cunningham v. Friendly, 70 Ore. 222. And we may add also Richards v. Belingham Bay Land Co., 54 Fed. 209, which decided to be legal a like statute of the State of Washington. And Blackstone speaks of dower as having become "a great clog to alienation" and "otherwise inconvenient to families." 1 Washburn on Real Property 5th Ed. 278, in note.

The cases recognize that the limitation of the dower right is to remove an impediment to the transfer of real estate and to assure titles against absent and probably unknown wives. And such is the purpose of the Oregon statute, and the means of executing the purpose appropriate, and a proper exercise of classification. It satisfies, therefore, the constitutional requirement of the equal protection of the laws; and we proceed to the inquiry whether the statute is otherwise valid.

Appellant's contention is that though she be living in New York, it is her privilege under the Fourteenth Amendment to resist the

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plies to their contract; and so, whether persons married and domiciled elsewhere, be or not be citizens or aliens, the law fails to regulate their rights. The law does not discriminate between citizens of the state and other persons; it discriminates between contracts only. Such discrimination has no connection with the clause in the constitution now in question."

The student should consider whether this decision supports the principal case. Compare the common requirement of a period of residence within a state to entitle one to sue for divorce in the courts of the state.

[16] Pratt v. Tefft (1866) 14 Mich. 191; Ligare v. Semple (1875) 32 Mich. 438; Bear v. Stahl (1886) 61 Mich. 203, 28 N. W. 69.—McKenna, J.

[17] Bennett v. Harms (1881) 51 Wis. 251, 8 N. W. 222; Ekegren v. Marcotte (1915) 159 Wis. 539, 150 N. W. 969; Atkins v. Atkins (1885) 18 Nebr. 474, 25 N. W. 724; Miner v. Morgan (1909) 83 Nebr. 400, 119 N. W. 781; Buffington v. Grosvenor (1891) 41 Kans. 730, 27 Pac. 137.—McKenna, J.

law of Oregon as a limitation of her dower rights, that is a limitation of rights in property situated in Oregon. The contention might be tenable if the legislature of a state was required to grant dower rights. As repellant of that proposition, the difference the laws of the states exhibit in the rights that attach to the marriage relation may be adduced. The states greatly differ as to what lands are dowable, and as to what claims are paramount to dower, and to some extent, how it will be barred. 4 Kent 35, *et seq.*

The granting of dower, therefore, is a matter of statutory regulation. It was so decided by the United States Circuit Court of Oregon in 1887. (Thornburn v. Doscher, supra), Judge Deady expressing it as follows: "It rests with the legislature to say what interest, if any, married persons shall have in the property of each other, as an incident of the relation between them. It may give or withhold dower altogether. Or it may for the security of titles, and the protection of innocent purchasers, provide that a non-resident woman whose very existence is probably unknown within the state, and is practically disavowed by the husband, shall not be entitled to dower of lands which he has disposed of without her concurrence or consent, and ostensibly as a single man." The law thus declared has been the law of Oregon for 65 years.

There is a distinction between dower created by the parties and that given by law, and the latter "is believed to be the only kind which ever obtained in this country." Randall v. Kreiger, 23 Wall. 137, 148. Expressing the power of the legislature over it, the court said: "During the life of the husband the right is a mere expectancy or possibility. In that condition of things, the lawmaking power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs, the law of descent and distribution may be molded according to the will of the legislature."

The ruling is a deduction or incident of the more general principle expressed in Kerr v. Moon, 9 Wheat. 565, 570, "that the title to, and the disposition of, real property, must be exclusively subject to the laws of the country where it is situated." And this was so considered and the case cited in Thomas v. Woods, 173 Fed. 585, 593, along with a number of other cases, to sustain the court in the declaration and decision that "the right of dower in real property is determined by the laws of the state in which the property is situated."

From these cases it results, as said by the Circuit Court of Appeals, that, "the legislature having this power to give or withhold dower, it follows that it has the power to declare the manner in which the dower right may be barred, or the grounds upon which it may be forfeited, and if so, it has the right to provide that it may be barred by the wife's nonresidence in the state." [268 Fed. 120.]

The action of the court, affirming the decree of the District Court, is affirmed.

CANADIAN NORTHERN R. CO. v. EGGEN.

1920. Supreme Court of the United States. 252 U. S. 553.

Mr. Justice Clarke delivered the opinion of the court.

The only question presented for decision in this case is as to the validity of § 7709 of the statutes of Minnesota (General Statutes of Minnesota, 1913), which reads:

"When a cause of action has arisen outside of this state and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued."

statute

The Circuit Court of Appeals, reversing the District Court, held this statute invalid for the reason that the exemption in favor of citizens of Minnesota rendered it repugnant to Article IV, § 2, of the Constitution of the United States, which declares that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The action was commenced in the District Court of the United States for the District of Minnesota, Second Division, by the respondent, a citizen of South Dakota, against the petitioner, a corporation organized under the laws of the Dominion of Canada, to recover damages for personal injuries sustained by him on November 29, 1913, when employed by the petitioner as a switchman in its yards at Humboldt, in the Province of Saskatchewan. The respondent, a citizen and resident of South Dakota, went to Canada and entered the employ of the petitioner as a switchman a short time prior to the accident complained of. He remained in Canada for six months after the accident and then returned to live in South Dakota. He commenced this action on October 15, 1915, almost two years after the date of the accident. By the laws of Canada, where the cause of action arose, an action of this kind must be commenced within one year from the time injury was sustained. If the statute of Minnesota, above quoted is valid, it is applicable to the action, which, being barred in Canada, cannot be maintained in Minnesota by a nonresident plaintiff. If, however, the statute is invalid, the general statute of limitations of Minnesota, allowing a period of six years within which to commence action, would be applicable. The record properly presents the claim of the petitioner that the Circuit Court of Appeals erred in holding the statute involved unconstitutional and void.

It is plain that the act assailed was not enacted for the purpose of creating an arbitrary or vexatious discrimination against nonresidents of Minnesota.

It has been in force ever since the state was admitted into the Union in 1858; it is in terms precisely the same as those of several other states, and in substance it does not differ from those of many more. It gives a nonresident the same rights in the Minnesota courts as a resident citizen has, for a time equal to that of the statute of limitations where his cause of action arose. If a resident citizen acquires such a cause of action after it has accrued, his rights are limited precisely as those of the nonresident are, by the laws of the place where it arose. If the limitation of the foreign state is equal to or longer than that of the Minnesota statute, the nonresident's position is as favorable as that of the citizen.

It is only when the foreign limitation is shorter than that of Minnesota, and when the nonresident who owns the cause of action from the time when it arose has slept on his rights until it is barred in the foreign state (which happens to be the respondent's case), that inequality results—and for this we are asked to declare a statute unconstitutional which has been in force for sixty years.

This court has never attempted to formulate a comprehensive list of the rights included within the "privileges and immunities" clause of the Constitution, Art. IV, Sec. 2, but it has repeatedly approved as authoritative the statement by Mr. Justice Washington, in 1823, in Corfield v. Coryell, 4 Wash. C. C. 371, 380 (the first federal case in which this clause was considered), saying: "We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental.*" Slaughter-House Cases, 16 Wall. 36, 76; Blake v. McClung, 172 U. S. 239, 248; Chambers v. Baltimore & Ohio R. R. Co., 207 U. S. 142, 155. In this Corfield case the court included in a partial list of such fundamental privileges, "The right of a citizen of one state, * * * to institute and maintain actions of any kind in the courts of another."

The State of Minnesota, in the statute we are considering, recognized this right of citizens of other states to institute and maintain suits in its courts as a fundamental right, protected by the Constitution, and for one year from the time his cause of action accrued the respondent was given all of the rights which citizens of Minnesota had under it. The discrimination of which he complains could arise only from his own neglect.

This is not disputed, nor can it be fairly claimed that the limitation of one year is unduly short, having regard to the likelihood of the dispersing of witnesses to accidents such as that in which the respondent was injured, their exposure to injury and death, and the failure of memory as to the minute details of conduct on which questions of negligence so often turn.—Thus, the holding of the Circuit Court of Appeals comes to this, that the privilege and immunity clause of the Constitution guarantees to a nonresident precisely the same rights in the courts of a state as resident citizens have, and that any statute which gives him a less, even though it be an adequate remedy, is unconstitutional and void.

Such a literal interpretation of the clause cannot be accepted.

From very early in our history, requirements have been imposed upon nonresidents in many, perhaps in all, of the states as a condition of resorting to their courts, which have not been imposed upon resident citizens. For instance, security for costs has very generally been required of a nonresident, but not of a resident citizen, and a nonresident's property in many States may be attached under conditions which would not justify the attaching of a resident citizen's property. This court has said of such requirements:

"Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states. * * * It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each State of the privileges and immunities secured by the Constitution to citizens of the several states." Blake v. McClung, 172 U. S. 239, 256.

The principle on which this holding rests is that the constitutional requirement is satisfied if the nonresident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms. A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.

This is the principle on which this court has repeatedly ruled that contracts were not impaired in a constitutional sense by change in limitation statutes which reduced the time for commencing actions upon them, provided a reasonable time was given for commencing suit before the new bar took effect. Sohn v. Waterson, 17 Wall. 596; Terry v. Anderson, 95 U. S. 628, 632; Tennessee v. Sneed, 96 U. S. 69, 74; Antoni v. Greenhow, 107 U. S. 769, 774.

A like result to that which we are announcing was reached with respect to similar statutes, in Chemung Canal Bank v. Lowery, 93 U. S. 72;[18] by the Circuit Court of Appeals, Second Circuit, in

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[18] In the cited case a Wisconsin statute of limitations was held valid which provided that if at the time the cause of action accrued the defendant was outside the state the statute should not run against a plaintiff who was a resident

Aultman & Taylor Co. v. Syme, 79 Fed. Rep. 238; in Klotz v. Angle, 220 N. Y. 347, and in Robinson v. Oceanic Steam Navigation Co., 112 N. Y. 315, 324. In this last case the Court of Appeals of New York pertinently says:

"A construction of the constitutional limitation [the one we are considering] which would apply it to such a case as this would strike down a large body of laws which have existed in all the states from the foundation of the government, making some discrimination between residents and nonresidents in legal proceedings and other matters."

The laws of Minnesota gave to the nonresident respondent free access to its courts, for the purpose of enforcing any right which he may have had, for a year,—as long a time as was given him for that purpose by the laws under which he chose to live and work—and having neglected to avail himself of that law, he may not successfully complain because his expired right to maintain suit elsewhere is not revived for his benefit by the laws of the state to which he went for the sole purpose of prosecuting his suit. The privilege extended to him for enforcing his claim was reasonably sufficient and adequate and the statute is a valid law.

It results that the judgment of the Circuit Court of Appeals must be reversed and that of the District Court affirmed.

Reversed.

Section 6.—Privileges and Immunities Clause of Fourteenth Amendment.

SLAUGHTER-HOUSE CASES.

1873. Supreme Court of the United States. 16 Wall. 36.

Mr. Justice Miller now, April 14, 1873,[1] delivered the opinion of the court.

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of the state but should run against a nonresident plaintiff. The only reasoning in support of this discrimination was: "There is, in fact, a valid reason for the discrimination. If the statute does not run as between nonresident creditors and their debtors, it might often happen that a right of action would be extinguished, perhaps for years, in the state where the parties reside; and yet, if the defendant should be found in Wisconsin,—it may be only in a railroad train,—a suit could be sprung upon him after the claim had been forgotten. The laws of Wisconsin would thus be used as a trap to catch the unwary defendant, after the laws which had always governed the case had barred any recovery. This would be inequitable and unjust. Beardsley v. Southmayd, 3 N. J. L. (Green) 171."

[1] These cases provoked one of the most prolonged states of indecision that the Supreme Court has ever experienced. The membership of the court had completely changed since the decision in Dred Scott v. Sandford (1857). The Fourteenth Amendment (the second of the Reconstruction Amendments) became operative July 28, 1868, and was now before the court for its first interpretation. The records in the cases were filed in the Supreme Court in 1870. The cases were argued in January, 1872, and reargued in February, 1873, and in April were decided by a 5 to 4 majority.

These cases are brought here by writs of error to the Supreme Court of the State of Louisiana. They arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that state. * * *

The records show that the plaintiffs in error relied upon, and asserted throughout the entire course of the litigation in the state courts, that the grant of privileges in the charter of defendant, which they were contesting, was a violation of the most important provisions of the thirteenth and fourteenth articles of amendment of the Constitution of the United States. The jurisdiction and the duty of this court to review the judgment of the state court on those questions is clear and is imperative.

The statute thus assailed as unconstitutional was passed March 8, 1869, and is entitled "An Act to protect the health of the City of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company."

The first section forbids the landing or slaughtering of animals whose flesh is intended for food, within the city of New Orleans and other parishes and boundaries named and defined, or the keeping or establishing any slaughter-houses or abattoirs within those limits, except by the corporation thereby created, which is also limited to certain places afterwards mentioned. Suitable penalties are enacted for violations of this prohibition.

The second section designates the corporators, gives the name to the corporation, and confers on it the usual corporate powers.

The third and fourth sections authorize the company to establish and erect within certain territorial limits, therein defined, one or more stockyards, stock-landings, and slaughter-houses, and impose upon it the duty of erecting, on or before the first day of June, 1869, one grand slaughter-house of sufficient capacity for slaughtering five hundred animals per day.

It declares that the company, after it shall have prepared all the necessary buildings, yards, and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the Act, and that all such animals shall be landed at the stock-landings and slaughtered at the slaughter-houses of the company, and nowhere else. Penalties are enacted for infractions of this provision, and prices fixed for the maximum charges of the company for each steamboat and for each animal landed.

Section five orders the closing up of all other stock-landings and slaughter-houses after the first day of June, in the parishes of Orleans, Jefferson, and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughter-houses under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered, by an officer appointed by the governor of the state for that purpose. * * *

The Act divides itself into two main grants of privilege,—the one in reference to stock-landings and stock-yards, and the other to slaughter-houses. That the landing of live-stock in large droves, from steamboats on the bank of the river, and from railroad trains, should, for the safety and comfort of the people and the care of the animals, be limited to proper places, and those not numerous, it needs no argument to prove. Nor can it be injurious to the general community that while the duty of making ample preparation for this is imposed upon a few men, or a corporation, they should, to enable them to do it successfully, have the exclusive right of providing such landing-places, and receiving a fair compensation for the service.

It is, however, the slaughter-house privilege, which is mainly relied on to justify the charges of gross injustice to the public, and invasion of private right.

It is not, and cannot be successfully controverted, that it is both the right and the duty of the legislative body—the supreme power of the state or municipality—to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively it is indispensable that all persons who slaughter animals for food shall do it in those places and nowhere else.

The statute under consideration defines these localities and forbids slaughtering in any other. It does not, as has been asserted, prevent the butcher from doing his own slaughtering. On the contrary, the Slaughter-House Company is required, under a heavy penalty, to permit any person who wishes to do so, to slaughter in their houses; and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher then is still permitted to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place.

The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the states, however it may now be questioned in some of its details. * * *

It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that state or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited.

If any such restraint is supposed to exist in the constitution of the state, the Supreme Court of Louisiana having necessarily passed on that question, it would not be open to review in this court.

The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:— * * *

That it abridges the privileges and immunities of citizens of the United States; * * *.

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the states. * * *

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the word citizen of the state should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the state, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the state as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

The first occurrence of the words "privileges and immunities" in our constitutional history, is to be found in the fourth of the Articles of the old Confederation. * * *

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." * * *

Fortunately we are not without judicial construction of this clause of the Constitution. * * * [Here the court cites and briefly considers Corfield v. Coryell, 4 Wash. C. C. 371, Ward v. Maryland, 12 Wall. 430, and Paul v. Virginia, 8 Wall. 180.]

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens.

Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the federal government for their existence or protection, beyond the very few express limitations which the federal Constitution imposed upon the states—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the federal government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the states to the federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and federal governments to each other and of both these governments to the people; the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the states as such, and that they are left to the state governments for security and protection, and not by this article placed under the special care of the federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the federal government, its national character, its Constitution, or its laws.[2]

One of these is well described in the case of Crandall v. Nevada, 6 Wall. 36. It is said to be the (a)[3] right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justices in the several states." And quoting from the language of Chief Justice Taney in another case, it is said "that for all the great purposes for which the federal government was established, we are one people, with one common country, we are all citizens of the United States;" and it is, as such citizens, that their rights are supported in this court in Crandall v. Nevada.

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[2] The court's wording of the definition, in the light of the examples given, comes down to this, the privileges or immunities, which *by this clause* a state may not abridge, are only those that are conferred by national law upon a person who is a citizen, conferred upon him as a citizen *eo nomine* or upon him in common with other persons.

"Privileges and immunities of citizens of the United States [within the protection of this clause] * * * are only such as arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States." Moody, J., for the court in Twining v. New Jersey (1908) 211 U. S. 77, 78, 97, 53 L. ed. 97.

"The privileges and immunities of citizens of the United States, protected by the Fourteenth Amendment, are privileges and immunities arising out of the nature and essential character of the federal government, and granted or secured by the Constitution * * *." Fuller, C. J., for the court in Duncan v. Missouri (1894) 152 U. S. 377, 382, 38 L. ed. 485. And see similar language of the same justice in In re Kemmler (1890) 136 U. S. 436, 448, 34 L. ed. 519 and in Giozza v. Tiernan (1893) 148 U. S. 657, 661, 37 L. ed. 599. The language used in Re Kemmler is quoted with approval in Orr v. Gilman (1902) 183 U. S. 278, 286, 46 L. ed. 196.

"The privileges and immunities of citizens of the United States [within the protection of this clause] are those which arise out of the nature and essential character of the national government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof * * *." Fuller, C. J., for the court in McPherson v. Blacker (1892) 146 U. S. 1, 38, 36 L. ed. 869.

"If the plaintiff in error has any such privilege, he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred." Woods, J., for the court in Presser v. Illinois (1886) 116 U. S. 252, 266, 29 L. ed. 615.

Moreover, the specific national law from which the alleged immunity is adduced must have been set up below; a contention that the state's action complained of violates merely the privileges and immunities clause is too general to support an appeal or writ of error. Cox v. Texas (1906) 202 U. S. 446, 451, 50 L. ed. 1099.

A narrower definition is suggested by the language of some opinions:

"There are privileges and immunities belonging to citizens of the United States, *in that relation and character*, and * * * it is these and these alone which a state is forbidden to abridge. But the right to admission to practice in the courts of a state is not one of them. This right in no sense depends on citizenship of the United States." Bradwell v. Illinois (U. S. 1873) 16 Wall. 130, 139, 21 L. ed. 442. Italics are the present editor's.

Shortly after this construction was announced in the Slaughter-House Cases, Judge Emmons said in charging a grand jury:

"As now judicially read by the court of last resort, it leaves the organic law in this regard precisely where it was before. It is one of those constructions, often resorted to, to prevent consequences serious and revolutionary, which courts believe were not contemplated by legislatures who pass laws, and by the people who adopt constitutions." (Mar. 1875, C. C. W. D. Tenn.) Fed. Cas. No. 18, 260, p. 1006.

[3] Letters (a) to (j) are inserted by the present editor for convenience of reference in critical discussion of each of these alleged illustrations of the doctrine of the opinion. What is the correct formulation of a doctrine that embraces all of these specific instances?

Another (b) privilege of a citizen of the United States is to demand the care and protection of the federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. (c) The right to peaceably assemble and petition for redress of grievances, (d) the privilege of the writ of *habeas corpus,* are rights of the citizen guaranteed by the federal Constitution. (e) The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, (f) all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a state. One of these privileges is conferred by the very article under consideration. (g) It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a *bona fide* residence therein, with the same rights as other citizens of that state. To these may be added the rights secured by the (h) thirteenth and (i) fifteenth articles of amendment, and (j) by the other clause of the fourteenth, next to be considered. [Due process clause.]

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the Fourteenth Amendment under consideration.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the federal power. It is also to be found in some form of expression in the constitutions of nearly all the states, as a restraint upon the power of the states. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the states in this matter in the hands of the federal government.

We are not without judicial interpretation, therefore, both state and national, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the states did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a state that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of state oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the national government from those of the state governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late Civil War. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the state organizations to combine and concentrate all the powers of the state, and of contiguous states, for a determined resistance to the general government.

Unquestionably this has given great force to the argument, and added largely to the number, of those who believe in the necessity of a strong national government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the states with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the states, and to confer additional power on that of the nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between state and federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

The judgments of the Supreme Court of Louisiana in these cases are

Affirmed.

[CHASE, C. J., FIELD, SWAYNE AND BRADLEY, JJ., dissented, the last three delivering dissenting opinions. In suggestive summary their view was, that the restrictive definition given by the majority rendered the clause nugatory, that with nation-conferred privileges and immunities "no state could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any state legislation of that character;" that rightly understood the privileges and immunities meant were the traditionally recognized rights of free men such as were enumerated in the Declaration of Independence and by Justice Washington in Corfield v. Coryell, the rights to life, liberty and property, including rights to engage in the common callings, professions and trades except as these might be regulated for the public welfare and by uniform regulations applicable to all persons; that the portion of the act which entirely prohibited all but the favored corporation from owning slaughter houses in so large an area was not reasonably necessary to the protection of the health of the community.]

Bradley, J., said: "The granting of monopolies, or exclusive privileges to individuals or corporations, is an invasion of the rights of others to choose a lawful calling, and an infringement of personal liberty.* * * Admitting, therefore, that formerly the states were not prohibited from infringing any of the fundamental privileges and immunities of citizens of the United States, except in a few specified cases, that cannot be said now, since the adoption of the Fourteenth Amendment. In my judgment it was the intention of the people of this country in adopting that amendment to provide National security against violation by the states of the fundamental rights of the citizen."[4]

MAXWELL v. DOW.

1900. Supreme Court of the United States. 176 U. S. 581.

[Maxwell was tried in Utah for robbery and convicted by a jury of eight jurors. He applied to the state Supreme Court for a writ of habeas corpus upon the ground that this procedure and the constitution of Utah authorizing it violated the abridgement clause of the Fourteenth Amendment and also the due process clause. His petition was denied and this writ of error was taken.]

Mr. Justice Peckham delivered the opinion of the court.

What are the privileges and immunities of a citizen of the United States which no state can abridge? Do they include the right to be exempt from trial, for an infamous crime, in a state court and under state authority except upon presentment by a grand jury? And do they also include the right in all criminal prosecutions in a state court to be tried by a jury composed of twelve jurors?

That a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the federal Constitution, there can be no doubt. Thompson v. Utah, 170 U. S. 343, 349. And as the right of trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be an unanimous verdict of twelve jurors in all federal courts where a jury trial is held. American Pub. Co. v. Fisher, 166 U. S. 464; Springville v. Thomas, 166 U. S. 707.

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[4] The student will be interested to note as he later proceeds with a study of the due process of law clause (which was passed over lightly in the argument of this case and in the opinion of Justice Miller) that by interpretation that clause has expanded to secure substantially as full a limitation on state power as the dissenters in this case contended was to be found in the "abridgement" clause. It seems sufficient for the student to realize at this point the uselessness of the "abridgement" clause as interpreted in this case, an interpretation that has never been retracted. For a full discussion see D. O. McGovney, Privileges or Immunities Clause—Fourteenth Amendment (1918) 4 Iowa Law Bul. 219-244.

It would seem to be quite plain that the provision in the Utah constitution for a jury of eight jurors in all state criminal trials, for other than capital offenses, violates the Sixth Amendment, provided that amendment is now to be construed as applicable to criminal prosecutions of citizens of the United States in state courts.

It is conceded that there are certain privileges or immunities possessed by a citizen of the United States, because of his citizenship, and that they cannot be abridged by any action of the states. In order to limit the powers which it was feared might be claimed or exercised by the federal government, under the provisions of the Constitution as it was when adopted, the first ten amendments to that instrument were proposed to the legislatures of the several states by the first Congress on the 25th of September, 1789. They were intended as restraints and limitations upon the powers of the general government, and were not intended to and did not have any effect upon the powers of the respective states. This has been many times decided.[5] * * *

It is claimed, however, that since the adoption of the Fourteenth Amendment the effect of the former amendments has been thereby changed and greatly enlarged. It is now urged in substance that all the provisions contained in the first ten amendments, so far as they secure and recognize the fundamental rights of the individual as against the exercise of federal power, are by virtue of this amendment to be regarded as privileges or immunities of a citizen of the United States, and therefore the states cannot provide for any procedure in state courts which could not be followed in a federal court because of the limitations contained in those amendments. This was also the contention made upon the argument in the Spies Case, 123 U. S. 131, 151; but in the opinion of the court therein, which was delivered by Mr. Chief Justice Waite, the question was not decided because it was held that the case did not require its decision.

In the Slaughter-House Cases, 16 Wall. 36, the subject of the privileges or immunities of citizens of the United States, as distinguished from those of a particular state, was treated by Mr. Justice Miller in delivering the opinion of the court. * * *

We have made this extended reference to the case because of its great importance, the thoroughness of the treatment of the subject, and the great ability displayed by the author of the opinion. Although his suggestion that only discrimination by a state against the negroes as a class or on account of their race was covered by the amendment as to the equal protection of the laws has not been affirmed by the later cases, yet it was but the expression of his belief as to what would be the decision of the court when a case came before it involving that point. The opinion upon the matters actually involved and maintained by the judgment in the case has never been doubted or overruled by any judgment of this court. It remains one of the leading cases upon the subject of that portion of the Fourteenth Amendment of which it treats.

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[5] The earliest and leading case on this point is Barron v. Mayor &c. of Baltimore (U. S. 1833) 7 Pet. 243, 8 L. ed. 672.

The definition of the words "privileges and immunities," as given by Mr. Justice Washington [in Corfield v. Coryell, ante, p. 457], was adopted in substance in Paul v. Virginia, 8 Wall. 168, 180, and in Ward v. Maryland, 12 Wall. 418, 430. These rights, it is said in the Slaughter-House Cases, have always been held to be the class of rights which the state governments were created to establish and secure. * * *

It was said in Minor v. Happersett, 21 Wall. 162, that the amendment did not add to the privileges and immunities of a citizen; it simply furnished an additional guaranty for the protection of such as he already had. And in Re Kemmler, 136 U. S. 436, 448, it was stated by the present Chief Justice that: "The Fourteenth Amendment did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty, and property rests primarily with the states, and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the states, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States. United States v. Cruikshank, 92 U. S. 542; Slaughter-House Cases, 16 Wall. 36." * * *

In Walker v. Sauvinet, 92 U. S. 90, it was held that a trial by jury in suits at common law in the state courts was not a privilege or immunity belonging to a person as a citizen of the United States, and protected, therefore, by the Fourteenth Amendment. * * *

This case shows that the Fourteenth Amendment in forbidding a state to abridge the privileges or immunities of citizens of the United States does not include among them the right of trial by jury in a civil case, in a state court, although the right to such a trial in the federal courts is specially secured to all persons in the cases mentioned in the Seventh Amendment.

Is any one of the rights secured to the individual by the Fifth or by the Sixth Amendment any more a privilege or immunity of a citizen of the United States than are those secured by the Seventh? In none are they privileges or immunities granted and belonging to the individual as a citizen of the United States, but they are secured to all persons as against the federal government, entirely irrespective of such citizenship. As the individual does not enjoy them as a privilege of citizenship of the United States, therefore, when the Fourteenth Amendment prohibits the abridgement by the states of those privileges or immunities which he enjoys as such citizen, it is not correct or reasonable to say that it covers and extends to certain rights which he does not enjoy by reason of his citizenship, but simply because those rights exist in favor of all individuals as against federal governmental powers. The nature or character of the right of trial by jury is the same in a criminal prosecution as in a civil action, and in neither case does it spring from nor is it founded upon the citizenship of the individual as a citizen of the United States, and if not, then it cannot be said that in either case it is a privilege or immunity which alone belongs to him as such citizen. * * * Those are not distinctly privileges or immunities of such citizenship, where everyone has the same as against the federal government, whether citizen or not. * * *

In Kemmler's case, 136 U. S. 436, 448, it was stated that it was not contended and could not be that the Eighth Amendment to the federal Constitution was intended to apply to the states. * * * In Presser v. Illinois, 116 U. S. 252, it was held that the Second Amendment to the Constitution, in regard to the right of the people to bear arms, is a limitation only on the power of Congress and the national government, and not of the states. * * * In O'Neil v. Vermont, 144 U. S. 323, 332, it was stated that as a general question it has always been ruled that the Eighth Amendment to the Constitution of the United States does not apply to the states. In Thorington v. Montgomery, 147 U. S. 490, it was said that the Fifth Amendment to the Constitution operates exclusively in restraint of federal power, and has no application to the states.

We have cited these cases for the purpose of showing that the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the federal Constitution against the powers of the federal government. They were decided subsequently to the adoption of the Fourteenth Amendment, and if the particular clause of that amendment, now under consideration, had the effect claimed for it in this case, it is not too much to say that it would have been asserted and the principles applied in some of them. * * *

[HARLAN, J., gave a dissenting opinion.] Judgment affirmed.[6]

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[6] For another discussion of the "abridgement" clause see Twining v. New Jersey (1908) 211 U. S. 78, 90-99, 53 L. ed. 97 holding that the immunity given to citizens of the United States and all other persons in Amend. V against being required to give self-incriminating testimony gives immunity in federal proceedings only; that Amendment gives no immunity from a state's exaction of self-incriminating testimony. Such immunity in state proceedings exists in all the states fully or to a limited extent by the common law, state statute or state constitution. The federal constitution leaves the states free to abridge it.

CHAPTER IV.

SEPARATION AND DELEGATION OF GOVERNMENTAL POWERS.

The following exposition of this topic is by Professor Frederick Green, of the College of Law of the University of Illinois.[1]

When a government is conceived of mainly as a means of protection from foreign foes, its people, desiring to see it strong, may willingly acquiesce in the concentration of unrestricted power in a few hands; but when they come to fear aggression from their governors as well as from the enemy, they seek to restrict governmental power and to control it. Prominent among expedients to that end has been the attempt to keep the legislative, executive and judicial powers apart. But as society grows complex and as private fortunes and combinations of private capital increase and operate obscurely, men, being dependent for their living upon sources beyond their control and even their knowledge, apprehend injustice and oppression rather from those without the government than from those within it, and a tendency revives to vest for protection a controlling power in public authority. Such a tendency which in ancient Rome helped, and perhaps sufficed, to extinguish the republic, and to restore to emperors of the world the power once exercised by kings of the petty city,[2] is operative today. Its more conservative manifestations include a disposition to trust to justice according to administrative discretion, rather than to justice according to law. The doctrine of the separation of powers has been called into question, and some say that it has broken down. It is the object of this article to consider the principles upon which that doctrine rests, and whether and how far they may usefully be applied in conditions now existing or likely to arise, and, with that purpose, to discuss the character and extent of the separation of powers which our constitutions in fact establish, its origin and effectiveness, and the extent to which present governmental practice is consistent with its theory.

A theoretical threefold division of governmental powers may be traced to Aristotle, who in his treatise on Politics wrote of the various kinds of government with which he was acquainted and attempted to ascertain their relative characteristics. For this purpose he distinguished in theory three kinds of governmental function, the kinds usually exercised by the deliberative assemblies, by the magistrates and by the law courts. He then looked to see what classes of citizens, by office holding, vote or appointment, respectively exercised or controlled the exercise of each of these functions in each state. These classes he denominated the elements of the state, and upon the composition of these elements he thought that the character of the state chiefly depended. "All states have three elements, and the good law giver has to regard what is expedient for each state. When they are well ordered, the state is well ordered, and, as they differ from one another, constitutions differ."[3] That is to say, in Aristotle's view, governmental functions are, on the whole, of three kinds, deliberative, magisterial, and judicial, and the character of the state varies with the hands that hold them. This is not to say that they should be in different hands, or separated, or independent of each other.

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[1] This exposition appeared as a whole in (1920) 2 Ill. Law Bul. 373-416, and most of it in (1920) 29 Yale Law Jour. 369-393, and is reprinted here with the consent of the author and publishers. The footnotes are Professor Green's.

[2] See Saint-Girons, La séparation des pouvoirs, p. 23.

On the other hand, the historian Polybius, in the second century before Christ, without distinguishing powers according to their nature, explained the advantages of a system of checks. He eulogized the constitution of the Roman republic because it divided authority between senate, consuls and people so that each was dependent upon the good will of one of the others, and thus all worked concertedly and none could abuse its power.[4]

It is sometimes said that the English government was the first in which a separation of powers was achieved; but Parliament had its rise and won its ascendency in an attempt to check the royal power and to gain a voice in government for the interests it represented, and not with an idea of separating legislative and executive power. "The Parliament," said Milton, "was set as a bridle to the King."[5] Nor did Parliament discriminate in practise between making new law, declaring old law, and judging particular cases. Rather it acted generally to protect rights and to redress abuses.[6] Yet to preserve Parliament's control it was necessary to maintain the principle that the King could not alter the law of his own will. In 1610, the royal officers demanded of Chief Justice Coke whether the King by proclamation could guard against fire and overcrowding in London by forbidding the erection of new buildings, or could conserve wheat for food by forbidding making it into starch. The

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[3] Aristotle, Politics, 4, 14. Jowett's Translation, p. 133.

[4] Polybius, History. Bk. 4, 11-18.

[5] The Tenure of Kings and Magistrates, quoting the French statesman, Claudius Sesell.

[6] See McIlvaine, The High Court of Parliament. Parliament and the law courts differed in the nature of the business usually brought before them, but each tended to deal finally and completely with the business in hand. Probably this tendency was at the bottom of the disposition of early judges to disregard acts of Parliament which they thought against reason or common right. Maine, Popular Government, p. 218, says that the different nature of the legislative and executive powers was not recognized by writers until the fourteenth century. It is said to be recognized in the Defensor Pacis of Marsilio (1387).

Lord Privy Seal urged, in support of executive police power, that the physician was not always bound to a precedent, but to apply his medicine according to the quality of the disease, "and all concluded," says Coke, "that it should be necessary at that time to confirm the King's prerogative with our opinions." But it was resolved upon conference between the chief judges and the lords of the privy council "that the King by his proclamation can not create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point; for * * * upon that ensues fine and imprisonment; also the law of England is divided into three parts, common law, statute law and custom; but the King's proclamation is none of them."[7]

Further, if Parliament's power were to be real, it would not do to let the King control the decisions of his judges upon the effect of its statutes or the extent of his prerogative. Bacon, to be sure, was of the numerous class of reformers who favor absolute government because through its power the pathway to reform seems easier.[8] "Though the judges be lions," he said, yet they should be "lions under the throne, being circumspect that they do not check or oppose any points of sovereignty." But when the Archbishop of Canterbury advised King James that the King was authorized by word of God in Scripture to take from the judges and to determine himself any question not settled by express provision, Coke answered "in the presence and with the clear consent of all the judges of England and barons of the exchequer, that the King in his own person can not adjudge any case, either criminal * * * or betwixt party and party * * * but this ought to be determined and adjudged in some court of justice according to the law and custom of England * * * and that the law was the golden met-wand and measure to try the causes of the subjects and which protected his majesty in safety and peace; with which the King was greatly offended, and said that then he should be under the law, which was treason to affirm, as he said."[9]

The changes incident to the establishment of constitutional government in England came about, as was natural, mainly through the pressure of conflicting interests, and the development of points of political weakness and strength, and thinkers, very largely, moralized about them after the event and pointed out their merits. It was long before they clearly distinguished between the functions of government. Thus Milton ignored the separation of powers, while he gave clear expression to the doctrine of popular sovereignty delegated to representatives in assembly.[10]

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[7] 12 Co. Rep. 74.

[8] The economist Le Trosne (quoted by St. Girons, La séparation des pouvoirs) thought France under the old regime infinitely better off than England, because "reforms can be put through to change the whole state of the country, whereas with the English such reforms are liable to be hampered by the parties."

[9] Prohibitions del Roy (1607) 12 Co. Rep. 63.

In 1656, Joseph Harrington published "The Commonwealth of Oceana" in which he repeatedly insisted on the necessity for government by legislative rule instead of administrative discretion. " * * * the liberty of a commonwealth consisteth in the empire of her laws, the absence whereof would betray her to the lusts of tyrants. And these I conceive to be the principles upon which Aristotle and Livy * * * have grounded their assertion 'that a commonwealth is an empire of laws and not of men.' " For, he says, though those that make the laws are but men, yet in a popular government, the laws will express the interest of the whole. "The wisdom of the few may be the light of mankind, but the interest of the few is not the profit of mankind." And in the preface to the Art of Lawgiving he said, "Whereas the law being not to be made but by the many, no man is governed by another man, but by that only which is the common interest; by which means this amounts to a government of laws and not of men." Harrington, of course, distinguished executing and judging the laws from making them. He thought it essential to liberty to have "a magistracy answerable to the people as distributors and executioners of the laws made by the people."[11] Sir Henry Vane also advocated the separation of executive from legislative power. He wrote: "Nay, would there be any just exception to be taken if * * * it should be agreed, as another part of the fundamental constitution of the government, to place that branch of the sovereignty which respects the execution of the laws in a distinct office from that of the legislative power and yet subordinate to them and to the laws * * *."[12] Locke, in his treatise on government, recognized the three functions. In his view the chief reasons for the existence of public authority are that in a state of nature there is wanting; first, an established law to decide controversies; second, an indifferent judge with authority to determine differences according to the law; and third, power to back the sentence and give it execution. In all well framed governments, he said, the legislative and the executive are in different hands, not only because the legislature need not, like the executive, be continually active, but also because in this way the laws, being freer from influence of class and of occasion, will be made and executed more impartially.[13] But unlike the framers of our constitutions, Locke apparently did not conceive of executive or judiciary as co-ordinate with the legislature, and, like it, drawing a direct and independent authority from the people.

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[10] "For the ground of every just and free government—since men have smarted so oft for committing all to one person—is a general council of ablest men, chosen by the people to consult of public affairs for the general good. In this Grand Council must the sovereignty, not transferred but delegated only, and as it were deposited, reside; * * * they * * * must elect, as they have already out of their own number and others, a Council of State." The Ready and Easy Way to Establish a Free Commonwealth. (Morley's Ed. p. 432.)

[11] See passages from Oceana and from the Art of Lawgiving printed in Thayer, Cases on Const. Law, I, 25-26.

[12] A Healing Question Propounded and Resolved (1656), Thayer, Cases on Const. Law, I, 24.

It was Montesquieu, in 1748, who, developing Locke's suggestions, distinguished the powers of government, and stated the need for separating them, in a manner that arrested and held attention. He saw, no doubt, that the English king held his throne by a parliamentary title at the people's will; that control over the making of law had passed from the crown; and that the executive power had, with the fall of the star chamber and the achievement of independence by the judges, come to depend for its enforcement on a separate judicial body, which held to account not only private persons but royal officers as well; and that these changes were a necessary condition to English freedom. Montesquieu did not make the mistake, sometimes charged upon him, of supposing that the powers should be completely and politically separated, like three governments in one state. He does say that the legislature should not call the executive to account except by impeachment, which is at variance with the existing English system of tenure; but, as a means of securing executive independence, he approves the veto and the power to summon the assembly and to dissolve it. His point is that the functions should not be so united that he who exercises one may also control affirmatively the exercise of another. That would be an end of liberty. For one loses liberty when he becomes apprehensive. "Political liberty in a citizen is *a tranquility of mind* arising from the opinion each person has of his safety. In order to have this liberty it is requisite the government be so constructed as one man need not be afraid of another."[14] "Political, like moral good, always lies between two extremes."[15] "All experience shows that every one who has power is moved to abuse it. He goes to the limit * * *." To make abuse of power impossible it is necessary to arrange matters so that power will check power.[16] Those who would be despots, he says, have always begun by uniting offices in their own person; and in the republics of Italy where a single body wields the whole power, there is less liberty than in monarchies. "Though there is no external pomp that reveals the despot, yet he is continually felt." The fundamental reason of this is that lawmakers are careful about entrusting power to others, and will guard against and correct its abuse; but if they themselves are to control administration, they will confer as arbitrary a power as they can in order to be as free as possible in exercising it. As Montesquieu puts it, they will make tyrannical laws to execute them tyrannically. A judge who can execute his own decrees has power to oppress; and a judge who can make his own laws can do as he pleases.[17] Each will make himself feared. Montesquieu thought that by preventing any single group of men from controlling the exercise of more than one of the three functions, and by giving each class of society such representation in the government that it might check the others, injustice and oppression would be minimized and yet those things would be done which the general need required.[18]

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[13] Treatise on Government, Book II, 124-126, 143, 144, 160 (1690).

[14] De l'Esprit des lois, Book II, ch. 6.

[15] Ibid, Book XXIX, ch. 1

[16] Ibid, Book XI, ch. 4.

Blackstone echoed the phrases of Montesquieu.[19] A legislature will not entrust dangerous powers to independent hands, but it can not fairly, and an executive can not safely, control adjudication.

The sophist Protagoras undertook to teach political science, and justified the adventure on the ground that since nothing was certain at all, political science was as certain as anything else. No doubt it was partly the definiteness, assurance and attractive simplicity with which Montesquieu laid down the doctrine of the separation of powers, together with the dearth of other formulas for good government, that gave the theory its immense vogue among those who in the eighteenth century were seeking a specific to make the world safe for democracy. The doctrine received the unquestioning adherence of Washington,[20] Jefferson,[21] John Adams,[22] and James Wilson.[23] It was expounded in the Federalist by Madison[24] and Hamilton.[25] It was later indorsed by Webster[26] and by the United States Supreme Court.[27] Article 16 of the declaration of the rights of man, prefixed to the French constitution of 1789, declared that without it there could be no constitution at all. All our state constitutions, beginning with Virginia in 1776, vested in separate departments legislative, executive and judicial powers, giving each department, as it were, its equal, independent warrant of attorney from the people. Most constitutions, like those of Illinois, have also expressly laid down, what in the others is necessarily implied, that no department shall exercise a power proper only to another. The Articles of Confederation it is true, gave Congress control of the executive, but this was thought a defect and the supposed mistake was remedied in the Constitution of the United States.

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[17] Ibid, Book IX, ch. 6.

[18] "Ces trois puissances devraient former repos ou une inaction. Mais, comme par le movement nécessaire des choses elles sont contraintes d'aller, elles seront forcées d'aller de concert." He thought neither democracy nor aristocracy compatible with liberty, but the judges should be drawn from the people. Rousseau, too, believed in the separation of powers. Otherwise "law and fact would be so confounded that it could no longer be known what is law and what is not" and the very object for which the body politic was instituted would be lost. Contrat Social, II, 16. He said that the administration of affairs and the exercise of justice over property, life and honor are incompatible; yet those who make the laws must have the oversight of their execution or "law would be but a word and a word without meaning." Lettres écrites de la montagne, II, 7.

[19] Commentaries, Vol. I, pp. 146, 269, (1765).

[20] In the farewell address, Washington said, "The spirit of encroachment tends to consolidate the powers of all departments in one, and thus to create, whatever the form of government, a real despotism."

[21] "The concentrating these in the same hands is precisely the definition of despotic government." Notes on Va. p. 195.

[22] Works, p. 186.

[23] 1 Works, 367 (Ed. of 1896)

[24] Nos. 47, 48.

[25] Nos. 66, 81.

[26] " * * * doubtless the continuance of regulated liberty depends on maintaining these boundaries." Works, Vol. 4, p. 122.

[27] Per Miller, J. in Kilbourn v. Thompson, 103 U. S. 188.

The separation of powers, says F. J. Stimson, is an American invention, for in America first was it formally or intelligently applied. It stands, he says, among America's great contributions to the science of government, along with the division of power between states and nation, and with the limitation of governmental authority over the individual. It is the principle "that they who make the laws may not administer them, and he who administers them may not judge them 'to the end it be a government of laws and not of men.' "[28]

Montesquieu once wrote, "Voltaire has too much mental activity to understand me. The books he reads he makes over, and then he criticises what he has made over."[29] The separation of powers has met many Voltaires. It is a phrase capable of varied meaning. It may be used in contrasting the position of an American executive with that of a minister responsible to a legislature.[30] But the essence of Montesquieu's meaning, and of the American doctrine, is not there. The irremovability of American executives is due to the method of electing them. A further and distinct result was aimed at by vesting differentiated powers in separate bodies. But on the other hand it was not intended to split each state into three sovereignties, each acting solely in a separate sphere. To prevent one department exercising its own functions with respect to the doings of another would vest in the other the uncontrolled power which separation is designed to prevent.[31] It is expected that the legislature will impose rules on the executive, the judge issue writs to the sheriff. The purpose of vesting the respective powers in different departments, which is their separation in its proper sense, is to prevent control over two powers coming to the same hands.[32]

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[28] Federal and State Constitutions, p. 7, § 200, note 5.

[29] See Saint-Girons, La séparation des pouvoirs, p. 103.

[30] See Woodrow Wilson, Congressional Government, pp. 284, 290; Ford, Rise and Growth of American Politics; Prof. Burgess, 10 Pol. Sci. Quart., 420. It is as true to say that ministerial responsibility is the English mode of enforcing the separation of powers as to say that it impairs it. It prevents executive usurpation. Parliament and the administration have each a responsibility of its own.

[31] Jas. Wilson, Works, Vol. I, 367 (1896 ed.); Cp. the French doctrine that only administrative courts may hold administrative officers responsible for official acts.

That power tends to increase and to encroach has often been demonstrated. The tendency is progressive, because with growth of power goes growth of prestige, authority, influence and disposition to make might determine right.[33] A system of checks, such as the veto, impeachment, and the judicial practise of passing upon the constitutionality of governmental acts, so far from infringing on the principle of the separation of powers, is a surety for preserving its supposed benefits. It provides means of self-defence to keep the executive from sinking to the level of a legislative committee, or the legislature from becoming a mouthpiece for executive decrees. As Madison argued in the convention of 1787, it does not blend the departments, but is a barrier to keep them apart.[34] It gives to neither power to dispense with or to direct the conduct of the other. And even if the President, by veto, patronage and popular backing, were able continually to coerce Congress and the courts into acting against their better judgments, it would still be true that the action they took would be their own. The separation of powers prevents a transfer of authority or responsibility. The question here to be considered is what this separation is and what it accomplishes. In other words, when our constitutions vest separately the three powers, what limits are thereby set to each power, and how far is the limitation effectual, beneficial or sufficient?

Many recent writers have remarked a growing tendency, if not a compelling need, to vest in administrators a large discretion, and an authority to make rules which amounts, in a sense, to a delegation of real, though limited, legislative power. Some writers deny the desirability of the separation of powers, as they conceive it, and dispute the value and even the reality of the theoretical division of governmental functions upon which it rests.[35] Some think that the distinction of functions is largely a matter of convention and convenience, and that the same kind of power may be exercised by a legislature and called legislative, by an administrator and called executive, or by a court and called judicial. Professor F. J. Goodnow, for instance, quotes from a French author the statement that "the mind can conceive of but two powers: that which makes the law and that which executes it. There is no place, therefore, for a third power by the side of the first two."[36] Mr. Goodnow, somewhat similarly, argues that acts of a state, like those of an individual, can naturally be grouped under two heads only, those necessary to the expression, and those necessary to the execution, of the will. The former he calls political, the latter administrative, action. He says the theory of three separated powers incorporated in our constitutions has proven "to be unworkable as a legal principle" because there is "a common borderland" between them, and that it is really "existent in our constitutional law only in an attenuated form," and that it has become "an unworkable and unapplicable rule of law."

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[32] Story on the Const. (5th ed.) §§ 525, 527; Saint-Girons, La séparation des pouvoirs, p. 142. The Federalist, Nos. 47, 48. The executive's right to recommend legislation is consistent with the principle. Cp. Garner, Intro. to Pol. Sci., pp. 417-425; Leacock, Elements of Pol. Sci. pp. 143-153; McLaughlin, The Courts, the Const. and Parties, pp. 50-58; Laski, Authority in the Modern State, pp. 69-72; Goodnow, Comparative Adm. Law, p. 20.

[33] See Mill, Representative Government, ch. 5; Lieber, Political Ethics, 118-119; Burgess, The Reconciliation of Government with Liberty, p. 305.

[34] Farrand, Records of the Federal Convention, II, 77.

[35] " * * * the one obvious method by which the past sought refuge from the dangers of authority has proved in fact delusive. * * * It is in fact a paper merit for the simple reason that in practice it is largely unworkable. * * * The business of government does not admit any exact division into categories." Laski, Authority in the Modern State (1919) 70, 71. "Modern political science has, however, generally discarded this theory, both because it is incapable of accurate statement, and because it seems impossible to apply it with beneficial results in the formation of any concrete political organization." Goodnow, Comparative Administrative Law (1903) 20. See also Baldwin, The American Judiciary (1905) 23, 24; Bondy, The Separation of Governmental Powers (1893) 76-80; Goodnow, Politics and Administration (1900) 9, 10, 22; Powell (1912)

There is no occasion to deny the possibility of a twofold division of governmental functions, nor its usefulness for some purposes. But there is need to challenge an assertion that the tripartite division is a fiction either of law or of political science, void of significance or value, necessarily disregarded in fact, or incapable of consistent application except by pretence. Perhaps there are differences which are inherently differences of kind. It may be that the differences between mind and matter, and between is and ought are such. But most classifications of human affairs rest upon differences of degree, like the difference between a grain of sand and the rock of Gibraltar. We can imagine a grain of sand increasing by degrees until it gets as big as Gibraltar, but when a change has progressed so far that we need to alter our manner of dealing with the changing thing we view it as a change in kind. What we generally mean by a different kind of thing is a thing that we need to treat differently.

Mr. Goodnow's classification rests on differences of degree to the same extent as the threefold classification. He says his classification applies to the single person as well as to the state, and therefore we might expect him to say that it is the distinction between deciding what to do, and doing it. But he says it is a distinction between the expression of the will, and putting the will into effect. Since important decisions may be made without any expression of will other than that involved in the act of putting the decisions into effect, it is not entirely clear whether Mr. Goodnow brings under

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27 Pol. Science Q. 215; Woodrow Wilson, Congressional Government (1885) 273, 284, 290; 1 Duguit, Manuel de droit constitutionnel (1911) pars. 63, 64; Hobbes, Leviathan (1651) ch. 18.

[36] Goodnow, Politics and Administration (1900) 9, 10, 12.

the head of expression of the state's will merely the enunciation of rules, or whether he intends to embrace all decisions on matters of policy, even such as may be involved in an executive dealing with a particular case. Whichever he means, such an "expression of will" forms an element of almost every governmental action. When a legislature passes a law for maintaining traffic policemen; when the chief of police details particular policemen to control traffic at particular street intersections; when the policeman whirls about the sign that says "Go," and makes it read "Stop," each has to decide what policy requires, and each expresses the will of the state. Indeed, as numbers of persons are dealt with by word of command, each in some sense legislates. Yet Mr. Goodnow does not hesitate to treat such acts as those of the chief of police or patrolmen as involving only the sort of thing he means by administration. It is no real objection to a classification of governmental activities that action classed under one head savors in some degree of the characteristics of action classed under another. The distinction between earth, air and water is not rendered "unworkable" by the existence of dust, mud and clouds, or "unapplicable" by the fact that a traveler may sometimes choose between railroad, airplane and steamship. It is true that judges' decisions in a certain sense make law, that legislatures sometimes pass acts for particular cases, that the same result may sometimes be accomplished by invoking the action either of legislature, executive or court, and, as has been said already, that administrative officers may be vested with real, though limited, legislative power. These things indicate that the separation of powers works elastically, but they neither prove nor disprove the desirability or feasibility of putting limits on the kind of power a given functionary may exercise. Though it is not always physically necessary to formulate the state's will separately from enforcing it, there may be good reason for imposing a legal necessity for usually doing so, by separating the powers.

Furthermore, adjudication differs essentially from administration. To compare a state to a person, and to speak of the execution of its "will," is likely to mislead. The state is concerned with two matters of a different sort; first, what it does itself; second, what its people do to each other. Its regulations are largely not of public, but of private, affairs. They concern private "will." The state does not decide whether a man shall sell his land or give his money to charity. It confers rights in case he does these things, but it is for the persons concerned to insist upon their rights or to waive them. Only when private wills conflict does the state determine which will is entitled to prevail, and then the winner may enforce the decision or not, as he chooses. In adjudication, the will of the state is conditional on the will of the parties. It has no will of its own. That is why judging between parties is the chief function of primitive governments, and precedes law making and executive force,[37] and why judicial tribunals in civilized countries are distinct bodies treated as discharging a distinct office. A lawsuit may be an enterprise of the parties, enriching or impoverishing them, but it is not an enterprise of the state, analogous to conducting a war, levying a tax or paving a street. In a suit over the price of land, the subject-matter of the state's action is not dollars or land, but the rights of others.

The case is the same if the suit involves the legality, not of private, but of governmental, action. To challenge the authority of an officer is to assert that what he does is not the "will" of the state. It raises the question what the state's will is. To will and to enforce that will, and to determine what that will has been in order to discover and protect rights under it are matters of a different kind. This is equally true of prosecutions for crime. A government conceivably might arrest disturbers of the peace, throw them into jail and keep them there for punishment, all in a single course of administrative procedure. But a government worthy of the name guards its people from violence and wrong not only from others, but from itself, and not only by physical measures, but by a system of legal rights.[38] But legal rights give no sure protection unless there is also an opportunity to invoke specific governmental action to determine whether they have been violated. Therefore a man against whom public force is brought generally has a right to a formal determination whether there is authority to bring it. The function is distinct from and even in a sense opposed to the function of repressing crime. It is the function of protecting the individual from wrong. The criminal and the administration are on opposing sides. The court judges between them. When we say we live under a government of laws, we recognize the protection of rights as a function of government set apart from and in some degree above the administrative power. It would shock us if the prisoner's guilt and its punishment were determined by his jailer, as in a case of breach of prison discipline. It would shock us if, whenever a court made a decision, the governor could reverse it. Yet if it is on a footing with other executive acts, there should be no impropriety in empowering him to do so.[39]

It is true that by conditioning the authority of executives on their opinion as to facts instead of upon the existence of the facts, legislatures, as will be seen, may narrow the field of individual freedom and widen that of executive power; but this increases the importance of distinguishing the ordinary executive authority from the power to judge the limits of that authority. It is also true that such matters as the assessment of values incident to the collection of taxes and to the exercise of eminent domain may be carried through by the executive department, being classed as pertaining to the satisfaction by government of its own needs, much as breaches of prison discipline are classed as pertaining to prison administration. Yet since the fourteenth century, the provision of Magna Carta that no free man should be taken, imprisoned or destroyed, nor proceeded against by royal power, except through the judgment of his peers or the law of the land has been regarded as securing the separation of trial for crime from administration in general. So essential is this to fundamental justice that though due process of law does not in general require a separation of powers,[40] it does prevent an administrative determination of guilt.[41] Courts and legislative bodies may punish for contempt. Executives may not.

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[37] See Esmein, Séparation des pouvoirs, 402-404.

[38] See Stimson, Federal and State Constitutions (1908) II; Dicey, The Law of the Constitution (8th ed. 1915) 183-184.

[39] See Esmein, *ibid.*, 402-404.

It is of fundamental importance to notice that the difference between legislative, executive and judicial action depends upon the kind of action taken and not upon the kind of mental process involved in deciding whether and how to take it.[42] Misconception on this point has caused much confusion.[43] If a claim is made against a principal on a contract alleged to have been concluded by his agent, the principal may try to ascertain the facts from witnesses and the law from law books, or he may go to a lawyer for an opinion or to an umpire for a decision, and as a result may pay the claim; but though principal, lawyer and umpire have gone through the same train of thought, as a judge would on a trial, they plainly have not exercised a judicial function because they have exercised no governmental power at all. If the contract claim were against a city, and the proper administrative officer of the city, after inquiry, thought it valid, and paid it, there would be governmental action involving the same mental process as adjudication, but the action would be administrative, not judicial, because the purpose and consummation of the proceeding were administrative. But if a debtor refuses to pay and is sued, all exercises of governmental power by the court are judicial, because they are steps in the giving of judicial relief.

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[40] Dreyer v. Illinois (1902) 187 U. S. 71, 23 Sup. Ct. 28; Prentis v. Atlantic Coast Line Co. (1908) 211 U. S. 210, 225, 29 Sup. Ct. 67.

[41] Cleveland, etc., R. R. v. People (1904) 212 Ill. 638, 72 N. E. 725; Interstate Commerce Commission v. Brimson (1894) 154 U. S. 447, 485, 14 Sup. Ct. 1125. "It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents." Wong Wing v. United States (1896) 163 U. S. 228, 237, 16 Sup. Ct. 977.

[42] "It is 'the nature of the final act' that determines 'the nature of the previous inquiry.'" Hughes, J., in Louisville, etc., R. R. v. Garrett (1913) 231 U. S. 298, 307, 34 Sup. Ct. 48; and see People v. Apfelbaum (1911) 251 Ill. 18, 95 N. E. 995; Klafter v. Board, etc. (1913) 259 Ill. 15, 102 N. E. 193.

[43] See Donahue v. Will Co. (1881) 100 Ill. 94; George v. People (1897) 167 Ill. 447, 47 N. E. 741; People v. Kipley (1897) 171 Ill. 44, 65, 49 N. E. 229; Devine v. Brunswick-Balke Co. (1915) 270 Ill. 504, 110 N. E. 780.

In what then does the distinction consist? To hazard definitions in an attempt to be explicit, it may be said:

Legislation is the creation by the state of a right (including an authority, a privilege or an immunity), duty, or status not dependent on the existence of a previous right, duty or status.

Adjudication is the imposition of a specific duty in *personam,* or of a liability, or the granting of a right or status which is dependent on a previous right or duty, in that it is imposed by way of giving effect to a right or duty determined to exist or to have existed, or by way of redress or punishment for its violation.

Administration probably can not be so closely defined. It consists in a management of public affairs and includes all state action not part of a process of legislation or adjudication which affects rights or involves the use of adverse force. It can not be closely defined, because, as will be explained, it may slightly overlap the legislative field, in that administrative officers may be vested with a limited, subsidiary discretion in the creation of rights and duties, and also because it may slightly overlap the judicial field, in that administrative officers may be vested with power to put existing rights into effect where doing so does not affect other rights adversely. With that part of administration which, as in many of the scientific activities of government, involves no control over rights, but only such action as might be carried on by private persons, we are not concerned.

LEGISLATIVE POWER.

Legislation may be permanent or temporary, general or special. A permanent revenue law or a tax for a particular work of public benefit, a general divorce, pension or incorporation law, or an act granting divorce, pension or incorporation to particular persons are alike legislation.[44] Divorces, pensions and incorporation were once usually granted by special act; and this required the legislature to make up its mind in each case whether sufficient reason existed. It was seen to be more simple and just to determine generally what facts are good reason for divorce, pension or incorporation and to pass an act conferring a right to an award thereof to any person in whose case the facts exist. It is then competent to vest a court with power to determine on application whether the conditions of the right are fulfilled, and, if so, to effectuate it by decree. The process which might have been purely legislative has been divided into two parts, one of which is judicial. But the legislature may frame its action so that the grant of incorporation, pension, or, it would seem, divorce, if by consent, shall come from the executive and not from a court. It can make it the duty of an administrative officer when the conditions are fulfilled (in fact or in his opinion, whichever the statute provides), and application duly made, to grant a certificate of incorporation or award a pension. This duty is purely executive. It administers the law. That in order to administer it correctly it is necessary to determine what the law and facts are is immaterial. Such a determination is generally necessary as a preliminary to administrative action; for instance, in arresting a disturber of the peace. But the legislature could not confer on an executive officer power to grant a decree of divorce for a specified cause without the consent of the parties, so long as marriage remains a matter involving individual rights. To deprive a person of a right in respect to another, putting an end to it upon the ground that he is not entitled under the law to possess it any longer, is to adjudicate.[45] In short, much as a bombardment may be carried on from land, air or water, so a corporation may be created by action which is legislative, administrative or judicial. Actions differing in nature are invoked to work the same result.

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[44] Fletcher v. Peck (1810, U. S.) 6 Cranch, 87; Maynard v. Hill (1888) 125 U. S. 190, 8 Sup. Ct. 723.

This is as it should be. Each of the three departments exists to help, according to its own function, in the general work of government. It may properly be used to carry out any measures for which it is adapted, and it is for the law-making power to decide to what extent to use it.[46] It is a mistake to think that the distinction between the functions of government is unreal because there is often a choice which to use. As to mental processes involved the powers are indifferent; but as to results to be accomplished, and in a lesser degree as to the mode of acting, they are circles which partly overlap. The doctrine is not that no two of them may include any common ground, but that none of them may pass without its own boundaries and intrude upon territory belonging solely to another. The executive can not take action which is legislative or judicial in such sense as to be non-executive, and so of the others. But it is no constitutional objection to executive action that it requires determination of law or fact or, in some degree, policy, or that instead a court or legislature might have acted in its own way and produced a like result; although it may be a good political objection that a court or legislature could have done it better.[47]

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[45] A court clerk can not enter judgment by default, but it seems that he may enter judgment on confession. Hall v. Marks (1864) 34 Ill. 358.

[46] United States v. Woo Jan (1918) 245 U. S. 552, 556, 38 Sup. Ct. 207. It seems that the legislature may confer power to determine election results either on an administrative body or on a court. Lyons v. Becker (1916) 272 Ill. 333, 336, 111 N. E. 980.

[47] Thus the legislature may appropriate money to pay a claim against the state, although the court of claims has decided that the claim is unfounded. Fergus v. Russel (1917) 277 Ill. 20, 115 N. E. 166.

Since the separation of powers operates by way of exclusion, the important thing is to consider what this exclusion is,—what power is non-legislative, non-executive and non-judicial. The legislature as the creator and destroyer of rights is in a sense the superior department, since, as Locke puts it, "the legislature is no otherwise legislative of the society, but by the right it has to make laws for all the parts." [48] By fixing the rights of persons, the duties of executives and the jurisdiction of courts, it largely determines the form the government shall take, the extent to which the power of the administrative and judicial departments shall be called into play.

Fixing a railroad rate confers on all who tender goods for shipment a right against the carrier to have that rate. It governs an undetermined multitude of persons and future transactions. When given by a legislature, it is given as a new, independent right, and not as an enforcement of a preëxisting one. Therefore it is legislation.[49] But though a legislature may itself fix rates it may instead provide that they shall be such as a board determine to be reasonable. The board only determines a fact and promulgates the law accordingly. The legislature has adopted the determination in advance and provided for writing it into the law when made.[50]

A grant of a special right to a particular person is also legislation.[51] But where it is obvious that the legislature is not attempting to create a new right, because it is desirable that a new right should exist, but to enforce, in favor of A against B, what it believes to be an old right because it thinks the right exists and deserves enforcement, it is obvious that the legislature is attempting to adjudicate, and its act is invalid.[52]

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[48] Locke, Treatise on Government (1690) Bk. 2, ch. 13, par. 150.

[49] Prentis v. Atlantic Coast Line Co., supra; Louisville, etc., R. R. v. Garrett, supra.

[50] "Such a commission is merely an administrative body created by the state for carrying into effect the will of the state, as expressed by its legislature." Public Utilities Commission v. Chicago, etc., R. R. (1916) 275 Ill. 555, 114 N. E. 325. Louisville, etc., R. R. v. Garrett, supra; Minneapolis, etc., R. R. v. Railroad Commission (1908) 136 Wis. 146, 116 N. W. 905; Chicago, etc., R. R. v. Dey (1888, C. C. S. D. Ia.) 35 Fed. 866, 874; People v. Harper (1878) 91 Ill. 357 (commission may have power to fix charges for grain at an amount sufficient to cover expenses).

[51] See cases cited under note 44, supra.

[52] Thus an act is valid which confers on a particular bastard a right to inherit from parents living when the act is passed. See Norman v. Heist (1843, Pa.) 5 Watts & S. 171. But an act is void which sets off specified land to a widow to be held as her dower. Edwards v. Pope (1842) 4 Ill. 465. It is within legislative power to give a particular plaintiff a right to special relief provided he obtains judgment. Edwards v. Pope, supra. Or to authorize a particular guardian to sell his ward's land for the ward's benefit. Mason v. Wait (1842) 5 Ill. 127. Or a particular administrator to sell land to pay judgment creditors. See Rozier v. Fagan (1868) 46 Ill. 404. But it is not within legislative power to authorize an administrator to sell land and pay from the proceeds alleged creditors who have not recovered judgment. Lane v. Dorman (1841) 4 Ill. 238 (to pay a specified claim); Rozier v. Fagan, supra (to pay debts generally). Or to make it the duty of a grantee, whose land is not under the control of the

Though it is within legislative power to create a special private right, there is high authority for saying that to destroy a private right, unless under a general law or rule of policy, is not, in general, legislation. An act conveying to A, B's land, in which A has no special concern, simply on the ground that A can use it better or needs it more, is legislative in a sense, and certainly is not adjudication. But there was no thought of vesting in the government power to make particular confiscations for private benefit. That is not the kind of thing meant by legislation.[53]

As "the nature of the final act" determines the nature of the proceedings, the body that is to act is within its function in controlling matters incident to its action. Either house may, without usurping judicial power, admit to or exclude from participation in its affairs members whose qualifications are questioned;[54] summon witnesses and require them to answer questions relevant to contemplated legislative action; condemn to punishment for contempt persons who obstruct it or disobey its lawful commands;[55] and apply force in preserving order at its sessions.[56] But it is not within legislative power to conduct inquiries merely to satisfy curiosity or to enlighten the public, and neither the separate houses nor the whole legislature may compel attendance before a legislative committee for that purpose.[57]

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state, to reconvey to the grantor by a statute whose preamble recites that the conveyance was on a condition which has been broken. Board v. Bakewell (1887) 122 Ill. 339, 10 N. E. 378. Nor can a recital of a non-political fact in a statute be conclusive. And an act is invalid which sets aside a judgment and grants a new trial. Merrill v. Sherburne (1818) 1 N. H. 199. But acts validating defective acknowledgments (Steger v. Traveling Men's Ass. (1904) 208 Ill. 236, 70 N. E. 236) or votes cast by disqualified electors (People v. Peltier (1916) 275 Ill. 217, 113 N. E. 856) justly confer new rights, and therefore are not judgments upon former rights. It is a doctrine of the civil law that where the canons of interpretation do not suffice, a later statute interpreting an earlier one binds the judges, even as to past cases. Coxe, Judicial Powers and Unconstitutional Legislation (1893) 60; Esmein, ibid., 437. Making law involves declaring what the law means, and reiterating the law's meaning to make it certain is thought naturally to appertain to the power of originally declaring it; and the maker knows his intention best. Eius est interpretari cuius est condere. But the common law with truer insight holds that legal duty depends on what the law ordains, not on what the legislature intended to ordain, or thinks it has ordained, and that interpretation, being the ascertainment of legal duty, is for the court. Rockhold v. Canton, etc., Society (1889) 129 Ill. 440, 21 N. E. 794.

[53] See Newland v. Marsh (1857) 19 Ill. 376, 383; Loan Ass. v. Topeka (1874, U. S.) 20 Wall. 655.

[54] See Keating v. Stack (1886) 116 Ill. 191, 5 N. E. 541.

[55] People v. Keeler (1885) 99 N. Y. 463, 2 N. E. 615; In re Chapman (1897) 166 U. S. 661, 17 Sup. Ct. 677.

[56] Offenses "against the peace of our Lord, the King, his crown and dignity," the common law elected to treat as crimes. If so treated, due process forbids administrative determination of guilt. See note 46, supra.

[57] See Kilbourn v. Thompson (1880) 103 U. S. 168; In re Chapman, supra; People v. McDonald (1885) 99 N. Y. 463, 2 N. E. 615. Cf. Ill. Rev. St. ch. 111 A. 72.

A legislature may properly make the operation of its laws conditional when the condition affects their expediency. Thus a statute may be passed to be operative only in time of war. Where expediency depends on the wishes of those whom the law will affect, its operation in a given locality may be made to depend on a majority vote in its favor.

JUDICIAL POWER.

That a judgment, like a statute, creates a new right is clear because it is valid even though founded in misjudgment, as where no cause of action really existed. Within the jurisdiction, it extinguishes the original claim. It carries right to execution. It may include interest and costs. It differs from a statutory right in being conferred only on application, on specific persons, and after a determination that under existing law they have a right to it. This gives the measure of judicial power. Thus, as has been said, the legislature may grant a right on conditions and empower a court, if it finds them fulfilled, to grant a new right by way of putting the old one into effect. So judicial power may be invoked to grant a certificate of incorporation,[58] or of election,[59] or to naturalize an alien.[60] Taking acknowledgments and celebrating marriages, sometimes adduced as instances of administrative action by judges, seem to the writer to be judicial action of this kind, for the effect is to confer a new right on an applicant deemed entitled to receive it. But the condition must be one of fact, not of expediency. To grant a right because it is expedient to grant it is to make law. A statute which directs a court to grant a right upon proof that it *ought* to be granted is void as attempting to confer legislative power. A court can not be empowered to incorporate a city upon finding that the city *ought* to be incorporated,[61] or "that the interests of the inhabitants will be promoted;"[62] but may have power to create a drainage district on petition and proof that the drains will be useful.[63] It may determine what location has been granted a street-railway and enter an order fixing it; but it is not within judicial power, as has been held, to determine what location, motive power and track will be the *proper* ones, and issue license to use them.[64] Power to issue licenses to *fit* persons has generally been upheld.[65] The principle is clear, but matters of fact and of expediency blend. Where the character of a thing depends on circumstances, we can not set up a quantitative standard for determining its character. And where a quantitative standard is impracticable we are often driven to using terms which savor of expediency. Speed must not be dangerous, regulations unreasonable, or goods unfit for use. There is conflict in the cases as to the degree in which room may be left for considerations of expediency to affect the determination. The separation of powers is not intended to prevent employing that organ of government whose characteristic mode of action is most appropriate for dealing with the situation. Where a standard of pure fact is impossible, and the conditions are so defined that when the facts in any case are ascertained there is little room for difference of opinion as to whether they come within the standard as defined, the power of the court should be upheld.

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[58] Wahoo v. Dickinson (1888) 23 Neb. 426, 36 N. W. 813; Blake v. People (1884) 109 Ill. 504.

[59] Moore v. Mayfield (1868) 47 Ill. 167; Dale v. Irwin (1875) 78 Ill. 170; Lyons v. Becker (1916) 272 Ill. 333, 336, 111 N. E. 980, 982.

[60] Cf. Supervisors of Election (1873) 114 Mass. 247. Courts may be empowered to grant licenses to sell liquor. Hall, Cases on Constitutional Law (1913) 84, note.

[61] Galesburg v. Hawkinson (1874) 75 Ill. 152.

[62] State v. Simons (1884) 32 Minn. 540.

[63] Blake v. People (1884) 109 Ill. 504. And see People v. Nelson (1890) 133 Ill. 565, 598, 27 N. E. 217, 225; and cases cited in Hall, Cases on Constitutional Law (1913) 86, note.

Judicial power acts specifically. To order a man to fulfill in general a legal duty to others, would duplicate the rule of law by adding a new obligation to obey the order, and would be to legislate. A court can go no farther in this regard than to enjoin, or to order specific performance, in favor of a party threatened with injury. It has been held that as a public utility company is bound to serve at a reasonable rate, a court may be empowered, on the application of a person to whom such service has been denied, to determine a reasonable rate and to direct the rendering of service at that rate to that person for a limited time.[66] But the court can not be empowered on such an application to require the utility to adhere to the rate for all customers.[67] As already explained[68] that would be to take part in legislation. The court would be the mouthpiece of the legislature reënacting the law in specific terms. The doctrine is that although it may be made an administrative function to ascertain and declare the existence of a fact upon which a statute is to take effect, as when demobilization is complete, or what rate is reasonable, it can not be a judicial one.

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[64] Appeal of Norwalk Street Ry. (1897) 69 Conn. 576, 37 Atl. 1080.

[65] See Hall, Cases on Constitutional Law (1913) 84, note.

[66] In re Janvrin (1899) 174 Mass. 514, 55 N. E. 381. But see Nebraska Tel. Co. v. State (1898) 55 Neb. 627, 76 N. W. 171.

[67] Western Union Tel. Co. v. Myatt (1899, C. C. D. Kan.) 98 Fed. 335. And see Michigan Central R. R. v. Circuit Judge (1909) 156 Mich. 459, 470, 120 N. W. 1073, 1078; Detroit v. Railroad Commission (1913) 178 Mich. 250, 144 N. W. 689; Hall, ibid., 95, note; Prentis v. Atlantic Coast Line Co., supra; Louisville, etc., R. R. v. Garrett, supra. But cf. Saratoga Springs v. Saratoga Gas Co. (1908) 191 N. Y. 123, 148, 86 N. E. 693, 701; People v. Willcox (1909) 194 N. Y. 383, 87 N. E. 517. The statutory power of a court to require obedience to an order of a commission by mandamus or injunction issued on application in behalf of the state would seem to be limited by this principle. See Ill. Pub. Util. Act, sec. 75; Fed. Trade Commission Act, secs. 5, 9. It is one thing to enjoin a man from further maintaining a particular house of ill-fame. It is another thing to order him to abstain from keeping any and all houses of ill-fame, or to obey the laws in general.

[68] See note 50, supra.

A court has, however, a power to make rules, which arises from the fact that it may control its own procedure in a way that does not amount to a denial of the parties' rights to relief or conflict with statutes. So far as it may control its procedure, it may announce in advance the manner in which it will act, and its rules may create rights which it would be error for it to disregard, and which, when the making of rules is authorized by statute, create rights which rank with statutory rights.[69]

There is a class of cases in which judicial power is invoked to guide executive discretion, which merits special consideration. Administrative boards and officers often have to take action which depends upon their decision as to law and fact, and directly affects the rights of others. If they exceed their authority, a court may generally give redress.[70] But they may act within their authority, and yet incorrectly. A valid assessment may be too high,[71] a license may be refused by mistake of law. A court is peculiarly fitted to decide questions of law and many questions of fact, and in the interest of good government it ought to be possible to obtain a court's decision, though there has been no violation of a legal right. It is competent for the legislature to give a court power, at the instance of a person aggrieved, to review administrative proceedings (other than rule making), determine what decisions of law and fact should have been made, and direct action in accordance with its findings. This is judicial action of a peculiar kind. No duty has been violated. The legislature has conferred on the person whose rights are *affected*, by the administrative action, a right to have the action changed and made correct, and has imposed on the court a duty of putting this right into effect. The court's action is analogous to issuing a certificate of incorporation, or of election, rather than to setting aside proceedings in excess of authority. The court merely determines what executive action was proper upon the evidence which the executive had before it. The decision is simply that given executive action shall or shall not take place. There is no adjudication on anything else. Thus where the issue of a patent for an invention is objected to on the ground that it infringes a previous patent, Congress may subject the patent commissioner's decision to review by a court, on the evidence before the commissioner, but the court's decision is only that the patent shall or shall not issue, and is not an adjudication that there is no infringement. If the patent is issued, the earlier patentee, though he was a party to the proceedings, may sue for infringement without prejudice.[72]

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[69] See the discussion of administrative power to make rules, infra.

[70] Interstate Commerce Commission v. Louisville & Nashville R. R. (1912) 227 U. S. 88, 33 Sup. Ct. 185.

[71] Spencer v. People (1873) 68 Ill. 510; see Porter v. Railroad, etc. (1875) 76 Ill. 561, 595.

So, too, an appeal may be granted from the verdict of a sheriff's jury as to the title to property attached, but the decision merely affects the action and "liability" of the sheriff, and does not settle the title.[73] Other examples of court control over executive action that is valid but incorrect are furnished by appeals on the merits from taxing-boards,[74] assessments by drainage commissioners,[75] rulings of election officers,[76] and of registration officers,[77] and in appeals on points of law from decisions of the Industrial Board in workmen's compensation cases.[78] May an appeal also be granted from an administrative ruling which involves no decision except as to matters of law and fact, but which instead of affecting only a single case promulgates a rule of law for future transactions, for example an order fixing reasonable railroad rates?[79] The commission's work consists substantially in ascertaining, first, what the law means by "reasonable," a matter of law, though hardly yet ascertained; and, secondly, what rates possess those qualities designated as reasonable, which is in substance a question of fact as to the effect of given rates. Hence it would seem that a court might constitutionally be vested with power to review an order fixing reasonable rates, to set aside a ruling contrary to the weight of evidence, and to direct a ruling in accordance with it,[80] though the language of some cases is to the contrary.[81] It does not require the court to collect evidence or to promulgate the order,[82] but only to ensure that executive action shall proceed upon a correct view of law and fact.

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[72] "It is evident that the appeal is not the exercise of ordinary jurisdiction * * * but is one in the statutory proceeding * * * in aid of the Patent Office. Its adjudication, though not binding upon any who choose by litigation in courts of general jurisdiction to question the validity of any patent thus awarded, is nevertheless conclusive upon the Patent Office itself." Butterworth v. Hoe (1884) 112 U. S. 50, 60, 5 Sup. Ct. 25, quoted in United States v. Duell (1899) 172 U. S. 576, 19 Sup. Ct. 286; Ewing v. Fowler Car Co. (1917) 244 U. S. 1, 11.

[73] Rowe v. Bowen (1862) 28 Ill. 116.

[74] Bureau County v. Chicago, etc., R. R. (1867) 44 Ill. 229.

[75] Owners v. People (1885) 113 Ill. 296.

[76] Sherman v. People (1904) 210 Ill. 552, 71 N. E. 618.

[77] See People v. McWeeney (1913) 259 Ill. 161, 102 N. E. 233.

[78] People ex rel. Munn v. McGoorty (1915) 270 Ill. 610, 620, 110 N. E. 791. * * *

[79] The Interstate Commerce Act does not authorize such an appeal, and consequently a ruling can be set aside only when the commission has exceeded its constitutional or statutory authority. Interstate Commerce Commission v. Illinois Cent. R. R. (1910) 215 U. S. 452, 30 Sup. Ct. 155. But the statute is interpreted as intended to confer authority to act only upon evidence, so that a ruling is invalid where contrary to the indisputable character of the evidence. See Interstate Commerce Commission v. Louisville, etc., R. R., supra.

[80] Saratoga Springs v. Saratoga Gas Co., supra; People v. Willcox, supra; Minneapolis, etc., R. R. v. Railroad Commission, supra; and see Public Utilities Commission v. Chicago, etc., R. R., supra; Public Utilities Commission v. Atchison, etc., R. R. (1917) 278 Ill. 58, 75, 115 N. E. 904; Sears, Roebuck & Co. v. Federal Trade Commission (1919, C. C. A. 7th) 258 Fed. 307, (1919) 29 Yale Law Journal, 125, 126; Federal Trade Commission v. Gratz (1919, C. C. A. 2d) 258 Fed. 314; Troutman v. Smith (1899) 105 Ky. 231, 48 S. W. 1084. Cf. Chicago, etc., R. R. v. Public Utilities Commission (1915) 268 Ill. 49, 108 N. E. 720; Public Utilities Commission v. Terminal, etc., R. R. (1917) 281 Ill. 181, 118 N. E. 71.

ADMINISTRATIVE POWER.[a]

The separation of powers does not require the legislature to settle all details of policy. Discretion belongs to the executive as well. It is enough if the legislature determines policies as far as is practicable, leaving to executive discretion the mode of carrying them out and the occasions on which action is required.[83] What the executive may accomplish by action it may accomplish without exceeding the limits of executive power by order. For illustration, as the legislature may empower the executive to prevent accidents and crowding by taking charge of traffic at street intersections, leaving to executive discretion the streets at which control of traffic is required and the mode of controlling it, so it may empower the executive to control it by making regulations and enforcing them. This vests the executive with power to make laws.[84] But making laws of this character is not a non-executive function, a usurpation of legislative power any more than control to the same extent by the discretionary use of force would be. So far as concerns the principle of the separation of powers, it is all one whether the police stop a horse at a street crossing by seizing its head, or by telling its driver to stop, or by issuing a rule requiring everybody to stop.

Thus the legislature may empower customs officers to exclude unwholesome teas by fixing standards of wholesomeness as well as by discretionary action in each case,[85] inspectors to fix the character

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[81] Reagan v. Farmers', etc., Co. (1894) 154 U. S. 362, 397, 399, 14 Sup. Ct. 1047; Steenerson v. Great Northern R. R. (1897) 69 Minn. 353, 72 N. W. 713. And see Detroit R. R. v. Michigan R. R. Commission (1914) 235 U. S. 402, 35 Sup. Ct. 126.

[82] See Western Union Tel. Co. v. Myatt, supra.

[83] Hawthorn v. People (1883) 109 Ill. 302 (clerk of court may determine sufficiency of sureties); Spiegler v. Chicago (1905) 216 Ill. 114, 74 N. E. 718 (drip pans must be such as commissioner of public works approves); Block v. Chicago (1909) 239 Ill. 251, 87 N. E. 1011 (picture films must be such as chief of police deems moral); People v. Apfelbaum, supra (physician's license may be revoked for dishonorable conduct); Klafter v. Board (1913), 259 Ill. 15, 102 N. E. 193 (architect's license may be revoked if he is thought grossly incompetent); Alton & Southern R. R. v. Vandalia R. R. (1915) 268 Ill. 68, 108 N. E. 800 (railroad crossing must be approved by commission). "The legislature * * * may designate others to do those things which it can appropriately yet can not understandingly or advantageously do itself"); People v. Stokes (1917) 281 Ill. 159, 118 N. E. 87 (license may be revoked if bond deemed insecure); Public Clearing House v. Coyne (1904) 194 U. S. 497, 24 Sup. Ct. 789 (postmaster may exclude article he deems fraudulent).

[84] U. S. Rev. St. 1878, sec. 4405 gives steamboat inspectors power to establish regulations necessary to carry out the provisions of the act. The regulations cover more than a hundred pages.

[85] Buttfield v. Stranahan (1904) 192 U. S. 470, 24 Sup. Ct. 349.

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[a] Cases on this phase are included in Chapter VII, Administrative Officers and Boards.

of fire escapes by regulation as well as by separate approvals,[86] and a prison board to govern its discipline of convicts by rules.[87] Upon this principle rest the rule making powers of civil service boards;[88] of boards of health;[89] of the department of the interior concerning the use of the public domain;[90] and of the interstate commerce commission as to the form of railroad accounts.[91] The farther administrative control by use of force extends, the farther goes the power of making rules. The power to command the army in management, discipline and drill may be exercised by army regulations and by courts martial administering a military law.

Conversely an attempt to empower a customs officer to collect such duties as he thinks proper, a board of pharmacy to determine whether or not to issue licenses to sell patent medicines,[92] or a fire marshal to require safety appliances in cases of danger, or to dispense with them, as he thinks best,[93] is invalid as vesting in an executive a kind of discretion which under the constitution belongs only to the legislature, though it does not involve his imposing any regulations at all.[94]

It is plain that administrative officers may be empowered to take specific action in executing the law on condition that the specific facts exist on which the law depends, and to take measures necessary to decide whether or not the facts do exist and whether or not the law does authorize action, in order to act accordingly, and that this involves no exercise of power judicial in such sense as to be non-administrative.[95] However it is sometimes said that in such cases administrative officers act judicially,[96] and the statement, though tending to confusion, is correct if it merely means that their mental processes resemble those of courts, or that due process may require a hearing, or that their resulting action may, like a judgment, be final, in that it may (as in awarding a pension or a civil service rating) confer a right which can not be rescinded except for a distinct cause.

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[86] See Arms v. Ayer (1901) 192 Ill. 601, 61 N. E. 851.

[87] George v. People (1897) 167 Ill. 447, 47 N. E. 741.

[88] People v. Kipley (1898) 171 Ill. 44, 49 N. E. 229; Fisk v. McGann (1903) 205 Ill. 179, 68 N. E. 761; People v. McCullough (1912) 254 Ill. 9, 98 N. E. 156; People v. Rischo (1914) 262 Ill. 596, 105 N. E. 8.

[89] People v. Tait (1913) 261 Ill. 197, 103 N. E. 750.

[90] United States v. Grimaud (1911) 220 U. S. 506, 31 Sup. Ct. 480.

[91] Interstate Commerce Commission v. Goodrich Co. (1912) 224 U. S. 194, 32 Sup. Ct. 436. The legislature may empower a commission to order the attendance of witnesses and make it a misdemeanor to disobey the order. People v. Kipley, supra; Interstate Commerce Commission v. Brimson, supra.

[92] Noel v. People (1900) 187 Ill. 587, 58 N. E. 616.

[93] Sheldon v. Hoyne (1913) 261 Ill. 222, 103 N. E. 1021.

[94] The pardoning power, like the veto, is a legislative power of negative nature, vested by the constitution in the chief executive, as a check upon injustice; historically it is a relic of executive supremacy.

[95] Cf. People v. Brady (1915) 271 Ill. 100, 110 N. E. 864. People v. Stokes (1917) 281 Ill. 159, 118 N. E. 87 (pawnbroker's license to be revoked if he has violated statute. Craig, J., said, at 175, "No power is conferred upon the department to adjudicate upon the rights and interests of parties or to construe and apply the law. * * * While the determination * * * requires the exercise of judgment and discretion, and to that extent is of a judicial nature, it is not judicial power").

[96] See Devine v. Brunswick-Balke Co., supra.

More than this, the legislature may authorize an officer to act, not merely when specified facts really exist, but when, after such investigation as due process of law may require, he deems them to exist.[97]

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[97] People v. Simon (1898) 176 Ill. 165, 52 N. E. 910 (registrar under Torrens Act need record only transfers he deems valid); People v. Apfelbaum, supra (Dunn, J., said of the revocation of a physician's license for dishonorable conduct, "It is similar in its nature to the acts of assessors in assessing property for taxation; of boards of review in reviewing such valuations; of clerks of courts and sheriffs in approving bonds taken by them; of commissioners of highways in laying out and opening roads; of city councils in granting or revoking licenses to keep dram shops, or of superintendents of schools in granting or revoking teachers' certificates"); People v. Brady (1915) 268 Ill. 192, 108 N. E. 1009 (auditor authorized to withhold permit to organize bank he believes to be for unauthorized purpose); People v. Sweitzer (1914) 266 Ill. 89, 107 N. E. 132 (legislature may provide that person shall be entitled to office whom canvassing board deems to have received most votes); Donahue v. County of Will (1881) 100 Ill. 94 (right to county office to cease, if board finds holder to be a defaulter). See also cases in note 83, supra. The distinction between deciding upon a legal right for the purpose of taking such administrative action as the law directs or authorizes in case the right exists, and deciding upon a legal right for the purpose of adjudicating and determining it, may be illustrated by comparing the preceding cases with those that follow: Cleveland, etc., R. R. v. People (1904) 212 Ill. 638, 72 N. E. 725 (an assessor can not be empowered to impose a penalty for misconduct); Hall v. Marks, supra (clerk of court cannot enter judgment on default); Poppen v. Holmes (1867) 44 Ill. 360 (poundkeeper can not be empowered to sell estray for penalty he deems due); Bullock v. Geomble (1867) 45 Ill. 218 (legislature can not confer on "three disinterested men" power to assess damages caused by cattle running at large). See also People ex rel. Kern v. Chase (1897) 165 Ill. 527, 46 N. E. 454, which holds that the legislature can not empower a registrar under the Torrens Act to make title to land good by registering it. It may be doubted, however, whether the facts brought this case within the principle, for the act of the registrar did not directly validate title, but only started the running of a short statute of limitations. It seems analogous to Devine v. Brunswick-Balke Co., supra, which holds that the legislature may make the verdict of a coroner's jury prima facie evidence of the cause of death.

The Interstate Commerce Act forbids excessive charges and unfair discriminations. Yet however excessive a charge has been or however unfair a discrimination, if it was in accordance with the carriers' duly published regulations, no court may award damages for the violation of the act, unless the Interstate Commerce Commission has first ruled that such a charge or discrimination would violate the act. Loomis v. Lehigh Valley R. R. (1916) 240 U. S. 43; Northern Pacific R. R. v. Solum (1918) 247 U. S. 477. The commission's determination as to the character of the alleged charge or discrimination is conclusive, both as to the carrier and as to the shipper. Phillips Co. v. Grand Trunk, etc., R. R. (1915) 236 U. S. 662, 35 Sup. Ct. 444; Pennsylvania R. R. v. Stineman Coal Co. (1915) 242 U. S. 298, 37 Sup. Ct. 118. This determination as to past rights looks at first sight like an exercise of judicial power. In truth, it is precisely parallel to the establishment of rates and practises for the future. It is an administrative determination of fact as to the character of the rate or practise, and the promulgation of the rule of law concerning it which the legislature has provided for. But instead of being promulgated for the future, the rule is promulgated, in a sense retroactively, to govern all past transactions. The explanation is found in the fact that the Interstate Commerce Act while it expressly prohibits excessive rates and unfair discriminations, nevertheless, in order to secure uniformity in the treatment of shippers, also provides, in effect, that reg-

Thus in the much discussed Ju Toy case[98] it was held that Congress, having under its legislative power denied to alien Chinese a privilege to enter the United States, could provide for the enforcement of the law, by empowering collectors of ports to exclude persons of the Chinese race, provided, after inquiry, they deemed them (though mistakenly) to be aliens. It is the same principle which authorizes policemen to prevent boys skating on ice, which the policemen, though mistakenly, think too thin. There is no exercise of judicial power in any degree. There is merely a decision by an executive that a case has arisen in which it is his duty to act. If in acting, he exceeds his authority, a person aggrieved has his remedy, by injunction, mandamus, habeas corpus, or suit for damages, as the case may be. If there has been no excess of authority, there is nothing for a court to redress. Whether there is excess of authority may depend on whether the legislature has seen fit to condition authority on the truth as to the facts, or on the officer's opinion as to them. When a policeman is authorized to prevent skating if he thinks the ice too thin, and acts mistakenly, the only remedy the boys have is to wait for another occasion. They may apply for permission five minutes later, if they wish, and the case is a new one. In the Ju Toy case, if the collector's authority had only been to exclude those who were aliens in fact, Ju Toy, if really a citizen, could have obtained from the court a release from detention. If he were not of Chinese race, but looked like a Chinaman, he could have had his release, for the collector's authority happened only to be to detain those who were really Chinese and who were or whom he thought to be aliens. As it was, the collector had a right to exclude Ju Toy; but it would be a great mistake to suppose that the collector's decision deprived him of anything except ability to enter the country on that occasion. He could have come again to the United States and applied for admission before the same or any other collector, and he would have had a right to a new ruling. If, while detained, he had sued the collector for false imprisonment in a United States court, alleging that he, Ju Toy, was a citizen of one state, and the collector a citizen of another, the court might have decided that he was a citizen and that it had jurisdiction, at the same time it decided that the imprisonment was not illegal and gave judgment against him on the merits.

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ulations duly published shall be obligatory unless and until the commission rules that they are counter to the act. A carrier thus establishes a rule at the risk of being bound to follow it while it is in force, and of becoming liable in damages, if the commission after the event, displaces it and substitutes a different standard, as being the course of conduct which the carrier was bound to follow. The new standard, accordingly, furnishes the measure of the rights of all shippers, whether they took part in the proceedings by which it was established or not. Phillips Co. v. Grand Trunk, etc., R. R., supra; Pennsylvania R. R. v. Puritan Coal Co. (1915) 237 U. S. 121, 131, 35 Sup. Ct. 484; Loomis v. Lehigh Valley R. R., supra; Pennsylvania R. R. v. Stineman Coal Co., supra.

[98] (1905) 198 U. S. 253, 25 Sup. Ct. 644.

In cases like this, discussions as to the degree in which administrative action may involve an exercise of judicial power are beside the point. Such administrative action is not judicial in any degree. But the fact that authority may be made to depend on a variety of facts, and either on facts or on belief as to facts, illustrates the elasticity in governmental method which is possible within the limits imposed by the separation of powers. Separation prevents the executive from adjudging controverted individual rights, or from making strictly legislative determinations of policy, but it leaves the legislature abundant opportunity by enlarging executive discretion and authority to contract the area within which courts are capable of giving protection in order to extend the area in which the executive may act with freedom. It makes some abuses impossible and diminishes the temptation to others and thus, as Professor Burgess has said, it "has a tendency to retard the development of government in its almost inevitable tendency to absolutism."[99] For beside the positive limitations that separation imposes, it enables the legislature, being prevented from itself exercising either the executive or the judicial power, to hold the balance impartially between the positive and negative functions of government, between the promotion of social interests and the judicial protection of rights. But to secure impartiality is not in itself to secure justice or wisdom. A well balanced diet is not a warranty of health. Powers arbitrary or discordant may sometimes be bestowed on others as well as grasped for one's self, and it is possible for a legislature so to extend the boundaries of executive authority and discretion, that the executive, within its realm, may act pretty largely according to its own views of policy, law and fact. It is where there are real abuses to correct that the practice of arbitrary power begins, and the danger "is always greater where the purposes for which it is exercised are good" because there it is less easy to see the danger.[1] "Good men in good times should beware of setting bad precedents for bad men in bad times."[2] * * *

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[99] Burgess, The Reconciliation of Government with Liberty (1898) 305.

[1] Pierce, Federal Usurpation (1908) ch. 10. See his account of the practice of stopping all mail addressed to persons suspected of fraud, and of the workings of administrative classification of mail matter, and determination as to objectionable character.

[2] "Those who meditate a recourse to arbitrary power for a good purpose should pause to consider the consequences, for it is a vice which brings in its train all the vices, and especially the detestable vices of official extortion and blackmail." Gaynor, J., in People ex rel. Lodes v. Department of Health (1907) 117 App. Div. 856, 865, 103 N. Y. Supp. 275.

SPRINGER ET AL. v. GOVERNMENT OF THE PHILIPPINE ISLANDS.

1928. Supreme Court of the United States. 277 U. S. 189.

Certiorari to two judgments of ouster rendered by the Supreme Court of the Philippine Islands in proceedings in the nature of quo warranto, which were brought in that court by the Philippine Government against the present petitioners, to test their right to be directors in certain corporations described in the opinion.

Mr. Justice Sutherland delivered the opinion of the court.

These cases, presenting substantially the same question, were argued and will be considered and disposed of together. In each case an action in the nature of quo warranto was brought in the court below challenging the right to hold office of directors of certain corporations organized under the legislative authority of the Philippine Islands, No. 564 involving directors of the National Coal Company and No. 573 involving directors of the Philippine National Bank.

The National Coal Company was created by Act 2705, approved March 10, 1917, subsequently amended by Act 2822, approved March 5, 1919. The Governor-General, under the provisions of the amended act, subscribed on behalf of the Philippine Islands for substantially all of the capital stock. The act provides: "The voting power of all such stock owned by the Government of the Philippine Islands shall be vested exclusively in a committee, consisting of the Governor-General, the President of the Senate and the Speaker of the House of Representatives."

The National Bank was created by Act 2612, approved February 4, 1916, subsequently amended by Act 2747, approved February 20, 1918, and Act 2938, approved January 30, 1921. The authorized capital of the bank, as finally fixed, was 10,000,000 pesos, consisting of 100,000 shares, of which, in pursuance of the legislative provisions, the Philippine Government acquired and owns 97,332 shares, the remainder being held by private persons. By the original act the voting power of the government-owned stock was vested exclusively in the Governor-General, but by the amended acts now in force that power was "vested exclusively in a board, the short title of which shall be 'Board of Control,' composed of the Governor-General, the President of the Senate, and the Speaker of the House of Representatives." * * *

In pursuance of the first-quoted provision, petitioners in No. 564 were elected directors of the National Coal Company by a vote of the government-owned shares cast by the President of the Senate and the Speaker of the House; and, in pursuance of the second quoted provision, petitioners in No. 573 were elected directors of the National Bank in the same way. The Governor-General, challenging the validity of the legislation, did not participate in either election. While there are some differences between the two actions in respect of the facts, they are differences of detail which do not affect the substantial question to be determined.

On behalf of the Philippine government, respondent in both cases, it is contended that the election of directors and managing agents by a vote of the government-owned stock was an executive function intrusted by the Organic Act of the Philippine Islands to the Governor-General, and that the acts of the Legislature divesting him of that power and vesting it, in the one case, in a "board," and, in the other, in a "committee," the majority of which in each instance consisted of officers and members of the Legislature, were invalid as being in conflict with the Organic Act. The court below sustained the contention of the Government and entered judgments of ouster against the petitioners in each case.

The Congressional legislation referred to as the "Organic Act" is the enactment of August 29, 1916, c. 416, 39 Stat. 545, which constitutes the fundamental law of the Philippine Islands and bears a relation to their governmental affairs not unlike that borne by a state constitution to the state. The act contains a bill of rights, many of the provisions of which are taken from the federal Constitution. It lays down fundamental rules in respect of taxation, shipping, customs duties, etc. Section 8 of the act provides, "That general legislative power, except as otherwise herein provided, is hereby granted to the Philippine Legislature, authorized by this Act." And by § 12 this legislative power is vested in a legislature, to consist of two houses, one the senate and the other the house of representatives. Provision is made (§§ 13, 14 and 17) for memberships, terms and qualifications of the members of each house. By § 21 it is provided "that the supreme executive power shall be vested in an executive officer, whose official title shall be 'The Governor General of the Philippine Islands.'" He is given "general supervision and control of all of the departments and bureaus of the government in the Philippine Islands as far as is not inconsistent with the provisions of this Act." He is made "responsible for the faithful execution of the laws of the Philippine Islands and of the United States operative within the Philippine Islands." Other powers of an important and comprehensive character also are conferred upon him. By § 22 the executive departments of the Philippine government, as then authorized by law, are continued until otherwise provided by the legislature. The legislature is authorized by appropriate legislation to "increase the number or abolish any of the executive departments, or make such changes in the names and duties thereof as it may see fit," and "provide for the appointment and removal of the heads of the executive departments by the Governor General." Then follows the proviso: "That all executive functions of the government must be directly under the

Governor General or within one of the executive departments under the supervision and control of the Governor General." Section 26 recognizes the existing supreme court and courts of first instance of the Islands and continues their jurisdiction as theretofore provided, with such additional jurisdiction as shall thereafter be prescribed by law.

Thus the Organic Act, following the rule established by the American constitutions, both state and federal, divides the government into three separate departments—the legislative, executive and judicial. Some of our state constitutions expressly provide in one form or another that the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other. Other constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments. See Kilbourn v. Thompson, 103 U. S. 168, 190-191. And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism. That the principle is implicit in the Philippine Organic Act does not admit of doubt. See Abueva v. Wood, 45 Phil. Rep. 612, 622, 628 et seq.

It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature can not exercise either executive or judicial power; the executive can not exercise either legislative or judicial power; the judiciary can not exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule.

Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this court. Myers v. United States, 272 U. S. 52.

Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature can not ingraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection; though the case might be different if the additional duties were devolved upon an appointee of the executive. Shoemaker v. United States, 147 U. S. 282, 300, 301. Here the members of the legislature who constitute a majority of the "board" and "committee," respectively, are not charged with the performance of any legislative functions or with the doing of anything which is in aid of the performance of any such functions by the Legislature. Putting aside for the moment the question whether the duties devolved upon these members are vested by the Organic Act in the Governor General, it is clear that they are not legislative in character, and still more clear that they are not judicial. The fact that they do not fall within the authority of either of these two constitutes logical ground for concluding that they do fall within that of the remaining one of the three among which the powers of government are divided. Compare Myers v. United States, supra, pp. 117-118.

Assuming, for present purposes, that the duty of managing this property, namely, the government-owned shares of stock in these corporations, is not sovereign but proprietary in its nature, the conclusion must be the same. The property is owned by the government, and the government in dealing with it, whether in its quasi sovereign or its proprietary capacity, nevertheless acts in its governmental capacity. There is nothing in the Organic Act, or in the nature of the legislative power conferred by it, to suggest that the Legislature in acting in respect of the proprietary rights of the government may disregard the limitation that it must exercise legislative and not executive functions. It must deal with the property of the government by making rules, and not by executing them. The appointment of managers (in this instance corporate directors) of property or a business, is essentially an executive act which the legislature is without capacity to perform directly or through any of its members.

Whether the members of the "board" or the "committee" are public officers in a strict sense, we do not find it necessary to determine. They are public agents at least, charged with the exercise of executive functions and, therefore, beyond the appointing power of the legislature. Stockman v. Leddy, 55 Colo. 24, involved a case very much like that now under consideration. The state legislature had created a committee of its own members to investigate the rights of the state in the flowing waters therein. The committee was authorized to determine what steps were necessary to be taken to protect the rights of the state, to employ counsel, etc. There was no claim that the investigation was for the purpose of ascertaining facts to aid in future legislation or to assist the legislature in its legislative capacity, but it was for the purpose of enabling the committee itself to reach a conclusion as to what should be proper to do in order to protect the rights of the state. The court, in holding the act unconstitutional, said (p. 31): "In other words, the general assembly not only passed an act—that is, made a law—but it made a joint committee of the senate and the house as its executive agent to carry out that law. This is a clear and conspicuous instance of an attempt by the general assembly to confer executive power upon a collection of its own members." And the court held that this was invalid under the provisions of the state constitution respecting the tripartite division of governmental powers. See also, Clark v. Stanly, 66 N. C. 59; State ex rel. Howerton v. Tate, 68 N. C. 546.

Petitioners seek to draw a parallel between the power of Congress to create corporations as appropriate means of executing governmental powers and the acts of the Philippine legislature here under consideration. To what extent the powers of the two bodies in this respect may be assimilated we need not stop now to determine, since the power of the legislature to create the two corporations here involved is not doubted. But it is argued further that Congress in creating corporations for governmental purposes has sometimes devolved the voting power in such corporations upon persons other than executive officers. In the case of the Smithsonian Institution, cited as an example, Congress provided for a governing Board of Regents composed in part of members of the Senate and of the House. There are two or three other instances in respect of non-stock organizations of like character. On the other hand, as pointed out by the Solicitor General, in the case of governmentally organized or controlled stock corporations, Congress has uniformly recognized the executive authority in their management, generally providing in express terms that the shares shall be voted by an executive officer, and in no instance attempting to grant such power to one or more of its members. Many instances of this kind are cited by the Solicitor General, but it is not necessary to repeat his enumeration. It is enough to say that, when we consider the limited number of acts of Congress which fall within the first class spoken of above, as well as the peculiar character of the institutions dealt with, and the contrary attitude of Congress toward corporations of a different character, such acts can not be regarded as lending support to a construction of the Constitution which would justify congressional legislation like that here involved. * * *

And we are further of the opinion that the powers asserted by the Philippine Legislature are vested by the Organic Act in the Governor-General. The intent of Congress to that effect is disclosed by the provisions of that act already set forth. Stated concisely these provisions are: that the supreme executive power is vested in the Governor-General, who is given general supervision and control over all the departments and bureaus of the Philippine government; upon him is placed the responsibility for the faithful execution of the laws of the Philippine Islands; and, by the general proviso, already quoted, all executive functions must be directly under the Governor-General or within one of the executive departments under his supervision and control. These are grants comprehensive enough to include the powers attempted to be exercised by the legislature by the provisions of law now under review. * * *

The judgments in both cases are affirmed.

Mr. Justice Holmes. The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. Property must not be taken without compensation, but with the help of a phrase, (the police power) some property may be taken or destroyed for public use without paying for it, if you do not take too much. When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on.

To make a rule of conduct applicable to an individual who but for such action would be free from it is to legislate—yet it is what the judges do whenever they determine which of two competing principles of policy shall prevail. At an early date it was held that Congress could delegate to the Courts the power to regulate process, which certainly is lawmaking so far as it goes. Wayman v. Southard, 10 Wheat. 1, 42. Bank of the United States v. Halstead, 10 Wheat. 51. With regard to the Executive, Congress has delegated to it or to some branch of it the power to impose penalties, Oceanic Steam Navigation Co. v. Stranahan, 214 U. S. 320; to make conclusive determination of dutiable values, Passavant v. United States, 148 U. S. 214; to establish standards for imports, Buttfield v. Stranahan, 192 U. S. 470; to make regulations as to forest reserves, United States v. Grimaud, 220 U. S. 506, and other powers not needing to be stated in further detail. Houston v. St. Louis Independent Packing Co., 249 U. S. 479. Union Bridge Co. v. United States, 204 U. S. 364. Ex parte Kollock, 165 U. S. 526. Congress has authorized the President to suspend the operation of a statute, even one suspending commercial intercourse with another country, Field v. Clark, 143 U. S. 649, and very recently it has been decided that the President might be given power to change the tariff. J. W. Hampton, Jr., & Co. v. United States, 276 U. S. 394. It is said that the powers of Congress can not be delegated, yet Congress has established the Interstate Commerce Commission, which does legislative, judicial and executive acts, only softened by a quasi; makes regulations, Intermountain Rate Cases, 234 U. S. 476, 486, issues reparation orders, and performs executive functions in connection with Safety Appliance Acts, Boiler Inspection Acts, &c. Congress also has made effective excursions in the other direction. It has withdrawn jurisdiction of a case after it has been argued. Ex parte McCardle, 7 Wall. 506. It has granted an amnesty, notwithstanding the grant to the President of the power to pardon. Brown v.

Walker, 161 U. S. 591, 601. A territorial legislature has granted a divorce. Maynard v. Hill, 125 U. S. 190. Congress has declared lawful an obstruction to navigation that this Court has declared unlawful. Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421. Parallel to the case before us, Congress long ago established the Smithsonian Institution, to question which would be to lay hands on the Ark of the Covenant; not to speak of later similar exercises of power hitherto unquestioned, so far as I know.

It does not seem to need argument to show that however we may disguise it by veiling words we do not and can not carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.

The only qualification of such latitude as otherwise would be consistent with the threefold division of power, is the proviso in § 22 of the Organic Act "that all executive functions of the Government must be directly under the Governor General or within one of the executive departments," &c. Act of August 29, 1916, c. 416, 39 Stat. 553, U. S. C., Title 48, § 1114. That does not appear to me to govern the case. The corporations concerned were private corporations which the legislature had power to incorporate. Whoever owned the stock, the corporation did not perform functions of the Government. This would be plain if the stock were in private hands, and if the government bought the stock from private owners the functions of the corporations would not be changed. If I am right in what I have said I think that ownership would not make voting upon the stock an executive function of the government when the acts of the corporation were not. I can not believe that the legislature might not have provided for the holding of the stock by a board of private persons with no duty to the government other than to keep it informed and to pay over such dividends as might accrue. It is said that the functions of the Board of Control are not legislative or judicial and therefore they must be executive. I should say rather that they plainly are no part of the executive functions of the Government but rather fall into the indiscriminate residue of matters within legislative control. I think it would be lamentable even to hint a doubt as to the legitimacy of the action of Congress in establishing the Smithsonian as it did, and I see no sufficient reason for denying the Philippine legislature a similar power.

Mr. Justice Brandeis agrees with this opinion.

Mr. Justice McReynolds. I think the opinion of the majority goes much beyond the necessities of the case.

The Organic Act is careful to provide:

"That all executive functions of the government must be directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General."

A good reason lies behind this limitation which does not apply to our federal or state governments. From the language employed, read in the light of all the circumstances, perhaps it is possible to spell out enough to overthrow the challenged legislation. Beyond that it is unnecessary to go.

CHAPTER V.

DUE PROCESS OF LAW: AMENDMENTS V AND XIV.

Section 1.—As a Standard of Validity of Modes of Law Enforcement.[1]

DEN d. MURRAY ET AL. v. THE HOBOKEN LAND, ETC. COMPANY.

1855. Supreme Court of the United States. 18 How. 272.

MR. JUSTICE CURTIS delivered the opinion of the court.

This case comes before us on a certificate of division of opinion of the judges of the Circuit Court of the United States for the District of New Jersey. It is an action of ejectment, in which both parties claim title under Samuel Swartwout—the plaintiffs, under the levy of an execution on the 10th day of April, 1839, and the defendants, under a sale made by the marshal of the United States for the District of New Jersey, on the 1st day of June, 1839—by virtue of what is denominated a distress warrant, issued by the solicitor of the treasury under the Act of Congress of May 15, 1820, * * *.

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[1] The cases in this section, with the exception of Murray v. Hoboken Land etc. Co., and Home Telephone and Telegraph Co. v. City of Los Angeles, deal with law administration by courts (judicial procedure). The restrictions of due process of law in administrative procedure are dealt with in Chapter VII.

What is due process in procedure varies with the governmental purpose to be accomplished and somewhat with the nature of the interests affected. It has been said that "by 'due process' is meant one which * * * is appropriate to the nature of the case."—Field, J., in Hagar v. Reclamation Dist. No. 108, (1884) 111 U. S. 701, 708, 28 L. ed. 569.

"What is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its powers cannot be reviewed or set aside by the [civil] courts." McKenna, J., in Reaves v. Ainsworth (1911) 219 U. S. 296, 304, 55 L. ed. 225.

In holding that an attorney may be disbarred by a court acting without a jury, it has been said: "It is a mistaken idea that due process of law requires a plenary suit and a trial by jury, in all cases where property or personal rights are involved. The important right of personal liberty is generally determined by a single judge, on a writ of habeas corpus, using affidavits or depositions for proofs, where facts are to be established. Assessments for damages and benefits occasioned by public improvements are usually made by commissioners in a summary way. Conflicting claims of creditors, amounting to thousands of dollars, are often settled by the courts on affidavits or depositions alone. And the courts of chancery, bankruptcy, probate, and admiralty administer immense fields of jurisdiction without trial by jury. In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts." Bradley, J., in Ex parte Wall (1882) 107 U. S. 265, 289, 27 L. ed. 552.

"Due process is not necessarily judicial process." Brewer, J., in Reetz v. Michigan (1903) 188 U. S. 505, 507, 47 L. ed. 563.

No objection has been taken to the warrant on account of any defect or irregularity in the proceedings which preceded its issue. It is not denied that they were in conformity with the requirements of the Act of Congress. The special verdict finds that Swartwout was collector of the customs for the port of New York for eight years before the 29th of March, 1838: that, on the 10th of November, 1838, his account, as such collector, was audited by the first auditor, and certified by the first comptroller of the treasury; and for the balance thus found, amounting to the sum of $1,374,119 65/100, the warrant in question was issued by the solicitor of the treasury. Its validity is denied by the plaintiffs, upon the ground that so much of the Act of Congress as authorized it, is in conflict with the Constitution of the United States.

In support of this position, the plaintiff relies on that part of the first section of the third article of the Constitution which requires the judicial power of the United States to be vested in one Supreme Court and in such inferior courts as Congress may, from time to time, ordain and establish; the judges whereof shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. Also, on the second section of the same article, which declares that the judicial power shall extend to controversies to which the United States shall be a party.

It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings.

The question, whether these acts were an exercise of the judicial power of the United States, can best be considered under another inquiry, raised by the further objection of the plaintiff, that the effect of the proceedings authorized by the Act in question is to deprive the party, against whom the warrant issues, of his liberty and property, "without due process of law;" and, therefore, is in conflict with the fifth article of the amendments of the Constitution.

Taking these two objections together, they raise the questions, whether, under the Constitution of the United States, a collector of the customs, from whom a balance of account has been found to be due by accounting officers of the treasury, designated for that purpose by law, can be deprived of his liberty, or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so, then, secondly, whether the warrant in question was such due process of law?

The words, "due process of law," were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in Magna Charta. Lord Coke, in his commentary on those words (2 Inst. 50), says they mean due process of law. The constitutions which had been adopted by the several states before the formation of the Federal Constitution, following the language of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land." The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words.

The Constitution of the United States, as adopted, contained the provision, that "the trial of all crimes, except in cases of impeachment, shall be by jury." When the fifth article of amendment containing the words now in question was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the state constitutions, and in the ordinance of 1787, the words of Magna Charta, and declared that no person shall be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause, "law of the land," without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on Magna Charta had declared to be the true meaning of the phrase, "law of the land," in that instrument, and which were undoubtedly then received as their true meaning.

That the warrant now in question is legal process, is not denied. It was issued in conformity with an Act of Congress. But is it "due process of law"? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will.[2] To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the Crown, and especially those due from receivers of the revenues. It is difficult, at this day, to trace with precision all the proceedings had for these purposes in the earliest ages of the common law. That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of Magna Charta treats of their restraint. It declares: "We or our bailiffs shall not seize any land or rent for any debt as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefor. Neither shall the pledges of the debtor be distrained, as long as the principal debtor is sufficient for the payment of the debt; and if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will not pay where he is able, the pledges shall answer for the debt. And if they will, they shall have the lands and rents of the debtor until they be satisfied of the debt which they before paid for him, except that the principal debtor can show himself to be acquitted against the said sureties."

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[2] That the "law of the land" and "due process of law" clauses of a state constitution imposed some restriction upon the state legislature had been held in Vanzant v. Waddel (1829, Tenn.) 2 Yerg. 260; Taylor v. Porter (1843, N. Y.)

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4 Hill 140, 40 Am. Dec. 274. This doctrine became general, Rison v. Farr (1865) 24 Ark. 161, 87 Am. Dec. 52; Parsons v. Russell (1863) 11 Mich. 113, 83 Am. Dec. 728, but not without dissent. In the last cited case where a statute was held to violate the due process clause of the Michigan constitution because it authorized what a majority of the court considered an unjust method for enforcing liens for supplies against boats and vessels, calling it an "outrage on the rights of property," Manning, J., dissenting, said: "This constitutional provision is borrowed from Magna Charta—not the language, but the idea, or principle. The phraseology is a little different, but the one great idea expressed is, that no one shall be deprived of life, liberty or property, except in pursuance of law. The language of the great charter is, *by the law of the land*; which Lord Coke, in commenting on the charter, paraphrased *due process of law*. The two phrases, therefore, mean the same thing. And, history shows us, with the clearness of a sunbeam, the meaning of the former, and that it was not intended to protect the subjects of the king against the legislation of Parliament, but against the illegal and arbitrary acts of the king and his government. * * * Until those who contend for a different meaning can show us when the change took place, the occasion of it, and in what it consists, we prefer looking to the circumstances in which the phrase originated for its meaning, rather than to groping in the dark and treacherous regions of conjecture for something new, where each one is at liberty to give a loose rein to his fancy in conjuring up something to suit himself. Those who have tried the experiment, though satisfied with it, acknowledge their inability to give us either the name or the virtues of the new god they worship."

By the common law, the body, lands, and goods of the king's debtor were liable to be levied on to obtain payment. In conformity with the above provision of Magna Charta, a conditional writ was framed, commanding the sheriff to inquire of the goods and chattels of the debtor, and, if they were insufficient, then to extend on the lands. 3 Co. 12 *b*; Com. Dig., Debt, G. 2; 2 Inst. 19. But it is said that since the statute 33 Hen. VIII. c. 39, the practice has been to issue the writ in an absolute form, without requiring any previous inquisition as to the goods. Gilbert's Exch. 127.

To authorize a writ of extent, however, the debt must be matter of record in the king's exchequer. The 33 Hen. VIII. c. 39, § 50, made all specialty debts due to the king of the same force and effect as debts by statute staple, thus giving to such debts the effect of debts of record. In regard to debts due upon simple contract, other than those due from collectors of the revenue and other accountants of the Crown, the practice, from very ancient times, has been to issue a commission to inquire as to the existence of the debt.

This commission being returned, the debt found was thereby evidenced by a record, and an extent could issue thereon. No notice was required to be given to the alleged debtor of the execution of this commission (2 Tidd's Pr. 1047), though it seems that, in some cases, an order for notice might be obtained. 1 Ves. 269. Formerly, no witnesses were examined by the commission (Chitty's Prerog. 267; West, 22); the affidavit prepared to obtain an order for an immediate extent being the only evidence introduced. But this practice has been recently changed. 11 Price, 29. By the statute 13 Eliz. ch. 4, balances due from receivers of the revenue and all other accountants of the Crown were placed on the same footing as debts acknowledged to be due by statute staple. These balances were found by auditors, the particular officers acting thereon having been, from time to time, varied by legislation and usage. The different methods of accounting in ancient and modern times are described in Mr. Price's Treatise on the Law and Practice of the Exchequer, ch. 9. Such balances, when found, were certified to what was called the pipe office, to be given in charge to the sheriffs for their levy. Price, 231.

If an accountant failed to render his accounts, a process was issued, termed a *capias nomine districtionis*, against the body, goods, and lands of the accountant. Price, 162, 233, note 3.

This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England, is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied widely from the usual course of the common law on other subjects; and that, as respects such debts due from such officers, "the law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of execution bearing a very close resemblance to what is termed a warrant of distress in the Act of 1820, now in question.

It is certain that this diversity in "the law of the land" between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the states, after the Declaration of Independence and before the formation of the Constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods, and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it. [Early state and federal legislation of this character is here referred to.]

Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the states at the time of the adoption of this amendment, the proceedings authorized by the Act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For, though "due process of law" generally implies and includes, *actor, reus, judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst. 47, 50; Hoke v. Henderson, 4 Dev. N. C. Rep. 15; Taylor v. Porter, 4 Hill, 146; Van Zandt v. Waddel, 2 Yerger, 260; State Bank v. Cooper, Ibid. 599; Jones's Heirs v. Perry, 10 Ibid. 59; Greene v. Briggs, 1 Curtis, 311), yet, this is not universally true. There may be, and we have seen that there are, cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial; and this brings us to the question, whether those provisions of the Constitution which relate to the judicial power are incompatible with these proceedings?

That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the Act of 1795, 12 Wheat. 19, or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. United States v. Ferreira, 13 How. 40. It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the Constitution. We do not doubt the power of Congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The Act of 1820 makes such a provision for reviewing the decision of the accounting officers of the treasury. But, until reviewed, it is final and binding; and the question is, whether its subject-matter is necessarily, and without regard to the consent of Congress, a judicial controversy. And we are of opinion it is not. * * *

It was strongly urged by the plaintiff's counsel, that though the government might have the rightful power to provide a summary remedy for the recovery of its public dues, aside from any exercise of the judicial power, yet it had not done so in this instance. That it had enabled the debtor to apply to the judicial power, and having thus brought the subject-matter under its cognizance, it was not for the government to say that the subject-matter was not within the judicial power. That if it were not in its nature a judicial controversy, Congress could not make it such, nor give jurisdiction over it to the district courts. In short, the argument is, that if this were not, in its nature, a judicial controversy, Congress could not have conferred on the district court power to determine it upon a bill filed by the collector. If it be such a controversy, then it is subject to the judicial power alone; and the fact that Congress has enabled the district court to pass upon it, is conclusive evidence that it is a judicial controversy.

We cannot admit the correctness of the last position. If we were of opinion that this subject-matter cannot be the subject of a judicial controversy, and that, consequently, it cannot be made a subject of judicial cognizance, the consequence would be, that the attempt to bring it under the jurisdiction of a court of the United States would be ineffectual. But the previous proceedings of the executive department would not necessarily be affected thereby. They might be final, instead of being subject to judicial review.

But the argument leaves out of view an essential element in the case, and also assumes something which cannot be admitted.

It assumes that the entire subject-matter is or is not, in every mode of presentation, a judicial controversy, essentially and in its own nature, aside from the will of Congress to permit it to be so; and it leaves out of view the fact that the United States is a party.

It is necessary to take into view some settled rules.

Though, generally, both public and private wrongs are redressed through judicial action, there are more summary extra-judicial remedies for both. An instance of extra-judicial redress of a private wrong is, the recapture of goods by their lawful owner; of a public wrong, by a private person is the abatement of a public nuisance; and the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agents. There is, however, an important distinction between these. Though a private person may retake his property, or abate a nuisance, he is directly responsible for his acts to the proper judicial tribunals. His authority to do these acts depends not merely on the law, but upon the existence of such facts as are, in point of law, sufficient to constitute that authority; and he may be required, by an action at law, to prove those facts; but a public agent, who acts pursuant to the command of a legal precept, can justify his act by the production of such precept. He cannot be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be sued without its own consent.

At the same time there can be no doubt that the mere question, whether a collector of the customs is indebted to the United States, may be one of judicial cognizance. It is competent for the United States to sue any of its debtors in a court of law. It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just. Though both the marshal and the government are exempt from suit, for anything done by the former in obedience to legal process, still, Congress may provide by law, that both, or either, shall, in a particular class of cases, and under such restrictions as they may think proper to impose, come into a court of law or equity and abide by its determination. The United States may thus place the government upon the same ground which is occupied by private persons who proceed to take extra-judicial remedies for their wrongs, and they may do so to such extent, and with such restrictions, as may be thought fit.

When, therefore, the Act of 1820 enacts, that after the levy of the distress warrant has been begun, the collector may bring before a district court the question, whether he is indebted as recited in the warrant, it simply waives a privilege which belongs to the government, and consents to make the legality of its future proceedings dependent on the judgment of the court; as we have already stated in case of a private person, every fact upon which the legality of the extra-judicial remedy depends may be drawn in question by a suit against him. The United States consents that this fact of indebtedness may be drawn in question by a suit against them. Though they might have withheld their consent, we think that, by granting it, nothing which may not be a subject of judicial cognizance is brought before the court.

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of Congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases, that upon their trial the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title. Foley v. Harrison, 15 How. 433; Burgess v. Gray, 16 How. 48; —— v. The Minnesota Mining Company at the present term.

It is true, also, that even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination by the Constitution and laws, is conclusive. Luther v. Borden, 7 How. 1; Doe v. Braden, 16 How. 635.

To apply these principles to the case before us, we say that, though a suit may be brought against the marshal for seizing property under such a warrant of distress, and he may be put to show his justification; yet the action of the executive power in issuing the warrant, pursuant to the Act of 1820, passed under the powers to collect and disburse the revenue granted by the Constitution, is conclusive evidence of the facts recited in it, and of the authority to make the levy; that though no suit can be brought against the United States without the consent of Congress, yet Congress may consent to have a suit brought, to try the question whether the collector be indebted, that being a subject capable of judicial determination, and may empower a court to act on that determination, and restrain the levy of the warrant of distress within the limits of the debt judicially found to exist.

It was further urged that, by thus subjecting the proceeding to the determination of a court, it did conclusively appear that there was no such necessity for a summary remedy, by the action of the executive power, as was essential to enable Congress to authorize this mode of proceeding.

But it seems to us that the just inference from the entire law is, that there was such a necessity for the warrant and the commencement of the levy, but not for its completion, if the collector should interpose, and file his bill and give security. The provision that he may file his bill and give security, and thus arrest the summary proceedings, only proves that Congress thought it not necessary to pursue them, after such security should be given, until a decision should be made by the court. It has no tendency to prove they were not, in the judgment of Congress, of the highest necessity under all other circumstances; and of this necessity Congress alone is the judge. * * *[3]

DAVIDSON v. CITY OF NEW ORLEANS.

1877. Supreme Court of the United States. 96 U. S. 97.

Error to the Supreme Court of the State of Louisiana.

MR. JUSTICE MILLER delivered the opinion of the court [sustaining an assessment levied on certain real estate by the City of New Orleans, as authorized by state legislation, for the drainage of swamp lands]. * * *

The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment, in the year 1866.

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[3] This is the first case in the Supreme Court of the United States in which the due process of law clause of Amendment V was discussed. Previously there seems to be not even a dictum throwing the slightest light upon it. There were, however, many earlier cases in state courts giving various constructions to similar clauses in their respective state constitutions. For discussions of these cases, see Edward S. Corwin, The Doctrine of Due Process of Law Before the Civil War (1911) 24 Harv. L. Rev. 366, 460; Lowell John Howe, The Meaning of "Due Process of Law" Prior to Adoption of the Fourteenth Amendment (1929) 18 Cal. L. Rev. ——.

Compare with the principal case Ownbey v. Morgan (1921) 256 U. S. 94, 65 L. ed. 837, where the court sustained, on grounds of English usage and long and previously unchallenged recognition in some states, a harsh procedure whereby a court refused to permit a nonresident of the state, in a suit commenced against him by attachment of property in the state, to defend without first giving security in an amount equal to the plaintiff's claim, and gave judgment on default of such security, collectible only by sale of the property attached, although in the particular case the defendant claimed that the property attached was substantially all that he had and that in spite of every possible effort he was unable to obtain security. For other instances of this historical interpretation of due process see Coler v. Corn Exchange Bank (1928) 250 N. Y. 136; 164 N. E. 882; Jackman v. Rosenbaum Co. infra, p. 688.

The equivalent of the phrase "due process of law," according to Lord Coke, is found in the words "law of the land," in the Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the oppression of the Crown. In the series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the states as further limitations upon the power of the federal government, it is found in the Fifth, in connection with other guarantees of personal rights of the same character. Among these are protection against prosecutions for crimes, unless sanctioned by a grand jury; against being twice tried for the same offence; against the accused being compelled, in a criminal case, to testify against himself; and against taking private property for public use without just compensation.

Most of these provisions, including the one under consideration, either in terms or in substance, have been embodied in the constitutions of the several states, and in one shape or another have been the subject of judicial construction.

It must be confessed, however, that the constitutional meaning or value of the phrase "due process of law," remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several states and of the United States.

It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the Crown, except as provided by the law of the land, they meant by "law of the land" the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that "no state shall deprive any person of life, liberty, or property without due process of law," can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision.

A most exhaustive judicial inquiry into the meaning of the words "due process of law," as found in the Fifth Amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts. Murray's Lessee et al. v. Hoboken Land and Improvement Co., 18 How. 272. * * *

It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the states, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a state to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.

But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, and regulation of commerce, and other powers conferred on the federal government, or limitations imposed upon the states.

As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us:—

That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. * * *

This proposition covers the present case. Before the assessment could be collected, or become effectual, the statute required that the tableau of assessments should be filed in the proper district court of the state; that personal service of notice, with reasonable time to object, should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown, or could not be found. This was complied with; and the party complaining here appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution. * * *

And lastly, and most strongly, it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force, —and some highly respectable authorities are cited to support the proposition,—that while for such improvements as this a part, or even the whole, of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it. If this were a proposition coming before us sitting in a State court, or, perhaps, in a circuit court of the United States, we might be called upon to decide it; but we are unable to see that any of the provisions of the Federal Constitution authorizes us to reverse the judgment of a State court on that question. It is not one which is involved in the phrase "due process of law," and none other is called to our attention in the present case.

As there is no error in the judgment of the Supreme Court of Louisiana, of which this court has cognizance, it is Affirmed.

Mr. Justice Bradley gave a concurring opinion, in which he said: "I think it [the opinion of the court] narrows the scope of inquiry as to what is due process of law more than it should do. * * * I think, therefore, we are entitled, under the Fourteenth Amendment, not only to see that there is some process of law, but 'due process of law,' provided by the state law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these: and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular state may require."

HOME TELEPHONE AND TELEGRAPH CO. v. CITY OF LOS ANGELES.

1913. Supreme Court of the United States. 227 U. S. 278.

[The telephone company filed a bill for an injunction against the city of Los Angeles in the District Court of the United States to restrain enforcement by the city of an ordinance which prescribed telephone rates. The company alleged that the rates prescribed were so low that to enforce compliance with them would deprive it of its property in violation of the due process clause of the Fourteenth Amendment. The city pleaded to the jurisdiction, asserting that there was a like due process clause in the California state constitution and that if the ordinance was lacking in due process it would be invalid under the state constitution, that in that contingency the ordinance could not be considered "state" action within the prohibition of the Fourteenth Amendment but only the unauthorized act of a state agent, and therefore the plaintiff could not make out a case for relief in a federal court unless upon proceedings had in the state courts the latter should sustain the ordinance as authorized by the state. The District Court sustained the plea and dismissed the bill, and this appeal was taken.]

Mr. Chief Justice White delivered the opinion of the court.

* * *

1. By the proposition the prohibitions and guarantees of the Amendment are addressed to and control the states only in their complete governmental capacity, and as a result give no authority to exert federal judicial power until by the decision of a court of last resort of a state, acts complained of under the Fourteenth Amendment have been held valid and therefore state acts in the fullest sense. To the contrary the provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the states, but also to every person

whether natural or juridical who is the repository of state power. By this construction the reach of the Amendment is shown to be coextensive with any exercise by a state of power, in whatever form exerted.

2. As previously stated, the proposition relied upon presupposes that the terms of the Fourteenth Amendment reach only acts done by state officers which are within the scope of the power conferred by the state. The proposition hence applies to the prohibitions of the Amendment the law of principal and agent governing contracts between individuals and consequently assumes that no act done by an officer of a state is within the reach of the Amendment unless such act can be held to be the act of the state by the application of such law of agency. In other words, the proposition is that the Amendment deals only with the acts of state officers within the strict scope of the public powers possessed by them and does not include an abuse of power by an officer as the result of a wrong done in excess of the power delegated. Here again the settled construction of the Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a state in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant and the federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power. * * *

[After quoting from Virginia v. Rives, 100 U. S. 313, Ex parte Virginia, 100 U. S. 339 and Yick Wo v. Hopkins, 118 U. S. 356.] In Raymond v. Traction Company, 207 U. S. p. 20, the whole subject—almost in the identical aspect which is here involved—came under consideration. The case concerned the repugnancy to the Fourteenth Amendment of a reassessment made by a state board of equalization, and the suit was originally commenced in a federal court. It was pressed that as the claim of the complainant was in effect that the board in the reassessment had violated an express requirement of the state constitution in that the board had "disobeyed the authentic command of the state by failing to make its valuations in such a way that every person shall pay a tax in proportion to the value of his property," the act of the subordinate board could not be deemed the act of the state. This contention was held to be unsound and it was decided that even although the act of the board was wrongful from the point of view of the state constitution or law, it was nevertheless an act of a state officer within the intendment of the Fourteenth Amendment. It was pointed out that as the result of the enforcement of the reassessment would be an assertion of state power accomplishing a wrong which the Fourteenth Amendment forbade, the claim of right to prevent such act under the Fourteenth Amendment "constitutes a federal question beyond all controversy." It was then said (pp. 35-36):

"The state board of equalization is one of the instrumentalities provided by the state for the purpose of raising the public revenue by way of taxation. * * * Acting under the constitution and laws of the state, the board therefore represents the state, and its action is the action of the state. The provisions of the Fourteenth Amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that, whoever by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state." * * *

Reversed.[4]

WALKER v. SAUVINET.

1875. Supreme Court of the United States. 92 U. S. 90.

[Sauvinet sued Walker, a licensed keeper of a coffee-house in New Orleans, for damages for the latter's refusal to sell him refreshments on the ground that he was a man of color. The court upon failure of the jury to agree gave judgment for $1,000 damages without resubmission to a jury, all in accordance with a Louisiana statute. From affirmance by the Supreme Court of Louisiana this writ of error was taken.]

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[4] So the injunction of the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws was held to be infringed by a state judge who so directed the selection of jurors as to make impossible the drawing of any negro as a juror although the state statutes did not authorize such discrimination. Ex parte Virginia (1880) 100 U. S. 339, 25 L. ed. 676.

That, on the other hand, the prohibitions of the Fourteenth Amendment are not addressed to private persons so as to make every murder, false imprisonment or theft a federal constitutional question see Civil Rights Cases, ante, 311, 317-318.

Mr. Chief Justice Waite delivered the opinion of the court.

So far as we can discover from the record, the only federal question decided by either one of the courts below was that which related to the right of Walker to demand a trial by jury, notwithstanding the provisions of the act of 1871 to the contrary. He insisted that he had a constitutional right to such a trial, and that the statute was void to the extent that it deprived him of this right.

All questions arising under the constitution of the state alone are finally settled by the judgment below. We can consider only such as grow out of the Constitution of the United States. By Art. VII of the Amendments, it is provided, that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This, as has been many times decided, relates only to trials in the courts of the United States. Edwards v. Elliot, 21 Wall. 557. The states, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of national citizenship, which the states are forbidden by the Fourteenth Amendment to abridge. A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Murray's Lessee v. Hoboken L. & I. Co., 18 How. 280. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land,—that is to say, with the Constitution and laws of the United States made in pursuance thereof,—or with any treaty made under the authority of the United States. Art. VI Const. Here the state court has decided that the proceeding below was in accordance with the law of the state; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States.

The other questions presented by the assignment of errors and argued here cannot be considered, as the record does not show that they were brought to the attention of either of the courts below.

Judgment affirmed.[5]

Mr. Justice Field and Mr. Justice Clifford dissented from the opinion and judgment of the court.

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[5] In a civil action in a state court a verdict upon concurrence of five-sixths of a jury of twelve, authorized by the constitution of Minnesota, is consistent with the requirement of due process even though the law to be applied by the state court in the suit is the Federal Employers' Liability Act, notwithstanding that

HURTADO v. PEOPLE OF CALIFORNIA.

1884. Supreme Court of the United States. 110 U. S. 516.

[The constitution of California of 1879 provided: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment with or without such examination and commitment, as may be prescribed by law." A statute of 1880 provided that when a committing magistrate upon giving an arrested person a preliminary examination should find sufficient cause to believe the person guilty of a public offense he should commit him to custody or bail, as the case might be, not for examination before a grand jury as theretofore but to stand trial, and the statute declared, "it shall be the duty of the district attorney, within thirty days thereafter, to file in the superior court of the county in which the offense is triable an information charging the defendant with such offense."[6] By this method of accusation Hurtado was prosecuted and convicted on a charge of murder and given a death sentence. The Supreme Court of California affirmed the judgment and this writ of error was taken.]

Mr. Justice Matthews delivered the opinion of the court. * * *

It is claimed on behalf of the prisoner that the conviction and sentence are void, on the ground that they are repugnant to that clause of the Fourteenth Article of Amendment of the Constitution of the United States, which is in these words:

"Nor shall any State deprive any person of life, liberty, or property without due process of law."

The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that "due process of law," when applied

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Amendment VII requires a unanimous verdict in suits under the act when brought in federal courts. Minneapolis & St. Louis R. Co. v. Bombolis (1916) 241 U. S. 211, 60 L. ed. 961, L. R. A. 1917A, 86, Ann. Cas. 1916E, 505.

It has been held that a state may enlarge the functions of the jury in civil cases, as by leaving to the jury the determination of the law of contributory negligence (making them judges of the law as well as of the facts). Chicago, R. I. & P. R. Co. v. Cole (1919) 251 U. S. 54, 64 L. ed. 133.

[6] Harlan, J., in his dissenting opinion gave an interpretation to this legislation: "Under the local statutes in question, even the district attorney of the county is deprived of any discretion in the premises; for, if in the judgment of the magistrate before whom the accused is brought—and, generally, he is only a justice of the peace—a public offence has been committed, it becomes the duty of the district attorney to proceed against him by information for the offence indicated by the committing magistrate. Thus, in California, nothing stands between the citizen and prosecution for his life, except the judgment of a justice of the peace."

This interpretation was approved by the Supreme Court of California in Ex parte Sternes (1889) 82 Cal. 245, 248.

to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which accordingly it is forbidden to the states respectively to dispense with in the administration of criminal law. * * *

It is maintained on behalf of the plaintiff in error that the phrase "due process of law" is equivalent to "law of the land," as found in the 29th chapter of Magna Charta; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the state; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the states themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

This view is certainly supported by the authority of the great name of Chief Justice Shaw and of the court in which he presided, which, in Jones v. Robbins, 8 Gray, 329, decided that the 12th article of the Bill of Rights of Massachusetts, a transcript of Magna Charta in this respect, made an indictment or presentment of a grand jury essential to the validity of a conviction in cases of prosecutions for felonies. In delivering the opinion of the court in that case, Merrick, J.; alone dissenting, the Chief Justice said:

"The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty."

* * *

[After commenting at length upon Coke's discussion of "the law of the land" clause of Magna Charta, referred to by Shaw, C. J., the opinion continues:]

Mr. Reeve, in 2 History of Eng. Law, 43 translates the phrase, *nisi per legale judicium parium suorum vel per legem terræ*, "but by the judgment of his peers, or by some other legal process or proceeding adapted by the law to the nature of the case."

Chancellor Kent, 2 Com. 13, adopts this mode of construing the phrase. Quoting the language of Magna Charta, and referring to Lord Coke's comment upon it, he says: "The better and larger definition of *due process of law* is that it means law in its regular course of administration through courts of justice."

This accords with what is said in Westervelt v. Gregg, 12 N. Y. 202, by Denio, J., p. 212: "The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government."

The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in Bank of Columbia v. Okely, 4 Wheat. 235-244: "As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

And the conclusion rightly deduced is, as stated by Mr. Cooley, Constitutional Limitations, 356: "The principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen."

It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in Murray's Lessee v. Hoboken Land & Improvement Company, 18 How. 272. * * * [Here follows the paragraph on p. 540, ante.]

This, it is argued, furnishes an indispensable test of what constitutes "due process of law;" that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law.

But this inference is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.

This would be all the more singular and surprising, in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally. For at first the words *nisi per legale judicium parium* had no reference to a jury; they applied only to the *pares regni,* who were the constitutional judges in the court of exchequer and *coram rege.* Bac. Abr. "Juries," 7th ed. Lond., note; 2 Reeve, Hist. Eng. Law, 41. And as to the grand jury itself, we learn of its constitution and functions from the Assize of Clarendon, A. D. 1164, and that of Northampton, A. D. 1176, Stubbs, Charters, 143-150 * * *. "The system thus established," says Mr. Justice Stephens, 1 Hist. Crim. Law of England 252, "is simple. The body of the country are the accusers. Their accusation is practically equivalent to a conviction, subject to the chance of a favorable termination of the ordeal by water. If the ordeal fails, the accused person loses his foot and his hand. If it succeeds, he is, nevertheless, to be banished. Accusation, therefore, was equivalent to banishment, at least." When we add to this that the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our "ancient liberties." It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government. * * *

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice,—*suum cuique tribuere.* There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

The concessions of Magna Charta were wrung from the king as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in Bonham's Case, 8 Rep. 115, 118 a, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and, while in every instance, laws that violated express and specific injunctions and prohibitions might, without embarrassment, be judicially declared to be void, yet, any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke's, "may alter the mode and application, but have no power over the substance of original justice." Tract on the Popery Laws, 6 Burke's Works, ed. Little & Brown, 323.

Such is the often-repeated doctrine of this court. * * * [Here follow citations from Munn v. Illinois, 94 U. S. 113; Walker v. Sauvinet, 92 U. S. 90; Kennard v. Louisiana, 92 U. S. 480; Davidson v. New Orleans, 96 U. S. 97.]

We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be witness against himself." [It then immediately adds:] "Nor be deprived of life, liberty, or property without due process of law."

According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important Amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, "due process of law" was not meant or intended to include, *ex vi termini,* the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the states, it was used in the same sense and with no greater extent; and that if in the adoption of that Amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. * * *

But it is not to be supposed that these legislative powers are absolute and despotic, and that the Amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society;" and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government. * * *

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law. * * *

Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offence of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments. * * *

For these reasons, finding no error therein, the judgment of the Supreme Court of California is Affirmed.[7]

[Mr. Justice Harlan dissenting, quoted many English and American eulogiums of the grand jury including, "Blackstone says: 'But to find a bill there must be at least twelve of the jury agree; for, so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the King of any capital offence, unless by an unanimous voice of twenty-four of his equals and neighbors, that is, by twelve at least of the grand jury, in the first place, assenting to the accusation, and afterwards by the whole petit jury, of twelve or more, finding him guilty upon his trial.' 4 Bl. Com. 306. The same author, after referring to prosecutions by

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[7] Criminal trial jury. The provision of the national constitution that in the federal courts "the trial of all crimes, except in cases of impeachment, shall be by jury" has been interpreted to require the common law number of twelve jurors, and conviction only by unanimous verdict. Thompson v. Utah (1898) 170 U. S. 343, 42 L. ed. 1061. The same construction is given to the usual specific provisions for jury trial in state constitutions in absence of express modifications.

"Petty" federal offenses may be tried in the federal courts without a jury if the accused waives jury trial, and this is so without statutory provision for waiver. So holding, in Schick v. United States (1904) 195 U. S. 65, 49 L. ed. 99, 1 Ann. Cas. 585, the court said that there is no constitutional requirement of jury trial for "petty" offenses. Semble, Congress may provide for punishment of petty offenses without giving the accused an option of trial by jury. Ibid. p. 71. See also Callan v. Wilson (1888) 127 U. S. 540, 32 L. ed. 223. On the probable validity of federal legislation that would provide for trial of petty offenses in federal courts without a jury and as to what are "petty" offenses, see Felix Frankfurter and Thomas G. Corcoran (1926) Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917.

Whether Congress may authorize a federal court to try, at the request or with the consent of the accused, serious offenses without jury has not been decided. In the absence of such statute a person accused of a serious offense does not have the privilege in the federal courts of trial without jury. Low v. United States (1909) 169 Fed. 86; Coates v. United States (1923) 290 Fed. 134; Blair v. United States (1917) 241 Fed. 217, 230.

Under the specific provisions of state constitutions for trial by jury the holdings of the state courts are at variance as to whether without or with a statute information, describing their different kinds, and stating that the mode of prosecution by information (or suggestion) filed on record by the King's attorney-general, or by his coroner or master of the crown office in the Court of King's Bench, was as ancient as the common law itself, proceeds: 'But these informations (of every kind) are confined by the constitutional law to mere misdemeanors only; for, wherever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it.' 4 Bl. Com. 309-10."]

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purporting to so authorize, a state court may try a person accused of a serious offense without jury at his option. See S. Chesterfield Oppenheim (1927) 24 Mich. L. Rev. 695. A few state constitutions expressly permit waiver. Ibid. 699. So California by amendment (1928) to Sec. 7 of Art. I (waiver "in all criminal cases, by consent of both parties, expressed in open court by the defendant and his counsel").

Does the due process of law requirement prevent a state from abolishing jury trial in trial of serious offenses? That it does not has been held in Williams v. Hert (1901) 110 Fed. 166. See also Ex parte Brown (1905) 140 Fed. 461. There are dicta to the same effect in Frank v. Mangum (1915) 237 U. S. 309, 340, 59 L. ed. 969 (holding that a state's procedure is not invalid under which the jury's verdict may be delivered in absence of the accused from the trial room) and in Jordan v. Massachusetts (1912) 225 U. S. 167, 56 L. ed. 1038, (holding that a state observes due process although upon motion for new trial on the ground of alleged insanity of one of the jurors the court denies the motion upon its finding the juror sane by a fair preponderance of the evidence as distinguished from proof beyond reasonable doubt). Also in Maxwell v. Dow (1900) 176 U. S. 581, 603, 44 L. ed. 597, in holding that a jury of eight in all criminal cases not capital is due process the court said, "trial by jury has never been affirmed to be a necessary requisite of due process of law." The decisions that Congress may provide for the enforcement of criminal law without jury trial in "unincorporated territory" and in exercise of exterritorial jurisdiction in foreign countries, may or may not be considered pertinent, the gist of the doctrine of "unincorporated territory" being that Congress is not subject to all the constitutional limitations in governing people there that restrain it in governing people in the states and incorporated territory. The due process requirement of Amendment V may be considered as not having normal operation there. See Dorr v. United States (1904) 195 U. S. 138, 49 L. ed. 128, 1 Ann. Cas. 697; Balzac v. Porto Rico (1922) 258 U. S. 298, 66 L. ed. 627; In re Ross (1890) 140 U. S. 453, 35 L. ed. 581; Hawaii v. Mankichi (1903) 190 U. S. 197, 47 L. ed. 1016. Congress while intentionally not establishing jury trial in the Philippines and Porto Rico has included in the Organic Acts for those islands a due process limitation on *legislation* by the governments there. 39 Stat. 545, 546; 39 Stat. 951.

Trial by jury is not an essential of due process in punishment for petty offenses, that is, not for petty punishment. Natal v. Louisiana (1891) 139 U. S. 621, 35 L. ed. 288.

A state statute is valid which provides that upon a plea of guilty to a charge of murder the court may without jury determine the degree of guilt. Hallinger v. Davis (1892) 146 U. S. 314, 36 L. ed. 986.

"We have also held that the states * * * may dispense with grand juries, Hurtado v. California, 110 U. S. 516; and perhaps also allow verdicts to be rendered by less than a unanimous vote. American Publishing Co. v. Fisher, 166 U. S. 464; Thompson v. Utah, 170 U. S. 343." Hawaii v. Mankichi (1903) 190 U. S. 197, 211, 47 L. ed. 1016. The cited cases do not so hold. Considering merely mathematical probabilities there is a vast difference between a jury of eight where a unanimous vote is required to convict and conviction by a vote of eight out of twelve jurors. See William Forsyth (1852) Trial by Jury, p. 254, note 1.

EILENBECKER v. PLYMOUTH COUNTY.

1890. Supreme Court of the United States. 134 U. S. 31.

[The statute involved in the case was "Whoever shall erect or establish or continue or use any building, erection or place for [the manufacture or sale of intoxicating liquor] shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and upon conviction shall pay a fine of not exceeding $1000 and costs of prosecution, and stand committed until the fine and costs are paid. * * * Any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in equity, to abate and perpetually enjoin the same, and any person violating the terms of any injunction granted in such proceeding shall be punished as for contempt, by fine of not less than five hundred nor more than one thousand dollars or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment in the discretion of the court."

Appeals from the trial court in the six cases stated in the opinion below being taken to the Supreme Court of Iowa were there treated as one, the judgment of the trial court affirmed and this writ of error taken.]

MR. JUSTICE MILLER delivered the opinion of the court. * * *

The judgment which we are called upon to review is one affirming the judgment of the District Court of Plymouth County in that state. This judgment imposed a fine of five hundred dollars and

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The constitution of Louisiana, art. 116, provides: "Cases in which the punishment may be at hard labor shall be tried by a jury of five, all of whom must concur to render a verdict; cases in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom concurring may render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict." See State v. Woodard (1919) 144 La. 845, 81 So. 337 (sustaining verdict of jury of five where offense was punishable by not more than twenty years' imprisonment with or without hard labor); State v. Wooten (1915) 136 La. 560, 67 So. 366, (sustaining verdict by concurrence of nine out of twelve for offense of manslaughter); followed in State v. Vial (1923) 153 La. 883, 96 So. 796; State v. Trull (1920) 147 La. 444, 85 So. 70 (bigamy). In none of these cases was the due process clause of the Fourteenth Amendment considered. Compare Muldrow v. State (1910) 4 Okla. Cr. 324, 111 Pac. 656 (state constitution art. 2, § 19, for misdemeanors jury of six and concurrence of three-fourths sufficient); State v. Scheminisky (1918) 31 Idaho 504, 174 Pac. 611 (for misdemeanors concurrence of five-sixths sufficient, Const. of Idaho, art. 1, § 7).

Lesser departures, in trial of serious offenses, from the common law incidents of jury trial have been sustained. Howard v. Kentucky (1906) 200 U. S. 164, 50 L. ed. 421 (permitting temporary absences of accused from the trial provided no injury results to his substantial rights); Felts v. Murphy (1906) 201 U. S. 123, 50 L. ed. 689 (conviction of an almost deaf person without so arranging the proceedings that he could hear everything through his ear trumpet); Brown v. New Jersey (1899) 175 U. S. 172, 44 L. ed. 119 (struck jury may be used for offenses for which it was not used at common law); Garland v. Washington (1914) 232 U. S. 642, 58 L. ed. 772 (deviation from formal arraignment).

costs on each of the six plaintiffs in error in this case, and imprisonment in the jail of Plymouth County for a period of three months, but they were to be released from confinement if the fine imposed was paid within thirty days from the date of the judgment.

This sentence was pronounced by the court as a punishment for contempt in refusing to obey a writ of injunction issued by that court, enjoining and restraining each of the defendants from selling, or keeping for sale, any intoxicating liquors, including ale, wine and beer, in Plymouth County, and the sentence was imposed upon a hearing by the court, without a jury, and upon evidence in the form of affidavits.

It appears that on the 11th day of June, 1885, separate petitions in equity were filed in the District Court of Plymouth County against each of these plaintiffs in error, praying that they should be enjoined from selling, or keeping for sale, intoxicating liquors, including ale, wine and beer, in that county. On the 6th of July the court ordered the issue of preliminary injunctions as prayed. On the 7th of July the writs were served on each of the defendants in each proceeding by the sheriff of Plymouth County. On the 24th of October, complaints were filed, alleging that these plaintiffs in error had violated this injunction by selling intoxicating liquors contrary to the law and the terms of the injunction served on them, and asking that they be required to show cause why they should not be punished for contempt of court. A rule was granted accordingly, and the court, having no personal knowledge of the facts charged, ordered that a hearing be had at the next term of the court, upon affidavits; and on the 8th day of March, 1886, it being at the regular term of said District Court, separate trials were had upon evidence in the form of affidavits, by the court without a jury, upon which the plaintiffs were found guilty of a violation of the writs of injunction issued in said cause, and a sentence of fine and imprisonment, as already stated, entered against them.

* * *

The first observation to be made on this subject is, that the plaintiffs in error are seeking to reverse a judgment of the District Court of Plymouth County, Iowa, imposing upon them a fine and imprisonment for violating the injunction of that court, which had been regularly issued and served upon them. Of the intentional violation of this injunction by plaintiffs we are not permitted to entertain any doubt, and, if we did, the record in the case makes it plain. Neither is it doubted that they had a regular and fair trial, after due notice, and opportunity to defend themselves in open court at a regular term thereof.

The contention of these parties is, that they were entitled to a trial by jury on the question as to whether they were guilty or not guilty of the contempt charged upon them, and because they did not have this trial by jury they say that they were deprived of their liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power.

In the case in this court of Ex parte Terry, 128 U. S. 289, this doctrine is fully asserted and enforced * * *. In Ex parte Robinson, 19 Wall. 505, 510, this court speaks in the following language:

"The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2d, 1831. 4 Stat. 487."

The statute, now embodied in § 725 of the Revised Statutes, reads as follows: "The power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons to any lawful writ, process, order, rule, decree, or command of the said courts."

It will thus be seen that even in the act of Congress, intended to limit the power of the courts to punish for contempts of its authority by summary proceedings,[8] there is expressly left the power to

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[8] For supplementary study of contempt of court see on the distinction between civil and criminal contempts Gompers v. Bucks Stove &c. Co. (1911) 221 U. S. 418, 55 L. ed. 797, 34 L. R. A. (N. S.) 874; Merchants' Stock & Grain Co. v. Board of Trade (1911) 187 Fed. 398; on the power of the president to pardon persons convicted of criminal contempts by the federal courts, Ex parte Grossman (1925) 267 U. S. 87, 69 L. ed. 527, 38 A. L. R. 131. Is not "criminal contempt" a broader classification than acts which are both contempts and crimes?

The Clayton Act, 38 Stat. 730, amending the federal antitrust laws provides in §§ 21, 22 (38 Stat. 738-739) that "in all cases within the purview of this Act," "any person who shall willfully disobey any lawful writ, process, order, rule, decree or command" of a federal district court by doing an act forbidden punish in this summary manner the disobedience of any party, to any lawful writ, process, order, rule, decree or command of said court. * * *

So far from any statute on this subject limiting the power of the courts of Iowa, the act of the legislature of that state, authorizing the injunction which these parties are charged with violating, expressly declares that for violating such injunction a person doing so shall be punished for the contempt by a fine of not less than five hundred or more than a thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment, in the discretion of the court. So that the proceeding by which the fine and imprisonment imposed upon these parties for contempt in violating the injunction of the court, regularly issued in a suit to which they were parties, is due process of law, and always has been due process of law, and is the process or proceeding by which courts have from time immemorial enforced the execution of their orders and decrees, and cannot be said to deprive the parties of their liberty or property without due process of law.

The counsel for plaintiffs in error seek to evade the force of this reasoning by the proposition that the entire statute under which this injunction was issued is in the nature of a criminal proceeding, and that the contempt of court of which these parties have been found guilty is a crime for the punishment of which they have a right to trial by jury.

We cannot accede to this view of the subject. Whether an attachment for a contempt of court, and the judgment of the court punishing the party for such contempt, is in itself essentially a criminal proceeding or not, we do not find it necessary to decide. We simply hold that, whatever its nature may be, it is an offence against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury; and that in that sense it is due process of law within the meaning of the Fourteenth Amendment of the Constitution. We do not suppose that that pro-

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thereby, "if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any state in which the act was committed" shall be tried by the court or upon his demand by a jury. It has been held, despite the separation of powers principle, that this limitation of the so-called inherent powers of the courts is not unconstitutional. Michaelson v. United States (1924) 266 U. S. 42, 69 L. ed. 162, 35 A. L. R. 451. The court said: "The only substantial difference between such a proceeding as we have here, and a criminal prosecution by indictment or information is that in the latter the act complained of is the violation of a law and in the former the violation of a decree. In the case of the latter, the accused has a constitutional right of trial by jury; while in the former he has not. The statutory extension of this constitutional right to a class of contempts which are properly described as "criminal offences" does not, in our opinion, invade the powers of the courts as intended by the Constitution or violate that instrument in any other way."

vision of the Constitution was ever intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or of a civil suit.

We might rest the case here; but the plaintiffs in error fall back upon the proposition that the statute of the Iowa legislature concerning the sale of liquors, under which this injunction was issued, is itself void, as depriving the parties of their property and of their liberty without due process of law. We are not prepared to say that this question arises in the present case. The principal suit in which the injunction was issued, for the contempt of which these parties have been sentenced to imprisonment and to pay a fine, has never been tried so far as this record shows. We do not know whether the parties demanded a trial by jury on the question of their guilty violation of that statute. We do not know that they would have been refused a trial by jury if they had demanded it. Until the trial of that case has been had they are not injured by a refusal to grant them a jury trial. It is the well-settled doctrine of this court that a part of a statute may be void and the remainder may be valid. That part of this statute which declares that no person shall own or keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquors with intent to sell the same within this state, and all the prohibitory clauses of the statute, have been held by this court to be within the constitutional powers of the state legislature, in the cases of Mugler v. Kansas, 123 U. S. 623, and Powell v. Pennsylvania, 127 U. S. 678.

If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the Constitution of the United States to the form of proceedings, or to the court in which this remedy shall be had. Certainly it seems to us to be quite as wise to use the processes of the law and the powers of the court to prevent the evil, as to punish the offence as a crime after it had been committed.

We think it was within the power of the court of Plymouth County to issue the writs of injunction in these cases, and that the disobedience to them by the plaintiffs in error subjected them to the proceedings for contempt which were had before that court.

The judgment of the Supreme Court of Iowa is affirmed.[9]

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[9] Directly on the issue in the above case see Arthur C. Rounds, Injunctions Against Liquor Nuisances (1896) 9 Harv. L. Rev. 521; "Red Light" Injunction and Abatement Acts (1920) 20 Col. L. Rev. 605 (giving references to statutes

in 38 states and state decisions all sustaining them, except Hedden v. Hand (1919) 90 N. J. Eq. 583, 107 Atl. 285, 5 A. L. R. 1474, annotations). See also (1921) 34 Harv. L. Rev. 398-400. These statutes have dealt with maintainance of places for the manufacture or sale of intoxicating liquor, gambling, Ex parte Allison (1905) 48 Tex. Cr. 634, 90 S. W. 492, 3 L. R. A. (N. S.) 622, 13 Ann. Cas. 684; houses of prostitution, Carleton v. Rugg (1888) 149 Mass. 550, 22 N. E. 55, 5 L. R. A. 193, 14 Am. St. 446; State v. Fanning (1914) 96 Nebr. 123, 147 N. W. 215; and horse racing, State v. Roby (1895) 142 Ind. 168, 41 N. E. 145, 33 L. R. A. 213, 51 Am. St. 174. Dissenting in Carleton v. Rugg, supra, Field, J., said: "The injunction issued in this case, and probably the only one that could have been issued, is one enjoining the respondents from using, or permitting to be used, the building, place, or tenement for the illegal keeping or sale of intoxicating liquors. The Public Statutes prohibit such a use as a crime, and the only effect of the injunction is to subject the respondents to the process used for punishing persons guilty of violating injunctions, in addition to or in substitution for criminal process. The Legislature apparently thought that a remedy in equity would be more speedy, or more certain, or more efficient, than that by complaint or indictment. The issuing of the injunction of itself adds nothing to the prohibition of the statutes, but the intention plainly is to call into use the peculiar process employed by courts of equity in punishing persons guilty of wilful violations of injunctions. The efficacy of the statute, apart from the fact that the prosecution may be beyond the control of the district attorney, depends wholly upon the proceedings that may be taken for punishing violations of injunctions."

Statutes authorizing commitment of juvenile delinquents to industrial schools and similar institutions by summary proceedings before a judge or commissioners are sustained on the ground that "the intent is to protect rather than punish the child." Cases are collected in Ann. Cas. 1914A, 1227. Likewise jury trial is not essential to due process in determination of insanity and commitment of the insane to hospitals and asylums, the proceedings being not criminal. Cases are collected in L. R. A. 1918A, 348. See Nobles v. Georgia (1897) 168 U. S. 398, 42 L. ed. 515 (jury not essential on issue of insanity after conviction and sentence for crime).

On topics related to the issues of the principal case see Jackson H. Ralston, Government by Injunction (labor disputes), (1920) 5 Cornell L. Quart. 424; Robert N. Golding, Constitutional Question Involved in the Abatement and Injunction Sections of the National Prohibition Act (1924) 19 Ill. L. Rev. 71; note in 72 U. of Pa. L. Rev. 283; Henry W. Ballantine, Extension of Criminal Equity (1924) 13 Cal. L. Rev. 63-68.

Sections 22, 23 and 24 of the National Prohibition Act, 41 Stat. 314, 315, U. S. C. A. Title 27, §§ 34, 35, 38, are similar to the Iowa legislation above, except that the action to obtain an injunction may be brought only by an official prosecutor. Neither in the proceeding to obtain an injunction nor in the contempt proceeding is provision made for jury trial. The act declares any building, boat, vehicle etc. in which liquor is manufactured, kept or sold a nuisance and also that any person who shall, with intent to effect a sale, carry around on his person any prohibited liquor or who shall travel to solicit orders for sale of such liquor is declared "guilty of a nuisance" and may be enjoined permanently and punished summarily for violation of the injunction. By other sections of the statute these acts are made criminal offenses to be prosecuted by the usual criminal procedure. The provision for trial of contempts by jury made in the Clayton Act, supra, note 8, do not apply to proceedings to punish violations of injunctions authorized by the National Prohibition Act, and trial of such contempts without jury is due process of law. Maynard v. United States (1927) 23 Fed. (2d) 141; Lewinsohn v. United States (1921) 278 Fed. 421. The original proceeding to obtain an injunction is the ordinary equity proceeding without jury and is valid. United States v. Duignan (1925) 4 Fed. (2d) 983, affirmed in Duignan v. United States (1927) 274 U. S. 195, 71 L. ed. 996; Kling v. United States (1925) 8 Fed. (2d) 730, certiorari denied, 269 U. S. 587, 70 L. ed. 426; Denapolis v. United States (1925) 3 Fed. (2d) 722.

Bearing on the validity of the bootlegger provision see United States v. McCrory (1928) 26 Fed. (2d) 189 (enjoining a person who had no place of business from soliciting orders anywhere within the court's jurisdiction); United States v. Rosoff (1928) 27 Fed. (2d) 719. Cf. United States v. Cunningham

TWINING v. STATE OF NEW JERSEY.

1908. Supreme Court of the United States. 211 U. S. 78.

[Defendant and another were indicted of a criminal offense in a New Jersey court, convicted and sentenced to six and four years imprisonment respectively. At the trial the accused refrained from testifying and objected to the judge's instruction: "Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him" by other testimony. The ~~court of~~ last resort of the state affirmed the conviction over the contention that the trial judge's instruction violated an immunity of an accused from testifying against himself and that this immunity was secured by the Fourteenth Amendment. This writ of error was taken.]

Mr. Justice Moody delivered the opinion of the court. * * *

The exemption from testimonial compulsion, that is, from disclosure as a witness of evidence against oneself, forced by any form of legal process, is universal in American law, though there may be differences as to its exact scope and limits. At the time of the formation of the Union the principle that no person could be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other systems of jurisprudence. It was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions. Five of the original thirteen states (North Carolina, 1776; Pennsylvania, 1776; Virginia, 1776; Massachusetts, 1780; New Hampshire, 1784) had then guarded the principle from legislative or judicial change by including it in constitutions or bills of rights; Maryland had provided in her constitution (1776) that "no man ought to be compelled to give evidence against himself,

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(1927) 21 Fed. (2d) 800 (holding this provision in violation of jury requirement in Const. Art. III, § 2). See the opinion of the same judge in United States v. Lot 29 (1924) 296 Fed. 729.

In May, 1921, a United States district court issued an injunction against Hansen enjoining him from permitting or continuing a nuisance on his premises in violation of the National Prohibition Act. On July 29, Hansen sold a glass of whiskey there. For this act he was indicted September 2, in the same district court, pleaded guilty September 22 and was fined $25. On September 27 a petition was filed in the same court alleging that Hansen had violated the injunction. The only evidence of such violation was the same single sale. The court held him in contempt and imposed a penalty of imprisonment for one year and a fine of $1,000. The Circuit Court of Appeals for the Seventh Circuit held that this did not violate the defendant's immunity from double jeopardy (Const., Amend. V), saying: "Contempt of court for transgression of its injunctional order bears no necessary relation to liability for violating a criminal statute, although both are incurred by the same act, and punishment for one is no bar to prosecution for the other." Hansen v. United States (1924) 1 Fed. (2d) 316. Cf. Murphy v. United States (1926) 272 U. S. 630, 71 L. ed. 446.

in a common court of law, or in any other court, but in such cases as have been usually practiced in this state or may hereafter be directed by the legislature;" and in the remainder of those states there seems to be no doubt that it was recognized by the courts. The privilege was not included in the federal Constitution as originally adopted, but was placed in one of the ten Amendments which were recommended to the states by the first Congress, and by them adopted. Since then all the states of the Union have, from time to time, with varying form but uniform meaning, included the privilege in their constitutions, except the States of New Jersey and Iowa, and in those states it is held to be part of the existing law [common law or statute]. State v. Zdanowicz, 69 N. J. L. 619; State v. Height, 117 Iowa, 650. It is obvious from this short statement that it has been supposed by the states that, so far as the state courts are concerned, the privilege had its origin in the constitution and laws of the states, and that persons appealing to it must look to the state for their protection. Indeed, since by the unvarying decisions of this court the first ten Amendments of the federal Constitution are restrictive only of national action, there was nowhere else to look, up to the time of the adoption of the Fourteenth Amendment, and the state, at least until then, might give, modify or withhold the privilege at its will. The Fourteenth Amendment withdrew from the states powers theretofore enjoyed by them to an extent not yet fully ascertained, or rather, to speak more accurately, limited those powers and restrained their exercise. There is no doubt of the duty of this court to enforce the limitations and restraints whenever they exist, and there has been no hesitation in the performance of the duty. But whenever a new limitation or restriction is declared it is a matter of grave import, since, to that extent, it diminishes the authority of the state, so necessary to the perpetuity of our dual form of government, and changes its relation to its people and to the Union. The question in the case at bar has been twice before us, and been left undecided, as the cases were disposed of on other grounds. Adams v. New York, 192 U. S. 585; Consolidated Rendering Co. v. Vermont, 207 U. S. 541. The defendants contend, in the first place, that the exemption from self-incrimination is one of the privileges and immunities of citizens of the United States which the Fourteenth Amendment forbids the states to abridge. It is not argued that the defendants are protected by that part of the Fifth Amendment which provides that "no person * * * shall be compelled in any criminal case to be a witness against himself," for it is recognized by counsel that by a long line of decisions the first ten Amendments are not operative on the states. Barron v. Baltimore, 7 Pet. 243; Spies v. Illinois, 123 U. S. 131; Brown v. New Jersey, 175 U. S. 172; Barrington v. Missouri, 205 U. S. 483. But it is argued that this privilege is one of the fundamental rights of national citizenship, placed under national protection by the Fourteenth Amendment, and it is specifically argued that the "privileges and immunities of citizens of the United States," protected against state action by that Amendment, include those fundamental personal rights which were protected against national action by the first eight Amendments; that this was the intention of the framers of the Fourteenth Amendment, and that this part of it would otherwise have little or no meaning and effect. These arguments are not new to this court and the answer to them is found in its decisions. The meaning of the phrase "privileges and immunities of citizens of the United States," as used in the Fourteenth Amendment, came under early consideration in the Slaughter-House Cases, 16 Wall. 36. * * *

We conclude, therefore, that the exemption from compulsory self-incrimination is not a privilege or immunity of national citizenship guaranteed by this clause of the Fourteenth Amendment against abridgment by the states.

The defendants, however, do not stop here. They appeal to another clause of the Fourteenth Amendment, and insist that the self-incrimination, which they allege the instruction to the jury compelled, was a denial of due process of law. This contention requires separate consideration, for it is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safe-guarded against state action, because a denial of them would be a denial of due process of law. Chicago, Burlington & Quincy Railroad v. Chicago, 166 U. S. 226. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law. Few phrases of the law are so elusive of exact apprehension as this. * * * [Here reference is made to the historical interpretation of "due process of law" expressed in Murray v. Hoboken Land Co., ante, p. 537, and in Hurtado v. California, ante, p. 554.]

The question under consideration may first be tested by the application of these settled doctrines of this court. If the statement of Mr. Justice Curtis, as elucidated in Hurtado v. California, is to be taken literally, that alone might almost be decisive. For nothing is more certain, in point of historical fact, than that the practice of compulsory self-incrimination in the courts and elsewhere existed for four hundred years after the granting of Magna Carta, continued throughout the reign of Charles I (though then beginning to be seriously questioned), gained at least some foothold among the early colonists of this country, and was not entirely omitted at trials in England until the eighteenth century. Wigmore on Evidence, § 2250 (see for the Colonies, note 108); Hallam's Constitutional History of England, ch. VIII, 2 Widdleton's American ed., 37 (describing the criminal jurisdiction of the Court of Star Chamber); Bentham's Rationale of Judicial Evidence, book IX, ch. III, § IV. * * *

But without repudiating or questioning the test proposed by Mr. Justice Curtis for the court, or rejecting the inference drawn from English law, we prefer to rest our decision on broader grounds, and inquire whether the exemption from self-incrimination is of such a nature that it must be included in the conception of due process. * * * One aid to the solution of the question is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law. Did those who then were formulating and insisting upon the rights of the people entertain the view that the right was so fundamental that there could be no due process without it? It has already appeared that, prior to the formation of the American constitutions, in which the exemption from compulsory self-incrimination was specifically secured, separately, independently, and side by side with the requirement of due process, the doctrine was formed, as other doctrines of the law of evidence have been formed, by the course of decisions in the courts covering a long period of time. Searching further, we find nothing to show that it was then thought to be other than a just and useful principle of law. None of the great instruments in which we are accustomed to look for the declaration of the fundamental rights made reference to it. The privilege was not dreamed of for hundreds of years after Magna Carta (1215), and could not have been implied in the "law of the land" there secured. The Petition of Right (1629), though it insists upon the right, secured by Magna Carta, to be condemned only by the law of the land, and sets forth by way of grievance divers violations of it, is silent upon the practice of compulsory self-incrimination, though it was then a matter of common occurrence in all the courts of the realm. The Bill of Rights of the first year of the reign of William and Mary (1689) is likewise silent, though the practice of questioning the prisoner at his trial had not then ceased. The negative argument which arises out of the omission of all reference to any exemption from compulsory self-incrimination in these three great declarations of English liberty (though it is not supposed to amount to a demonstration) is supported by the positive argument that the English Courts and Parliaments, as we have seen, have dealt with the exemption as they would have dealt with any other rule of evidence, apparently without a thought that the question was affected by the law of the land of Magna Carta, or the due process of law which is its equivalent.

We pass by the meager records of the early colonial time, so far as they have come to our attention, as affording light too uncertain for guidance. * * *

But the history of the incorporation of the privilege in an amendment to the National Constitution is full of significance in this connection. Five states, Delaware, Pennsylvania, New Jersey, Georgia and Connecticut, ratified the Constitution without proposing amendments. Massachusetts then followed with a ratification, accompanied by a recommendation of nine amendments, none of which referred to the privilege; Maryland with a ratification without proposing amendments; South Carolina with a ratification accompanied by a recommendation of four amendments, none of which referred to the privilege, and New Hampshire with a ratification accompanied by a recommendation of twelve amendments, none of which referred to the privilege. The nine states requisite to put the Constitution in operation ratified it without a suggestion of incorporating this privilege. Virginia was the tenth state to ratify, proposing, by separate resolution, an elaborate Bill of Rights under twenty heads, and in addition twenty amendments to the body of the Constitution. Among the rights enumerated as "essential and inalienable" is that no man "can be compelled to give evidence against himself," and "no freeman ought to be deprived of his life, liberty or property but by the law of the land." New York ratified with a proposal of numerous amendments and a declaration of rights which the convention declared ought not be violated and were consistent with the Constitution. One of these rights was that "No person ought to be taken, imprisoned or deprived of his freehold, or be exiled or deprived of his priveleges, franchises, life, liberty or property but by due process of law;" and another was that "in all criminal prosecutions the accused * * * should not be compelled to give evidence against himself." North Carolina and Rhode Island were the last to ratify, each proposing a large number of amendments, including the provision that no man "can be compelled to give evidence against himself;" and North Carolina, that "no freeman ought to be * * * deprived of his life, liberty or property but by the law of the land;" and Rhode Island, that "no freeman ought to be * * * deprived of his life, liberty or property but by the trial by jury, or by the law of the land."

Thus it appears that four only of the thirteen original states insisted upon incorporating the privilege in the Constitution, and they separately and simultaneously with the requirement of due process of law, and that three states proposing amendments were silent upon this subject. It is worthy of note that two of these four states did not incorporate the privilege in their own constitutions, where it would have had a much wider field of usefulness, until many years after. New York in 1821 and Rhode Island in 1842 (its first constitution). This survey does not tend to show that it was then in this country the universal or even general belief that the privilege ranked among the fundamental and inalienable rights of mankind; and what is more important here, it affirmatively shows that the privilege was not conceived to be inherent in due process of law, but on the other hand a right separate, independent and outside of due process. Congress, in submitting the amendments to the several states, treated the two rights as exclusive of each other. Such also has been the view of the states in framing their own constitutions, for in every case, except in New Jersey and Iowa, where the due process clause or its equivalent is included, it has been thought necessary to include separately the privilege clause. Nor have we been referred to any decision of a state court save one (State v. Height, 117 Iowa, 650), where the exemption has been held to be required by due process of law. The inference is irresistible that it has been the opinion of constitution makers that the privilege, if fundamental in any sense, is not fundamental in due process of law, nor an essential part of it. We believe that this opinion is proved to have been correct by every historical test by which the meaning of the phrase can be tried.

The decisions of this court, though they are silent on the precise question before us, ought to be searched to discover if they present any analogies which are helpful in its decision. The essential elements of due process of law, already established by them, are singularly few, though of wide application and deep significance. We are not here concerned with the effect of due process in restraining substantive laws, as, for example, that which forbids the taking of private property for public use without compensation. We need notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes. Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, Pennoyer v. Neff, 95 U. S. 714, 733; Scott v. McNeal, 154 U. S. 34; Old Wayne Life Association v. McDonough, 204 U. S. 8, and that there shall be notice and opportunity for hearing given the parties, Hovey v. Elliott, 167 U. S. 409; Roller v. Holly, 176 U. S. 398; and see Londoner v. Denver, 210 U. S. 373. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. * * *

Salutary as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The wisdom of the exemption has never been universally assented to since the days of Bentham; many doubt it today, and it is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient. See Wigmore, § 2251. It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law. It should, must and will be rigidly observed where it is secured by specific constitutional safeguards, but there is nothing in it which gives it a sanctity above and before constitutions themselves. Much might be said in favor of the view that the privilege was guaranteed against state impairment as a privilege and immunity of national citizenship, but, as has been shown, the decisions of this court have foreclosed that view. There seems to be no reason whatever, however, for straining the meaning of due process of law to include this privilege within it, because, perhaps, we may think it of great value. The states had guarded the privilege to the satisfaction of their own people up to the adoption of the Fourteenth Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands. They may, if they choose, alter it by legislation, as the people of Maine did when the courts of that state made the same ruling. State v. Bartlett, 55 Maine, 200; State v. Lawrence, 57 Maine, 574; State v. Cleaves, 59 Maine, 298; State v. Banks, 78 Maine, 490, 492; Rev. Stat. ch. 135, § 19.

We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. We do not intend, however, to lend any countenance to the truth of that assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself and not a denial of it. The reasoning by which this view is supported will be found in the cases cited from New Jersey and Maine, and see Reg. v. Rhodes (1899), 1 Q. B. 77; Ex parte Kops (1894), A. C. 650. The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, we think that the exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution.

Judgment affirmed.[10]

[A dissenting opinion by MR. JUSTICE HARLAN is omitted.]

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[10] For a brief statement of the scope of the privileges (established in the common law and put by almost all state constitutions beyond alteration by ordinary state legislation, and by the federal constitution beyond change by Congress) (1) of the accused not to testify at all and (2) of any witness in any proceeding or investigation to decline to give an answer to any question the

TUMEY v. STATE OF OHIO.

1927. Supreme Court of the United States. 273 U. S. 510.

[Tumey was convicted in the mayor's court of the Village of North College Hill, Ohio, of possessing intoxicating liquor in violation of state law, over his objection that trial by the mayor would not accord him due process of law as required by the Fourteenth Amendment. This contention was based on the following facts. This rural village which had a population of about 1100 people is located in Hamilton County, which had a population of half a million, including the City of Cincinnati. By state statute village mayors had jurisdiction to try violations of the state prohibition law occurring in any part of the county. Tumey's offense as charged was committed in another village of Hamilton County. Trial was to be without a jury for offenses punishable by fine only. On appeal the finding of fact by the mayor could be set aside only if so clearly unsupported by the evidence "as to indicate some misapprehension or mistake or bias on the part of the trial court, or a wilful disregard of duties." The statute prescribed a fine of not less than $100 nor more than $1000, half to go to the state and half to the village. Also in cases of convictions the mayor was entitled by state statute to fees charged as costs to the convicted defendants. He received no fees except in case of conviction. By authority of state statute the village by ordinance appropriated one-half of its share of fines to a secret service fund, 15% of which was allotted to deputy marshals as compensation for services in obtaining evidence of violation of the liquor laws, 10% to payment of counsel fees, and 15% for services of detectives in securing evidence. The balance was used for village improvements and repairs. The Mayor owned a house in the village.] Between May 11, 1923 and December 31, 1923, the total amount of fines for violation of the prohibition law, collected by this village court, was upwards of $20,000, from which the state received $8,992.50, North College Hill received $4,471.25 for its general uses, $2,697.25 was placed to the credit of the village safety fund, and the balance was put in the secret service fund. Out of this, the person acting as prosecutor in the liquor court received in that period $1,796.50; the deputy marshals, inspectors and other employees, including the detectives, received $2,697.75, and $438.50 was paid for costs in transporting prisoners, serving writs and other services in connection with the trial of these cases. Mayor Pugh received $696.35

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answer to which would tend (?) to disclose criminality of the witness; and the effect of statutes securing to the witness immunity from prosecution for offenses disclosed, see D. O. McGovney, Self-Criminating and Self-Disgracing Testimony (1920) 5 Iowa L. B. 176; for full discussion, 4 Wigmore, Evidence (2d ed. 1923) §§ 2250-2284.

from these liquor cases during that period, as his fees and costs, in addition to his regular salary. [The conviction was affirmed by the Supreme Court of Ohio and this writ of error taken.]

Mr. Chief Justice Taft delivered the opinion of the court.

* * *

That officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule. * * * Nice questions, however, often arise as to what the degree or nature of the interest must be. One is in respect of the effect of the membership of a judge in a class of taxpayers or others to be affected by a principle of law, statutory or constitutional, to be applied in a case between other parties and in which the judge has no other interest. Then the circumstance that there is no judge not equally disqualified to act in such a case has been held to affect the question. * * * We are not embarrassed by such considerations here, for there were available in this case other judicial officers who had no disqualification either by reason of the character of their compensation or their relation to the village government. All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion. Wheeling v. Black, 25 W. Va. 266, 270. But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.

The mayor of the village of North College Hill, Ohio, had a direct personal pecuniary interest in convicting the defendant who came before him for trial, in the $12 of costs imposed in his behalf, which he would not have received if the defendant had been acquitted. This was not exceptional, but was the result of the normal operation of the law and the ordinance. Counsel for the state do not deny this, but assert the validity of the practice as an exception to the general rule. They rely upon the cases of Ownbey v. Morgan, 256 U. S. 94; Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 276-280.

These cases show that in determining what due process of law is, under the Fifth or Fourteenth Amendment, the court must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, which were shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. Counsel contend that in Ohio and in other states, in the economy which it is found necessary to maintain in the administration of justice in the inferior courts by justices of the peace and by judicial officers of like jurisdiction, the only compensation which the state and county and township can afford is the fees and costs earned by them, and that such compensation is so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty, or as prejudicing the defendant in securing justice, even though the magistrate will receive nothing if the defendant is not convicted.

We have been referred to no cases at common law in England, prior to the separation of colonies from the mother country, showing a practice that inferior judicial officers were dependent upon the conviction of the defendant for receiving their compensation. Indeed, in analogous cases it is very clear that the slightest pecuniary interest of any officer, judicial or quasi judicial, in the resolving of the subject-matter which he was to decide, rendered the decision voidable. Bonham's Case, 8 Coke, 118a; s. c. 2 Brownlow & Goldesborough's Rep. 255; City of London v. Wood, 12 Modern Rep. 669, 687; Day v. Savage, Hobart, 85, 87; Hesketh v. Braddock, 3 Burrows, 1847, 1856, 1857, 1858.[11] * * *

That practice has prevailed, and still prevails, in Arkansas, Kentucky, Nebraska, North Carolina, Georgia, Ohio, and Texas, and it seems at one time to have obtained in Indiana, Oregon, Illinois, and Alabama. * * *

The strict common law rule was adopted in this country as one to be enforced where nothing but the common law controlled, and citizens and taxpayers have been held incompetent to sit in suits against the municipal corporation of which they have been residents. Diveny v. Elmira, 51 N. Y. 506; Corwein v. Hames, 11 Johns. 76; Clark v. Lamb, 2 Allen 396; Dively v. Cedar Falls, 21 Iowa 565; Fulweiler v. St. Louis, 61 Mo. 479; Petition of New Boston, 49 N. H. 328; Commonwealth v. McLane, 4 Gray 427; Fine v. St. Louis Public Schools, 30 Mo. 166, 173. With other courts, however, and with the legislatures, the strict rule seemed to be inconvenient, impracticable and unnecessary, and the view was taken that such remote or minute interest in the litigation might be declared by the Legislature not to be a reason for disqualification of a judge or juror. * * * Mr. Justice Cooley, in his work on Constitutional Limitations, 7th edition, page 594, points out that the real ground of the ruling in these cases is that "interest is so remote, trifling and insignificant that it may fairly be supposed to be incapable of affecting the judgment of or of influencing the conduct of an individual. And where penalties are imposed, to be recovered only in a municipal court, the judge or jurors in which would be interested as corporators in the recovery, the law providing for such recovery must be regarded as precluding the objection of interest." But the learned judge then proceeds:

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[11] See the first three of these cases printed ante, pp. 3, 6.

"But except in cases resting upon such reasons, we do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority." * * *

From this review we conclude that a system by which an inferior judge is paid for his service only when he convicts the defendant has not become so embedded by custom in the general practice, either at common law or in this country, that it can be regarded as due process of law, unless the costs usually imposed are so small that they may be properly ignored as within the maxim "de minimis non curat lex."

The mayor received for his fees and costs in the present case $12, and from such costs under the Prohibition Act for seven months he made about $100 a month, in addition to his salary. We cannot regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling, or insignificant interest. It is certainly not fair to each defendant brought before the mayor for the careful and judicial consideration of his guilt or innocence that the prospect of such a loss by the mayor should weigh against his acquittal.

These are not cases in which the penalties and the costs are negligible. The field of jurisdiction is not that of a small community, engaged in enforcing its own local regulations. The court is a state agency, imposing substantial punishment, and the cases to be considered are gathered from the whole county by the energy of the village marshals and detectives regularly employed by the village for the purpose. * * * Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

But the pecuniary interest of the mayor in the result of his judgment is not the only reason for holding that due process of law is denied to the defendant here. The statutes were drawn to stimulate small municipalities in the country part of counties in which there are large cities to organize and maintain courts to try persons accused of violations of the Prohibition Act everywhere in the county. The inducement is offered of dividing between the state and the village the large fines provided by the law for its violations. * * * The mayor represents the village and cannot escape his representative capacity. * * * With his interest as mayor in the financial condition of the village and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine? The old English cases cited above of the days of Coke and Holt and Mansfield are not nearly so strong. A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him. * * *

It is also correctly pointed out that it is completely within the power of the legislature to dispose of the fines collected in criminal cases as it will, and it may therefore divide the fines as it does here, one-half to the state and one-half to the village by whose mayor they are imposed and collected. It is further said with truth that the legislature of a state may and often ought to stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the state and the people. The legislature may offer rewards or a percentage of the recovery to informers. United States v. Murphy & Morgan, 16 Pet. 203. It may authorize the employment of detectives. But these principles do not at all affect the question whether the state, by the operation of the statutes we have considered, has not vested the judicial power in one who by reason of his interest, both as an individual and as chief executive of the village, is disqualified to exercise it in the trial of the defendant. * * *

Judgment reversed.[12]

PENNOYER v. NEFF.

1877. Supreme Court of the United States. 95 U. S. 714.

[Mitchell sued Neff in an Oregon court to recover compensation for services as an attorney. At the time of suit Neff was not a resident of Oregon. By direction of the court, given in accordance with an Oregon statute, Neff not being found in the state, notice

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[12] In Dugan v. Ohio (1928) 277 U. S. 61, 72 L. ed. 784, Dugan was convicted before the mayor's court of the city of Xenia, Ohio, on a charge of possession of intoxicating liquor in violation of a state statute. The offense was committed within the corporate limits of Xenia. The mayor received a fixed salary and no fees. Nevertheless Dugan contended that because of the interest of the mayor the conviction was not by due process of law. Distinguishing the case from Tumey v. Ohio, the court by Taft, C. J. said: "The mayor of Xenia receives a salary which is not dependent on whether he convicts in any case or not. While it is true that his salary is paid out of a fund to which fines accumulated from his court under all laws contribute, it is a general fund, and he receives a salary in any event, whether he convicts or acquits. There is no reason to infer on any showing that failure to convict in any case or cases would deprive him of or affect his fixed compensation. The mayor has himself as such no executive, but only judicial, duties. His relation under the Xenia charter, as one of five members of the city commission, to the fund contributed to by his fines as judge, or to the executive or financial policy of the city, is remote."

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of the suit was published in a newspaper. Neff did not appear or answer. In 1866 judgment for Mitchell was given by default. Land in Oregon belonging to Neff was sold at sheriff's sale in execution of this judgment. Pennoyer was the purchaser.

Neff later brought this action against Pennoyer in the Circuit Court of the United States in Oregon to recover the land. The court gave judgment for Neff. Pennoyer appealed to the Supreme Court of the United States.]

MR. JUSTICE FIELD delivered the opinion of the court. * * *

It was * * * contended in that court [the Circuit Court of the United States] and is insisted upon here, that the judgment in the state court against the plaintiff was void for want of personal service of process on him, or of his appearance in the action in which it was rendered, and that the premises in controversy could not be subjected to the payment of the demand of a resident creditor except by a proceeding in rem; that is, by a direct proceeding against the property for that purpose. If these positions are sound, the ruling of the Circuit Court as to the invalidity of that judgment must be sustained, * * *. And that they are sound would seem to follow from two well-established principles of public law respecting the jurisdiction of an independent state over persons and property. The several states of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent states, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every state has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no state can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunals." Story, Confl. Laws, sec. 539. * * *

These views are not new. They have been frequently expressed, with more or less distinctness, in opinions of eminent judges, and have been carried into adjudications in numerous cases. Thus, in Picquet v. Swan, 5 Mas. 35, Mr. Justice Story said:

"Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment in personam, for the plain reason, that, except so far as the property is concerned, it is a judgment *coram non judice.*"

And in Boswell's Lessee v. Otis, 9 How. 336, where the title of the plantiff in ejectment was acquired on a sheriff's sale, under a money decree rendered upon publication of notice against nonresidents, in a suit brought to enforce a contract relating to land, Mr. Justice McLean said:

"Jurisdiction is acquired in one of two modes: first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding in rem." * * *

If, without personal service, judgments in personam, obtained ex parte against nonresidents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished.

Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability.

The want of authority of the tribunals of a state to adjudicate upon the obligations of nonresidents, where they have no property with its limits, is not denied * * *; but the position is assumed, that, where they have property within the state, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and the property of the nonresident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement, that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. * * *

The force and effect of judgments rendered against nonresidents without personal service of process upon them, or their voluntary appearance, have been the subject of frequent consideration in the courts of the United States and of the several states, as attempts have been made to enforce such judgments in states other than those in which they were rendered, under the provision of the Constitution requiring that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state;" and the act of Congress providing for the mode of authenticating such acts, records, and proceedings, and declaring that, when thus authenticated, "they shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are or shall be taken." In the earlier cases, it was supposed that the act gave to all judgments the same effect in other states which they had by law in the state where rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject-matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the state itself to exercise authority over the person or the subject-matter. * * * [Here several cases are cited and discussed.]

In several of the cases, the decision has been accompanied with the observation that a personal judgment thus recovered has no binding force without the state in which it is rendered, implying that in such state it may be valid and binding. * * * In later cases, this language is repeated with less frequency than formerly, it beginning to be considered, as it always ought to have been, that a judgment which can be treated in any state of this union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the state where rendered. Smith v. McCutchen, 38 Mo. 415; Darrance v. Preston, 18 Iowa, 396; Hakes v. Shupe, 27 id. 465; Mitchell's Administrator v. Gray, 18 Ind. 123.

Be that as it may, the courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the state courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them.

Since the adoption of the Fourteenth Amendment to the federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the state resisted on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.

Except in cases affecting the personal status[13] of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, * * * the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other states, where actions are brought against nonresidents, is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding in rem. As stated by Cooley in his Treatise on Constitutional Limitations, 405, for any other purpose than to subject the property of a nonresident to valid claims against him in the state, "due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

It is true that, in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or foreclose a lien. So far as they affect property in the state, they are substantially proceedings in rem in the broader sense which we have mentioned.

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[13] "The rule as to notice necessary to give effect to a decree of divorce is different from that which is required in suits in personam." Atherton v. Atherton (1901) 181 U. S. 155, 162, 45 L. ed. 794. Compare Haddock v. Haddock (1906) 201 U. S. 562, 50 L. ed. 867, 5 Ann. Cas. 1. The difficult question, to what extent decrees of divorce granted in one state are respected or must be respected by other states, is usually fully considered in courses on Conflict of Laws.

It is hardly necessary to observe, that in all we have said we have had reference to proceedings in courts of first instance, and to their jurisdiction, and not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the state creating the tribunal may provide. They are considered as rather a continuation of the original litigation than the commencement of a new action. Nations et al. v. Johnson et al., 24 How. 195.

It follows from the views expressed that the personal judgment recovered in the state court of Oregon against the plaintiff herein, then a nonresident of the state, was without any validity, and did not authorize a sale of the property in controversy.

Judgment affirmed.[14]

[Dissenting opinion of MR. JUSTICE HUNT is omitted.]

WUCHTER v. PIZZUTTI.

1928. Supreme Court of the United States. 276 U. S. 13.

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

* * *

Pizzutti was driving a team of horses attached to a wagon on a public highway in New Jersey. Wuchter was a resident of Pennsylvania, who was following the wagon with his automobile. Wuchter drove his car so as to crash into the rear of the wagon, damaging it, and injuring Pizzutti and his horses. Pizzutti instituted a suit against Wuchter in the Supreme Court of New Jersey. Wuchter was served with process under the provisions of the act known as chapter 232 of the Laws of 1924 (P. L. 1924, p. 517) by leaving process with the secretary of state. Wuchter interposed no defense. A judgment interlocutory was taken against him and a writ of inquiry of damages was issued. Although the statute did not require it, notice of its proposed execution was actually served personally on Wuchter in Pennsylvania. Wuchter did not appear. A final judgment was entered. Wuchter then appealed to the court below, contending that the act under which the process was served upon him was unconstitutional, because it deprived him of his property without due process of law, in contravention of section 1 of the Fourteenth Amendment to the federal Constitution.

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[14] Prior to the decision in Pennoyer v. Neff (1877) 95 U. S. 714, 24 L. ed. 565, "it occasionally was intimated, if not held, by some of the state courts, that a personal judgment effective within the territory of the state could be rendered against a nonresident defendant who did not appear and submit himself to the jurisdiction, provided notice of the suit had been served upon him in the state of his residence, or had been published in the state within which the court was situate, pursuant to the provisions of a local statute. See Smith v. Colloty, 69 N. J. L. 365, 371. As was said by Mr. Justice Field, speaking for this court in Pennoyer v. Neff, 95 U. S. 714, 732, it is difficult to see how such a judgment could legitimately have force even within the state. But until the adoption of the Fourteenth Amendment (1868) this remained a question of state law; the effect of the 'due process' clause of that Amendment being, as was held in the case just mentioned, to establish it as the law for all the states that a judgment rendered against a nonresident who had neither been served with process nor appeared in the suit was devoid of validity within as well as without the territory of the state whose court had rendered it, and to make the assertion of its invalidity a matter of federal right.

"The fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard. Louisville & Nashville R. R. Co. v. Schmidt, 177 U. S. 230, 236; Simon v. Craft, 182 U. S. 427, 436; Grannis v. Ordean, 234 U. S. 385, 394. To hold one bound by the judgment who has not had such opportunity is contrary to the first principles of justice. And to assume that a party resident beyond the confines of a state is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a state beyond its own territory." Pitney, J., delivering the opinion of the court in Baker v. Baker, Eccles & Co. (1917) 242 U. S. 394, 402-403, 61 L. ed. 386.

Section 1 of the act complained of, under which the process was served in this case, was as follows:

"From and after the passage of this act any chauffeur, operator or owner of any motor vehicle, not licensed under the laws of the State of New Jersey, providing for the registration and licensing of motor vehicles, who shall accept the privilege extended to nonresident chauffeurs, operators and owners by law of driving such a motor vehicle or of having the same driven or operated in the State of New Jersey, without a New Jersey registration or license, shall, by such acceptance and the operation of such automobile within the State of New Jersey, make and constitute the secretary of state of the State of New Jersey, his, her or their agent for the acceptance of process in any civil suit or proceeding by any resident of the State of New Jersey against such chauffeur, operator or the owner of such motor vehicle, arising out of or by reason of any accident or collision occurring within the state in which a motor vehicle operated by such chauffeur, or operator, or such motor vehicle is involved." * * *

By the general state motor law, as amended by chapter 211, Laws of 1924, provision is made for the registration and license of automobiles owned by nonresidents who use the highways of the state, P. L. 1924, § 9, par. 4, p. 451. They are required to agree that original process against the owner made by leaving it in the office of the secretary of state shall have the same effect as if served on the owner within the state, and the statute provides that the commissioner of motor vehicles shall notify the owner of such motor car by letter directed to him at the post office address stated in his application for registration and license already filed with the commissioner.

The act first above referred to, No. 232, under which process in this case was served, applies to the owners of automobiles who are not licensed, but who come into the state and use the highways of the state without registration, and is not to be confused with the license act or its provisions.

It is settled by our decisions that a state's power to regulate the use of its highways extends to their use by nonresidents as well as by residents. Hendrick v. Maryland, 235 U. S. 610, 622. We have further held that, in advance of the operation of a motor vehicle on its highways by a nonresident, a state may require him to take out a license and to appoint one of its officials as his agent, on whom process may be served in suits growing out of accidents in such operation. This was under the license act of New Jersey, last above referred to, and not No. 232. Kane v. New Jersey, 242 U. S. 160, 167. We have also recognized it to be a valid exercise of power by a state, because of its right to regulate the use of its highways by nonresidents, to declare, without exacting a license, that the use of the highway by the nonresident may by statute be treated as the equivalent of the appointment by him of a state official as agent on whom process in such a case may be served. Hess v. Pawloski, 274 U. S. 352.

The question made in the present case is whether a statute, making the secretary of state the person to receive the process, must, in order to be valid, contain a provision making it reasonably probable that notice of the service on the secretary will be communicated to the nonresident defendant who is sued. Section 232 of the Laws of 1924 makes no such requirement and we have not been shown any provision in any applicable law of the State of New Jersey requiring such communication. We think that a law with the effect of this one should make a reasonable provision for such probable communication. We quite agree, and, indeed, have so held in the Pawloski Case, that the act of a nonresident in using the highways of another state may properly be declared to be an agreement to accept service of summons in a suit growing out of the use of the highway by the owner of the automobile, but the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice. Otherwise, where the service of summons is limited to a service on the secretary of state or some officer of the state, without more, it will be entirely possible for a person injured to sue any nonresident he chooses, and through service upon the state official obtain a default judgment against a nonresident who has never been in the state, who had nothing to do with the accident, or whose automobile having been in the state has never injured anybody. A provision of law for service that leaves open such a clear opportunity for the commission of fraud (Heinemann v. Pier, 110 Wis. 185), or injustice is not a reasonable provision, and in the case supposed would certainly be depriving a defendant of his property without due process of law. The Massachusetts statute, considered in Hess v. Pawloski, really made necessary actual personal service to be evidenced by the written admission of the defendant.[15] In Kane v. New Jersey, the service provided for by statute was by mail to the necessarily known registered address of the licensed defendant.

In determining the reasonableness of provision for service we should consider the situation of both parties. The person injured must find out to whom the offending automobile belongs. This may be a difficult task. It is easy when the owner of the automobile is present after the accident. That is provided for in the second section of this act by apprehending him or his operator. But the vehicle may be operated by some one who having committed the injury successfully escapes capture or identification. In such a case, the person injured must be left without a remedy by suit at law, as every one must be who does not know or cannot discover the person who injured him. The burden is necessarily on him to investigate and learn. In finding out who it was, and whether the person is of such financial responsibility as to warrant a suit, he almost necessarily will secure knowledge of his post office address or his place of residence, and thereby be enabled to point out how notice may be communicated to him. With this information at hand the state may properly authorize service to be made on one of its own officials, if it also requires that notice of that service shall be communicated to the person sued. Every statute of this kind, therefore, should require the plaintiff bringing the suit to show in the summons to be served the post office address or residence of the defendant being sued, and should impose either on the plaintiff himself or upon the official receiving service or some other, the duty of communication by mail or otherwise with the defendant.

The cases, in which statutes have been upheld providing that nonresident corporations may properly be served by leaving a summons with a state official, where the corporation has not indicated a resident agent to be served, are not especially applicable to the present statute. Pennsylvania Fire Insurance Co. v. Gold Issue Mining Co., 243 U. S. 93; Simon v. Southern Ry. Co.. 236 U. S. 115; Old

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[15] The statute of Massachusetts required a copy of the process or notice filed with the state official to be forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt to be filed in the court together with an affidavit by the plaintiff that he had complied with these requirements.

Wayne Mutual Life Association v. McDonough, 204 U. S. 8. Such corporations may properly be required to accept service through a public officer as a condition of their doing business in the state. Their knowledge of the statutory requirement may perhaps prompt frequent inquiry as to suits against them, of their appointed agent or at the office of the public official to be served, but it could hardly be fair or reasonable to require a nonresident individual owner of a motor vehicle who may use the state highways to make constant inquiry of the secretary of state to learn whether he has been sued. Even in cases of nonresident corporations, it has been held that a statute directing service upon them by leaving process with a state official is void if it contains no provision requiring the official, upon whom the service may be made, to give the foreign corporations notice that suit has been brought and citation served. Southern Railway Co. v. Simon, 184 Fed. 959, 961; Gouner v. Missouri Valley Bridge Co., 123 La. 964. * * * The question is mooted in Simon v. Southern Railway, 236 U. S. 115, 129 * * * but it was not found necessary to decide the point. * * *

In McDonald v. Mabee, 243 U. S. 90, 91, a person domiciled in Texas left the state to make his home in another state. An action for money was begun by publication in a newspaper after his departure, and a judgment recovered and sustained by the state supreme court was held void by this court. This court said:

"The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person. * * * No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind. Subject to its conception of sovereignty even the common law required a judgment not to be contrary to natural justice. * * * And in states bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." See, also, Roller v. Holly, 176 U. S. 398.

These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here.

But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by the statute. Not having been directed by the statute it cannot, therefore, supply constitutional validity to the statute or to service under it. * * *

Judgment reversed.[16]

[BRANDEIS and HOLMES, JJ., dissented, chiefly on the ground that notice having actually been given, the defendant should not be heard to complain of a defect in the statute which had not operated to his prejudice; and STONE, J., on the ground that it should be left to the state court to decide whether the statute should be construed as impliedly requiring notice to be given a defendant. Otherwise these justices concurred in the principles announced.]

MOORE ET AL. v. DEMPSEY, KEEPER OF ARKANSAS STATE PENITENTIARY.

1923. Supreme Court of the United States. 261 U. S. 86.

Appeal from the District Court of the United States for the Eastern District of Arkansas.

Habeas corpus proceedings by Frank Moore and others against E. H. Dempsey, Keeper of the Arkansas State Penitentiary. From an order dismissing the writ upon demurrer, the petitioners appeal.

MR. JUSTICE MCREYNOLDS, dissenting.

We are asked to overrule the judgment of the District Court discharging a writ of habeas corpus by means of which five negroes sought to escape electrocution for the murder of Clinton Lee. Sec. 753, Rev. Stats. They were convicted and sentenced in the circuit court of Phillips county, Arkansas, two years before the writ issued. The petition for the writ was supported by affidavits of these five ignorant men whose lives were at stake, the ex parte affidavits of three other negroes who had pleaded guilty and were then confined in the penitentiary under sentences for the same murder, and the affidavits of two white men—low villains according to their own admissions. It should be remembered that to narrate the allegations of the petition is but to repeat statements from these sources. Considering all the circumstances—the course of the cause in the state courts and upon application here for certiorari, etc.—the District Court held the alleged facts insufficient prima facie to show nullity of the original judgment.

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[16] For discussions of the issues decided or referred to in this and the preceding case see Austin W. Scott, Jurisdiction over Nonresidents Doing Business within a State (1919) 32 Harv. L. Rev. 871; Jurisdiction over Nonresident Motorists (1926) 39 Harv. L. Rev. 533. See also Hess v. Pawloski (1927) 274 U. S. 352, 71 L. ed. 1091; York v. Texas (1890) 137 U. S. 15, 34 L. ed. 604; Flexner v. Farson (1919) 248 U. S. 289, 63 L. ed. 250; McDonald v. Mabee (1917) 243 U. S. 90, 61 L. ed. 608, L. R. A. 1917F, 458; Miedreich v. Lauenstein (1914) 232 U. S. 236, 58 L. ed. 584.

The matter is one of gravity. If every man convicted of crime in a state court may thereafter resort to the federal court and by swearing, as advised, that certain allegations of fact tending to impeach his trial are "true to the best of his knowledge and belief," and thereby obtain as of right further review, another way has been added to a list already unfortunately long to prevent prompt punishment. * * *

Let us consider with some detail what was presented to the court below.

There was the complete record of the cause in the state courts—trial and Supreme—showing no irregularity. After indictment the defendants were arraigned for trial and eminent counsel appointed to defend them. He cross-examined the witnesses, made exceptions, and evidently was careful to preserve a full and complete transcript of the proceedings. The trial was unusually short but there is nothing in the record to indicate that it was illegally hastened. November 3, 1919, the jury returned a verdict of "guilty"; November 11th the defendants were sentenced to be executed on December 27th; December 20th new counsel chosen by them or their friends moved for a new trial and supported the motion by affidavits of defendants and two other negroes who declared they testified falsely because of torture. This motion questioned the validity of the conviction upon the very grounds now advanced—torture, prejudice, mob domination, failure of counsel to protect interests, etc. * * *

A new trial having been denied, an appeal was granted to the State Supreme Court and 60 days allowed for preparing bill of exceptions; March 22, 1920, this appeal was argued orally and by briefs; March 29th the court announced its opinion, reviewed the proceedings and affirmed the judgment. Hicks v. State, 143 Ark. 158. A petition for rehearing was presented April 19th and overruled April 26th.

A petition for certiorari filed in this court May 24, 1920, with the record of proceedings in the state courts, set forth in detail the very grounds of complaint now before us. It was presented October 5th, denied October 11th, 1920.

April 29, 1921, the Governor directed execution of the defendants on June 10th. June 8th the chancery court of Pulaski county granted them a writ of habeas corpus; on June 20th the state Supreme Court held that the chancery court lacked jurisdiction and prohibited further proceedings. State v. Martineau, 149 Ark. 237. August 4th a justice of this court denied writ of error. Thereupon, the Governor fixed September 23d for execution. On September 21st the present habeas corpus proceeding began, and since then the matter has been in the courts. * * *

Under the disclosed circumstances I cannot agree that the solemn adjudications by courts of a great state, which this court has refused to review, can be successfully impeached by the mere ex parte affidavits made upon information and belief of ignorant convicts joined by two white men—confessedly atrocious criminals. The fact that petitioners are poor and ignorant and black naturally arouses sympathy; but that does not release us from enforcing principles which are essential to the orderly operation of our federal system.

I am authorized to say that Mr. Justice Sutherland concurs in this dissent.

Mr. Justice Holmes delivered the opinion of the court.

This is an appeal from an order of the District Court for the Eastern District of Arkansas dismissing a writ of habeas corpus upon demurrer, the presiding judge certifying that there was probable cause for allowing the appeal. There were two cases originally, but by agreement they were consolidated into one. The appellants are five negroes who were convicted of murder in the first degree and sentenced to death by the Court of the State of Arkansas. The ground of the petition for the writ is that the proceedings in the State Court, although a trial in form, were only a form, and that the appellants were hurried to conviction under the pressure of a mob without any regard for their rights and without according to them due process of law.

The case stated by the petition is as follows, and it will be understood that while we put it in narrative form, we are not affirming the facts to be as stated but only what we must take them to be, as they are admitted by the demurrer: On the night of September 30, 1919, a number of colored people assembled in their church were attacked and fired upon by a body of white men, and in the disturbance that followed a white man was killed. The report of the killing caused great excitement and was followed by the hunting down and shooting of many negroes and also by the killing on October 1 of one Clinton Lee, a white man, for whose murder the petitioners were indicted. They seem to have been arrested with many others on the same day. The petitioners say that Lee must have been killed by other whites, but that, we leave on one side as what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved. They say that their meeting was to employ counsel for protection against extortions practiced upon them by the landowners and that the landowners tried to prevent their effort, but that again we pass by as not directly bearing upon the trial. It should be mentioned, however, that O. S. Bratton, a son of the counsel who is said to have been contemplated and who took part in the argument here, arriving for consultation on October 1, is said to have barely escaped being mobbed; that he was arrested and confined during the month on a charge of murder and on October

31 was indicted for barratry, but later in the day was told that he would be discharged but that he must leave secretly by a closed automobile to take the train at West Helena, four miles away, to avoid being mobbed. It is alleged that the judge of the Court in which the petitioners were tried facilitated the departure and went with Bratton to see him safely off.

A Committee of Seven was appointed by the Governor in regard to what the committee called the "insurrection" in the county. The newspapers daily published inflammatory articles. On the 7th a statement by one of the committee was made public to the effect that the present trouble was "a deliberately planned insurrection of the negroes against the whites, directed by an organization known as the 'Progressive Farmers' and 'Household Union of America' established for the purpose of banding negroes together for the killing of white people." According to the statement the organization was started by a swindler to get money from the blacks.

Shortly after the arrest of the petitioners a mob marched to the jail for the purpose of lynching them but were prevented by the presence of United States troops and the promise of some of the Committee of Seven and other leading officials that if the mob would refrain, as the petition puts it, they would execute those found guilty in the form of law. The Committee's own statement was that the reason that the people refrained from mob violence was "that this Committee gave our citizens their solemn promise that the law would be carried out." According to affidavits of two white men and the colored witnesses on whose testimony the petitioners were convicted, produced by the petitioners since the last decision of the Supreme Court hereafter mentioned, the Committee made good their promise by calling colored witnesses and having them whipped and tortured until they would say what was wanted, among them being the two relied on to prove the petitioners' guilt. However this may be, a grand jury of white men was organized on October 27 with one of the Committee of Seven and, it is alleged, with many of a posse organized to fight the blacks, upon it, and on the morning of the 29th the indictment was returned. On November 3 the petitioners were brought into Court, informed that a certain lawyer was appointed their counsel and were placed on trial before a white jury—blacks being systematically excluded from both grand and petit juries. The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a juryman or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand. The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no juryman could have voted for an acquittal and continued to live in Phillips County and if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob.

The averments as to the prejudice by which the trial was environed have some corroboration in appeals to the Governor, about a year later, earnestly urging him not to interfere with the execution of the petitioners. One came from five members of the Committee of Seven, and stated in addition to what has been quoted heretofore that "all our citizens are of the opinion that the law should take its course." Another from a part of the American Legion protests against a contemplated commutation of the sentence of four of the petitioners and repeats that a "solemn promise was given by the leading citizens of the community that if the guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld." A meeting of the Helena Rotary Club attended by members representing, as it said, seventy-five of the leading industrial and commercial enterprises of Helena, passed a resolution approving and supporting the action of the American Legion post. The Lions Club of Helena at a meeting attended by members said to represent sixty of the leading industrial and commercial enterprises of the city passed a resolution to the same effect. In May of the same year, a trial of six other negroes was coming on and it was represented to the Governor by the white citizens and officials of Phillips County that in all probability those negroes would be lynched. It is alleged that in order to appease the mob spirit and in a measure secure the safety of the six the Governor fixed the date for the execution of the petitioners at June 10, 1921, but that the execution was stayed by proceedings in Court; we presume the proceedings before the Chancellor to which we shall advert.

In Frank v. Mangum, 237 U. S. 309, 335, it was recognized of course that if in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law; and that "if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law." We assume in accordance with that case that the corrective process supplied by the state may be so adequate that interference by habeas corpus ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the state courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights.

In this case a motion for a new trial on the ground alleged in this petition was overruled and upon exceptions and appeal to the Supreme Court the judgment was affirmed. The Supreme Court said that the complaint of discrimination against petitioners by the exclusion of colored men from the jury came too late and by way of answer to the objection that no fair trial could be had in the circumstances, stated that it could not say "that this must necessarily have been the case"; that eminent counsel was appointed to defend the petitioners, that the trial was had according to law, the jury correctly charged, and the testimony legally sufficient. On June 8, 1921, two days before the date fixed for their execution, a petition for habeas corpus was presented to the Chancellor and he issued the writ and an injunction against the execution of the petitioners; but the Supreme Court of the state held that the Chancellor had no jurisdiction under the state law whatever might be the law of the United States. The present petition perhaps was suggested by the language of the court: "What the result would be of an application to a Federal Court we need not inquire." It was presented to the District Court on September 21. We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void. We have confined the statement to facts admitted by the demurrer. We will not say that they cannot be met, but it appears to us unavoidable that the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed.

Order reversed. The case to stand for hearing before the District Court.

DUNN ET AL. v. LYONS, SHERIFF.

1928. Circuit Court of Appeals, Fifth Circuit. 23 Fed. (2d) 14.

Appeal from the District Court of the United States for the Western District of Louisiana; Benjamin C. Dawkins, Judge.

Petition by Byron Dunn and W. Robert Dunn against J. Horace Lyons, Sheriff, for a writ of habeas corpus. From an order dismissing the petition, petitioners appeal. Affirmed.

Before Walker, Bryan and Foster, Circuit Judges.

Bryan, Circuit Judge. The District Judge dismissed upon demurrer the petition of appellants for writ of habeas corpus, but certified that in his opinion there was probable cause for an appeal. Appellants were convicted of murder in a state trial court of Louisiana. The judgment of conviction was affirmed by the Supreme Court of Louisiana (161 La. 532, 109 So. 56), and writ of error dismissed by the Supreme Court of the United States (273 U. S. 656, 744, 47 S. Ct. 344, 71 L. Ed. 825.[17] After that the state Supreme Court denied the writ of habeas corpus on a petition containing substantially the same averments of fact that we now have to consider.

The petition is based on the ground that the trial in the state court was one in form only and deprived appellants of their liberty without due process of law. It is alleged that the trial was dominated by an organization commonly known as the Ku Klux Klan; that the judge, the sheriff, the clerk, and at least one of the jurors were all members of that organization; that the person of whose murder appellants were convicted was a member thereof at the time of his death; that during the trial the courtroom was packed with its members; that the judge allowed one of them to sit with him on the bench, and to pay a fine imposed upon one of the attorneys, and failed to require another member to leave the witness room in order that appellants might have a private interview with their counsel. The petition contains other averments tending to support the general statement that this organization exerted its influence to impress upon the jury that a verdict of guilty would meet with popular approval.

It is not alleged that appellants did not have full knowledge of every matter now complained of, either before or during the trial, or at the time they submitted their motion for a new trial, or that they did not have full opportunity to present such matters on their appeal to the State Supreme Court. They did assign as error the overruling of their challenges for cause of certain jurors on the ground that they were members of the Ku Klux, and many other rulings of the trial court. All the rulings that were excepted to and assigned as error were considered and passed upon by the Supreme Court on that appeal. No objection was made to the qualifications or competency of the trial judge or any of the court officials. It is not suggested that counsel for the accused were intimidated by popular clamor or hostile sentiment, and that they fearlessly represented their clients affirmatively appears from the number and nature of exceptions reserved at the trial and presented for review on appeal. The Supreme Court entertained jurisdiction of the petition for a writ of habeas corpus, but declined to issue that writ on the grounds that all questions of law and fact that were reserved and presented had already been decided, and that the matters complained of in that petition for the first time should have been presented in the regular and appropriate way by proper bills of exceptions on the appeal from the judgment of conviction.

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[17] This dismissal of the case when it was brought to the court on writ of error, Dunn v. Louisiana, was by memorandum opinion saying, "dismissed for want of substantial federal constitutional question," which seems to mean that the *record* disclosed no error constituting a denial of a federal constitutional right.—Editor.

Appellants contend that the state trial court lost jurisdiction on account of the influence and activities of the Ku Klux, and that this case is governed by Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543. In the cited case it is said: * * * [The omitted quotation is the full paragraph beginning, "In Frank v. Mangum," ante, p. 595.]

It is thus established by these two leading Supreme Court cases that a writ of habeas corpus will not lie where the state supplies and its courts make available process adequate to correct errors committed during the trial of a case. In Ashe v. U. S. ex rel. Valotta, 270 U. S. 424, 46 S. Ct. 333, 70 L. Ed. 662, it is said that the regular administration of the criminal law of a state can only be attacked by collateral habeas corpus proceedings in "extraordinary cases where there is only the form of a court under the domination of a mob." Louisiana recognizes that motions for a new trial are reviewable on appeal, as sufficiently appears from the opinion of its Supreme Court that was rendered in reviewing the judgment of conviction of appellants. State v. Dunn, 161 La. 532, 597, 109 So. 56. It was open to appellants to attack the fitness and qualifications of the trial judge by taking exceptions during the trial, or by motion for a new trial after conviction. All the matters complained of here were reviewable by the Supreme Court. Many of them were in fact made the subject of review, and those that were not were not presented as they ought to have been in the regular way provided by law.

Finally, the judgment of the state trial court was affirmed by the Supreme Court of the United States. It therefore is clear, not only that the state of Louisiana affords adequate corrective process, but that such process was made available to appellants in the state Supreme Court.

The order appealed from is affirmed.

HEBERT v. STATE OF LOUISIANA.

1926. Supreme Court of the United States. 272 U. S. 312.

Mr. Justice Van Devanter delivered the opinion of the court.

The State of Louisiana, like the United States, has a statute making it a criminal offense to manufacture intoxicating liquor for beverage purposes. A judgment of the Supreme Court of the State affirming a conviction under this statute, 158 La. 209, is presented for review by this writ of error. * * *

The accused also assign error on a ruling respecting the maximum period of imprisonment admissible under the state law. Two statutes were involved. The accused took the position that one was special and excluded the other. But the trial court rejected that view, construed the statutes as intended to be taken together, and as a result imposed a more burdensome sentence than was named in the statute which the accused thought controlling. The Supreme Court sustained that construction, and the accused contend here, as they did in that court, that the construction was wrong and, being wrong, operated as a denial of due process of law in the sense of the Fourteenth Amendment. The contention must be overruled. Whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the state. The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as "law of the land." Those principles are applicable alike in all the states and do not depend upon or vary with local legislation. Castillo v. McConnico, 168 U. S. 674, 682-683; West v. Louisiana, 194 U. S. 258, 261-263; Patterson v. Colorado, 205 U. S. 454, 459; Pullman Co. v. Knott, 235 U. S. 23, 25; Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157, 166. The Supreme Court of the state having held that the two statutes must be taken together in determining the penalty intended we must accept that conclusion as if written into the statutes themselves. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 73. All that would be open in this court under the due process clause is whether the state had power to impose the penalty fixed by the statutes as thus construed. Rawlins v. Georgia, 201 U. S. 638, 640. That the state had such power is not questioned, but only that the statutes rightly construed show that the power has been exercised.

On this question, as we have said, the decision of the Supreme Court of the state is controlling.

Judgment affirmed.

AMERICAN RAILWAY EXPRESS COMPANY v. COMMONWEALTH OF KENTUCKY.

1927. Supreme Court of the United States. 273 U. S. 269.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Without opinion the Kentucky Court of Appeals affirmed a judgment by the Harlan Circuit Court against petitioner and in favor of the Commonwealth for the aggregate sum of forty-four judgments against the Adams Express Company theretofore granted on account of alleged defaults during 1916.

The Adams Company is a "joint stock association," organized under the laws of New York. For many years it operated as a common carrier of goods in Kentucky and other states and owned therein valuable property essential to the conduct of this business. In Kentucky it owned no other property.

The petitioner is a Delaware corporation, organized under an agreement of the interested parties for the purpose of taking over the business and operating property of all the principal express companies of the country by issuing stock to the several owners. Directly after its organization, and on July 1, 1918, it acquired the entire express business and all property connected therewith of the Adams Company and issued therefor several million dollars of its capital stock. (Like transfers were made by the other express companies.) The seller immediately ceased to operate in Kentucky and the purchaser continued the business. Neither company made any provision for paying the outstanding obligations of the Adams Company contracted in Kentucky; but the latter held in its treasury at New York the stock received from the purchaser, possessed other valuable property located there, and was solvent.

Respondent claimed that petitioner became liable for unsatisfied obligations of the Adams Company. After a full and fair hearing upon pleadings and proof, the Court of Appeals sustained this theory but assigned no reason. That court, it is said, determined the same issues as here presented in American Railway Express Co. v. Commonwealth of Kentucky, 190 Ky. 636, and supported the judgment by an elaborate opinion. But the record now before us fails to show any reference whatever to that opinion when the present cause was decided.

The petition for certiorari affirmed that the cause involved the following questions of constitutional law and because of them asked a review. We go no further than their consideration requires.

(1) Whether it is a lack of due process of law for the Kentucky Court to deprive the petitioner of its property on the following assumptions which are unsupported by the record and contrary to fact; (a) that the Adams Express Company is a corporation; (b) that the State of Kentucky was a creditor of the Adams Express Company on June 30, 1918; (c) that the stock issued to the Adams Express Company was distributed by it among its shareholders.

(2) Whether petitioner is denied the equal protection of the laws by a decision of a state court which holds that a corporation which pays cash for property is a holder for value, but that a corporation which issues less than a controlling interest of its own stock for property is a donee, and takes such property subject to existing claims of the vendor's creditors.

(3) Whether it is lack of due process for the state of Kentucky to enforce a rule that a bona fide purchaser for value of all the Kentucky property of a solvent vendor is liable to Kentucky creditors of the vendor to the extent of the value of the property acquired.

(4) Whether a decision of a state court which is contrary to the common law, and justifiable only as an exercise of the state's police power, can be retroactively applied to affect vested rights.

The grounds upon which the Court of Appeals rested its judgment are not revealed—there was no opinion. Consequently, petitioner's argument which rests upon alleged assumptions is impertinent.

The record discloses no ruling that a corporation which pays cash for property holds for value, but if property is acquired by issuing less than a controlling interest of stock it takes subject to claims of the seller's creditors.

As there was no controlling statute the state court necessarily determined the rights and liabilities of the parties under the general rules of jurisprudence which it deemed part of the law of Kentucky and applicable in the circumstances. It went no further. No earlier opinion was overruled or qualified and no rule was given any retroactive effect. Save in exceptional circumstances not now present we must accept as controlling the decision of the state courts upon questions of local law, both statutory and common. "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law." Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157, 165, 166.

The Kentucky court had jurisdiction and has determined only that under common law principles in the peculiar circumstances above narrated, where the facts were or might have been known to the purchasing corporation, it became liable for claims against the vendor resulting from transactions within the state. The action of the court followed a fair hearing, and there is no pretense that the challenged views were adopted in order to evade a constitutional issue. We cannot interfere unless the judgment amounts to mere arbitrary or capricious[18] exercise of power or is in clear conflict with those fundamental "principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." Pennoyer v. Neff, 95 U. S. 714, 733; Booth v. Illinois, 184 U. S. 425, 429; Truax v. Corrigan, 257 U. S. 312, 329.

It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. Arrowsmith v. Harmoning, 118 U. S. 194, 195; Iowa Central Ry. Co. v. Iowa, 160 U. S. 389, 393; Tracy v. Ginsberg, 205 U. S. 170, 177; Bonner v. Gorman, 213 U. S. 86, 91; McDonald v. Oregon R. R. & Nav. Co., 233 U. S. 665, 669.[19]

Considering the circumstances disclosed by the record, there was nothing arbitrary or obviously contrary to the fundamental principles of justice in requiring the petitioner, organized for the purposes shown, to satisfy claims against the Adams Company which arose out of business within the state. The transfer of all the latter's property located in the state materially interfered with the ability of Kentucky creditors to enforce their claims, and, as to them, might have been declared fraudulent. It seems clear that the state, without conflict with the Fourteenth Amendment, might have enacted through its legislative department a statute of precisely the same effect as the rule of law and public policy declared by the Court of Appeals, and its decision is just as valid as such a statute would have been. Prudential Insurance Co. v. Cheek, 259 U. S. 530, 548. * * *

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[18] Consider these other vague dicta or vague implications of similar import: "Whenever a wrong judgment is entered against a defendant his property is taken when it should not have been, but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights." Holmes, J., in Chicago Life Ins. Co. v. Cherry (1917) 244 U. S. 25, 30, 61 L. ed. 966.

"Due process implies a tribunal both impartial and mentally competent to afford a hearing." Holmes, J., in Jordan v. Massachusetts (1912) 225 U. S. 167, 176, 56 L. ed. 1038.

[19] "In general the decision of a [state] court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed." Holmes, J., in Patterson v. Colorado (1907) 205 U. S. 454, 461, 51 L. ed. 879, 10 Ann. Cas. 689.

"When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law." Gray, J., in Central Land Co. v. Laidley (1895) 159 U. S. 103, 112, 40 L. ed. 91. Does this mean that it is with due process that the deprival is made?

"The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the Fourteenth Amendment, and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative or coterminous. The first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the lawmaking power of the state, and, as it is solely the result of such authority, may vary or change as the legislative will of the state sees fit to ordain. It follows that, to determine the existence of the one, due process of law, is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question within the final jurisdiction of courts of last resort of the several states. When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no federal question, providing always the statute as thus construed does not violate the Constitution of the United States, by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the state interpretation of its own law is controlling and decisive." White, J., in Castillo v. McConnico (1898) 168 U. S. 674, 683, 42 L. ed. 622.

The judgment of the court below must be affirmed.

MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER dissent.

Section 2.—As a Standard of Validity of the Substance or Purpose of Legislation.

"Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law[1] as well as to

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[1] To inquire into the origin, development and present working of this remarkable doctrine is the purpose of this section.

The three pre-Fourteenth Amendment New York cases printed in this section have been selected because they are substantially the only state court decisions of that period that subsumed under a due process clause "implied" limitations on the substance of legislation. Commonwealth v. Alger was the leading case in giving "police power" a description widely followed. Is the chief significance of that case found in the apparent assumption of the court that some apology must be found for discovering that the powers of a legislature are extensive? Yet, not too extensive? Limits are assumed, though not definitely disclosed in the opinion. It has been supposed that Chief Justice Shaw's thinking may have been influenced by the peculiar terms in which the constitution of Massachusetts made one of its grants of power to the legislature: "to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances * * * ; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this Commonwealth * * * ." (Professor Thayer traced these words, with slight variation, to the Provincial Charter of 1691. Cases on Constitutional Law, p. 386.) Was there an implication that the legislature should not pass unreasonable laws? If read fully, however, the passage seems to make the legislators judges of the reasonableness of their enactments. It seems more probable that Chief Justice Shaw merely shared the view common to judges elsewhere that there were limitations to be found outside of the expressions of the constitution. It should be noted that he, like most other judges of the period, did not assert that such limitations were to be found in the law of the land clause, the form that the due process clause took in the Massachusetts constitution. It also should be noted that the grant of legislative powers made in other state constitutions was expressed in no such limiting phraseology.

The United States Supreme Court cases following the state cases are arranged in the main in chronological order and include all the instances from the first, in 1857, through the period of forty years thereafter, in which consideration was matters of procedure." Mr. Justice Brandeis, in Whitney v. California (1927) 274 U. S. 357, 373, 71 L. ed. 1095.

TAYLOR v. PORTER & FORD.

1843. Supreme Court of the State of New York. 2 Hill 140.

Trespass for breaking and entering the plaintiff's close at Milton, in the county of Saratoga, on the 1st of May, 1841, and on divers other days and times etc., and digging up, subverting and carrying away the earth and soil, and breaking down, prostrating and destroying the plaintiff's fence; and also for making and laying out a private road through and over the plaintiff's close, whereby he was prevented from having the use, benefit and enjoyment thereof, to the damage, etc. [The defendant justified his acts as strictly in accordance with a New York statute and the issue was whether this statute was in conflict with the state constitution. The opening paragraph of the opinion is a statement of the provisions of the statute.]

Bronson, J. Every person liable to be assessed for highway labor, may apply to the commissioners of highways of the town in which he resides to lay out a road. Whenever application is made to the commissioners for a *private road,* they are to summon twelve freeholders of the town to meet on a day certain, of which notice must be given to the owner or occupant of the land through which it is proposed to lay out the road. The freeholders, when met and sworn, are to view the lands through which the road is applied for, and if they determine that the road is necessary, they are to make and subscribe a certificate in writing to that effect, and the commissioners are required thereupon to lay out the road, and cause a record of it to be made in the town clerk's office. The

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given to due process clauses as limitations on the substance of legislation. Nothing throws more light on this doctrine than does its history. For instance, would the issue decided in Munn v. Illinois in 1877 have been decided the same way if it had come before the court for the first time in 1927? The chronological order is departed from by the insertion of cases intended to conclude the study of the due process limitation as a protection to "property," before consideration of it as a protection to "liberty," which begins at page 732, post. Also some cases are inserted out of chronological order in order to compare recent holdings with earlier ones. The section has not formally been broken into subsections under the titles "property" and "liberty" for fear that an undue emphasis might thereby be given to those vague and overlapping concepts.

The bulk of the section consists of relatively recent cases. No attempt has been made to catalog the numerous applications which have been made to almost every conceivable subject matter. The disposition made of some of the most outstanding issues is deemed adequate to show the nature and operation of the doctrine in action at the present time.

damages of the owner of the land through which the road is laid, if not adjusted by agreement, are to be assessed by a jury of six freeholders of some other town, and are to be paid *by the person applying for the road.* "Every such private road, when so laid out, *shall be for the use of such applicant, his heirs and assigns;* but not to be converted to any other use or purpose than that of a road. *Nor shall the occupant or owner of the land through which such road shall be laid out, be permitted to use the same as a road,* unless he shall have signified his intention of so making use of the same, to the jury or commissioners who ascertained the damages sustained by laying out such road, and before such damages were so ascertained." (1 R. S. 513, §§ 54, 77-79.) The road is paid for and owned by the applicant. The public has no title to, nor interest in it. No citizen has a right to use the road as he does the public highway. He can only use it when he has business with the road owner, or some other lawful occasion for going to the land intended to be benefited by the road. He can only justify an entry on the road, when he could justify an entry on the land on account of which the road was laid out. Even the owner of the land over which the road passes, unless he has given notice of such an intention before the damages are assessed, has no right to use the road for his own purposes; and if he does so, or if his fences encroach upon the road, the owner of the road may have an action against him. (Lambert v. Hoke, 14 John. 383; Herrick v. Stover, 5 Wend. 580.) In short, the road is the private property of the applicant. In the words of the statute, the road "shall be for the use of such applicant, his heirs and assigns."

This right of way is an incorporeal hereditament, in which the owner has an estate of inheritance. The owner of the land over which the road is laid has not lost the entire fee, but he has lost the beneficial use and enjoyment of his property forever. It is not, however, material to enquire what *quantum* of interest has passed from him. It is enough that some interest—some portion of his estate, no matter how small—has been taken from him without his consent. The property of A. is taken, without his permission, and transferred to B. Can such a thing be rightfully done? Has the legislature any power to say it may be done?

I will not stop to enquire whether the damages must not be paid before the title will pass. The difficulty lies deeper than that. Whatever sum may be tendered, or however ample may be the provision for compensation, the question still remains, can the legislature compel any man to sell his land or his goods, or any interest in them, to his neighbor, when the property is not to be applied to public use? Or, must it be left to the owner to say, when, to whom, and upon what terms he will part with his property, or whether he will part with it at all?

The right to take private property for *public* purposes is one of the inherent attributes of sovereignty, and exists in every independent government. Private interests must yield to public necessity. But even this right of eminent domain cannot be exercised without making just compensation to the owner of the property. (Const. Art. 7, § 6.) And thus, what would otherwise be a burden upon a single individual, has been made to fall equally upon every member of the state. But there is no provision in the constitution that just compensation shall be made to the owner when his property is taken for *private* purposes; and if the power exists to take the property of one man without his consent and transfer it to another, it may be exercised without any reference to the question of compensation. The power of making bargains for individuals has not been delegated to any branch of the government, and if the title of A. can, without his fault, be transferred to B., it may as well be done without as with a consideration. This view of the question is sufficient to put us upon the enquiry, where can the power be found to pass such a law as that under which the defendants attempt to justify their entry upon the plaintiff's land? It is not to be presumed that such a power exists, and those who set it up should tell where it may be found.

Under our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the state who transcends his jurisdiction, are utterly void. Where, then, shall we find a delegation of power to the legislature to take the property of A. and give it to B., either with or without compensation? Only one clause of the constitution can be cited in support of the power, and that is the first section of the first article, where the people have declared that "the legislative power of this state shall be vested in a senate and assembly." It is readily admitted that the two houses, subject only to the qualified negative of the governor, possess all "the legislative power of this state;" but the question immediately presents itself, what is that "legislative power," and how far does it extend? Does it reach the life, liberty or property of a citizen who is not charged with a transgression of the laws, and when the sacrifice is not demanded by a just regard for the public welfare? In Wilkinson v. Leland, (2 Peters, 657,) Mr. Justice Story says: "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country should be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty

—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention." He added: "We know of no case in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced." (See also 2 Kent's Com. 13, 340, and cases there cited.) The security of life, liberty and property, lies at the foundation of the social compact; and to say that this grant of "legislative power" includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established. If there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing myself to the conclusion that the clause under consideration had clothed the legislature with despotic power; and such is the extent of their authority if they can take the property of A., either with or without compensation, and give it to B. "The legislative power of this state" does not reach to such an unwarrantable extent. Neither life, liberty nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of the power. Such, at least, are my present impressions.

But the question does not necessarily turn on the section granting legislative power. The people have added negative words, which should put the matter at rest. "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless *by the law of the land,* or the judgment of his peers." (Const. Art. 7, § 1.) The words "by the law of the land," as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses, "You shall be vested with 'the legislative power of the state;' but no one 'shall be disfranchised, or deprived of any of the rights or privileges' of a citizen, unless you pass a statute for that purpose:" in other words, "You shall not do the wrong, unless you choose to do it." The section was taken with some modifications from a part of the 29th chapter of *Magna Charta*, which provided, that no freeman should be taken, or imprisoned, or be disseised of his freehold etc., but by lawful judgment of his peers, or *by the law of the land.* Lord Coke in his commentary upon this statute says, that these words, "by the law of the land," mean "by the due course and process of law;" which he afterwards explains to be, "by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law." (2 Inst. 45, 50.) In North Carolina and Tennessee, where they have copied almost literally this part of the 29th chapter of *Magna Charta,* the terms "law of the land" have received the same construction. (Hoke v. Henderson, 4 Dev. 1; Jones v. Perry, 10 Yerger, 59; and see 3 Story on Const. U. S. 661; 2 Kent's Com. 13.) The meaning of the section then seems to be, that no member of the state shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. It cannot be done by mere legislation.

But if there can be a doubt upon the first section of the seventh article, there can, I think, be none that the seventh section of the same article covers the case. "No person shall be deprived of life, liberty, or property, *without due process of law;* nor shall private property be taken for public use, without just compensation." In the matter of Albany-Street, (11 Wend. 149,) where it was held that private property could not be taken for any other than public use, Chief Justice Savage went mainly upon the implication contained in the last member of the clause just cited. He said: "The constitution, by authorizing the appropriation of private property to public use, impliedly declares, that for any other use, private property shall not be taken from one and applied to the private use of another." And in Bloodgood v. The Mohawk & Hudson Rail Road Co. (18 Wend. 59,) Mr. Senator Tracy said, the words should be construed "as equivalent to a constitutional declaration, that private property, without the consent of the owner, shall be taken *only* for the public use, and then only upon a just compensation." I feel no disposition to question the soundness of these views: but still it seems to me that the case stands stronger upon the first member of the clause: "No person shall be deprived of life, liberty or property, *without due process of law.*" The words "due process of law," in this place, cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property. It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty and property; and if the latter can be taken without a forensic trial and judgment, there is no security for the others. If the legislature can take the property of A. and transfer it to B., they can take A. himself, and either shut him up in prison, or put him to death. But none of these things can be done by mere legislation. There must be "due process of law." Perhaps the whole clause should be read together, (Matter of John and Cherry Streets, 19 Wend. 659,) and then if it do not, as I have supposed, amount to a direct prohibition against taking the property of one and giving it to another, it contains, at the least, an implication too strong to be resisted that such an act cannot be done. * * *

Cowen, J., concurred.

Nelson, Ch. J., dissenting. * * * There can be no doubt, the universal opinion heretofore has been, that the law authorizing the laying out of private roads stands upon the same principle with the law in respect to highways; and that all these improvements, if not equally necessary, are at least so much a matter of public concern as to justify the full exercise of the right of eminent domain.

I will add, if the government of this state does not possess the power of authorizing the laying out of private roads, it is probably the only state government in the union to which the power has been denied; and I may probably say, the only government in the world.

COMMONWEALTH v. ALGER.

1851. Supreme Judicial Court of Massachusetts. 7 Cush. 53.

[The defendant was convicted for violation of statutes forbidding the building of wharves beyond harbor lines established by one of the statutes. By the agreed statement of facts the defendant built his wharf on his own flatland, not beyond low water-mark, and although it extended beyond the statutory line, it did not interfere with navigation. The case was reserved for the opinion of the Supreme Judicial Court on questions of law.]

Shaw, C. J., delivered the opinion of the court. * * *

Assuming, then, that the defendant was owner in fee of the soil and flats upon which the wharf in question was built, it becomes necessary to inquire whether it was competent for the legislature to pass the Acts establishing the harbor lines, and what is the legal validity and effect of those Acts. * * *

The manifest object of these statutes is to prevent injurious obstructions in the harbor of Boston, and to secure the free, common, and unobstructed use thereof, for the citizens of the Commonwealth, and all other persons, for navigation with ships, boats, and vessels of all kinds, as a common and public right. If this can be done, without an unwarrantable encroachment on the rights of private property, it is an object of great importance, and one in which the holders of riparian rights, as well as all other holders of real estate, and the whole community, have a deep and abiding interest.

We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others, having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth, as well that in the interior as that bordering on tide-waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.

This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same.

It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well-ordered governments, and where its fitness is so obvious, that all well-regulated minds will regard it as reasonable. Such are the laws to prohibit the use of warehouses for the storage of gunpowder near habitations or highways; to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be covered with slate or other incombustible material; to prohibit buildings from being used for hospitals for contagious diseases, or for the carrying on of noxious or offensive trades; to prohibit the raising of a dam, and causing stagnant water to spread over meadows, near inhabited villages, thereby raising noxious exhalations, injurious to health and dangerous to life.

Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building, and cover it with shingles, he might obtain a larger profit of his land, than if obliged to build of stone or brick, with a slated roof. If the owner of a warehouse in a cluster of other buildings could store quantities of gunpowder in it for himself and others, he might be saved the great expense of transportation. If a landlord could let his building for a small-pox hospital, or a slaughter-house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, *Sic utere tuo, ut alienum non lædas*. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain. The distinction, we think, is manifest in principle, although the facts and circumstances of different cases are so various, that it is often difficult to decide whether a particular exercise of legislation is properly attributable to the one or the other of these two acknowledged powers. * * *

And so in the exercise of the more general power of government, so to restrain the injurious use of property, it seems to apply more significantly and more directly to real estate thus situated on the sea-shore, separating the upland from the sea, to which the public have a common and acknowledged right, so that such estate should be held subject to somewhat more restrictive regulations in its use, than interior and upland estate remote from places in which the public have a common right. The circumstances are different. In respect to land lying in the interior, and used for agricultural purposes, there is little occasion to impose any restraint upon the absolute dominion of the owner, because such restraint is not necessary to prevent it from being injurious. But the circumstances are entirely different in regard to the sea-shore, which lies between the sea, admitted to be common to all, and the use of which is of vast importance to the public, and ports and places, without access to which, the use of the sea for navigation would be of little value.

* * *

Wherever there is a general right on the part of the public, and a general duty on the part of a land-owner, or any other person, to respect such rights, we think it is competent for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it. It may be said in general terms, independently of any positive enactment, that it is the right of society, in the midst of a populous settlement, to be exempt from the proximity of dangerous and noxious trades; and that it is the duty of the owner of real estate, in the midst of many habitations, to abstain from erecting buildings thereon, or otherwise using it, for carrying on a trade dangerous to the lives, health, or comfort of the inhabitants of such dwellings; although a trade in itself useful and beneficial to the public. But such general duty and obligation not being fixed by a rule precise enough for practical purposes, we think it is competent for the legislature to interpose, and by a specific enactment to declare what shall be deemed a dangerous or noxious trade, under what circumstances and within what distance of habitations it may or shall not be set up, how the use of it shall be regulated, and to prohibit any other than such regulated use, by specific penalties.

* * *

But in reference to the present case, and to the Act of the Legislature, establishing lines in the harbor, beyond which private proprietors are prohibited from building wharves, it is urged that such a restraint upon the estate of an individual, debarring him to some extent from the most beneficial use of it, is in effect taking his estate. If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable. But we are to consider the subject-matter, to which such restraint applies. The value of this species of estate, that of shore and flats, consists mainly in the means it affords of building wharves from the upland towards deep water, to place merchandise and build wharves upon, and principally to afford access, to vessels requiring considerable depth of water, from the sea to suitable landings. Now, if along a shore where there are flats of considerable extent, one were restrained to a certain length, whilst others were allowed to extend further, the damage might be great. So if one were allowed to extend, and the coterminous proprietors adjacent were restrained, it would be obviously more injurious. The one extended would stop or check the current along the others, cause mud to accumulate near them, and thus render the water shoal at those wharves. But where all are permitted to extend alike, and all are restrained alike, by a line judiciously adapted to the course of the current, so that all have the benefit of access to their wharves, with the same depth of water, and the same strength of current at their heads, the damage must be comparatively less.

But of this the legislature must judge. Having once come to the conclusion that a case exists, in which it is competent for the legislature to make a law on the subject, it is for them, under a high sense of duty to the public and to individuals, with a sacred regard to the rights of property and all other private rights, to make such reasonable regulations as they may judge necessary to protect public and private rights, and to impose no larger restraints upon the use and enjoyment of private property, than are in their judgment strictly necessary to preserve and protect the rights of others. * * *

In regard to the other suggestion, that it is found by the case that the particular wharf of Mr. Alger did not obstruct or impede navigation, it is proper to say, that if we are right in principle, we are bound to hold that this circumstance can afford no defence. A consideration of this fact illustrates the principles we have been discussing. The reason why it is necessary to have a certain and authoritative law, is shown by the difficulty, not to say impracticability, of inquiring and deciding as a fact, in each particular case, whether a certain erection in tide-water is a nuisance at common law or not; and when ascertained and adjudged, it affords no rule for any other case, and can have little effect in maintaining and protecting the acknowledged public right. It is this consideration (the expediency and necessity of defining and securing the rights of the public), which creates the exigency, and furnishes the legislature with the authority to make a general and precise law; but when made, because it was just and expedient, and because it is law, it becomes the duty of every person to obey it and comply with it. The question under the statute therefore is, not whether any wharf, built after the statute was made and promulgated, was an actual obstruction to navigation, but whether it was within the prohibited limit.

On the whole, the court are of opinion that the Act fixing a line within the harbor of Boston, beyond which no riparian proprietor should erect a wharf or other permanent structure, although to some extent it prohibited him from building such structure on flats of which he owned the fee, was a constitutional law, and one which it was competent for the legislature to make; that it was binding on the defendant, and rendered him obnoxious to its penalties, if he violated its provisions.

"Police" in the current sense of policeman came into common use in England only after 1829 when the first London police force was established supplanting or supplementing the former watchmen. English writers of the 18th century and earlier used it in senses more closely resembling its original Greek sense of state and government, just as the word "policy" (derived from the same source through the Latin *politia*) was then used. Thus an English writer said in 1612, "French Pollicie consists of Three Estates, the Princes, Nobles, Commons." To say that the root Greek word *polis* meant "city" is misleading unless it is remembered that Greek cities were states. The more usual use of "police" (a form derived through the French) in England during the 18th century and the first quarter of the 19th is, administering the affairs of people by organized government; regulation, discipline and control of a community. Thus, Swift wrote in 1761, "Nothing is held more commendable in all great cities * * * than what the French call the *police*; by which word is meant the government thereof." Erskine, Inst. Laws of Scotl. (1773) II, 714: "Offences against the laws enacted for the police or good government of a country are truly crimes against the state." Blackstone (1769) Comm. Bk. IV, Ch. 13, 162: "By the public policy and economy, I mean the due regulation and domestic order of the Kingdom."

The later narrowing of the sense is seen in: Brougham (1844) Brit. Const. XIX (ed. 1862) 324: "By police is properly meant the care of preventing infractions of the law, detecting offenders, bringing them to justice." The above extracts are from Murray's English Dictionary.

Marshall used the word in the broader sense of regulating all kinds of conduct, thus, in Gibbons v. Ogden (1824) 9 Wheat. 1, 208: "The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens" * * *. Also, in the same case, discussing, without deciding, whether a state has some power to regulate acts of foreign or interstate commerce, which occur within the state, Marshall said: "Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the Constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several states,' or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; * * *." pp. 209-210.

It is easy to describe "police power" as power regulatory or prohibitory of individual conduct. It is a different matter to define the scope of a state's police power under the Constitution of the United States. Numerous and somewhat conflicting generalizations may be found in the opinions of judges. These occur in cases where the question is whether the Fourteenth Amendment diminished the powers of the states, or whether the prohibition that a state shall not pass any law impairing the obligation of contracts, or the grant to Congress of power to regulate foreign and interstate commerce, deprived the states of power which they would have had if these provisions were not in the Constitution. Of course, if the present police power of a state is merely the residuum of regulatory and prohibitory power, the residuum possessed after the subtractions made by all federal constitutional limitations are accounted for, it seems that the concept is of little aid in determining the scope of one of the limitations. You have a single, simple equation containing two unknown quantities.

The assertion that a given act, regulation or command, by a state is within its police power (authority) is a conclusion and not a premise. (In fact it is two conclusions: (1) that it is within the scope of the state's powers, (2) that it is "police power.") A person unconscious that he does not know the scope of a state's police power may assume that he is reasoning when he says that a given regulation put forth by a state is within its police power *therefore* the constitutional limitation in question is not to be interpreted as depriving the state of power to make the regulation. He is not conscious that he is dealing with two unknowns; that he will know either one only when he settles the limits of the other,—or rather that an authoritative answer to the question, is this specific regulation permissible, simultaneously makes both the unknowns known to that extent. May a state validly regulate employers and employees by prescribing a minimum wage to be paid the employee? This in fact would be a regulation. It is one which a legislature might believe would promote human welfare. It is the sort of thing which causes us to think of "police power." If the court of last resort says the regulation is valid, we then know something of the scope of the police power and something of the scope of the restriction which the Fourteenth Amendment puts upon the states. If the court of last resort holds that the regulation is invalid, we discover that the state's police power is less and that the quantity of the restriction of the Fourteenth Amendment is greater.

Of course Congress also has police power. It may "police" (regulate) the conduct which constitutes the carrying on of foreign and interstate commerce. It may forbid persons to carry lottery tickets from state to state, or transportation of women from state to state for immoral purposes, or require safety devices on trains that operate on tracks over which interstate commerce is carried on. The power to pass a bankruptcy law is a police power. Under it Congress provides for the discharge of creditor's claims without full payment. It is supposed that economic welfare is promoted by giving debtors a fresh start. Congress may to some extent legislate to prevent fraud, e. g., so far as this can be accomplished by "punishment of counterfeiting the securities and current coin of the United States" Const. Art. I, Sec. 8, Cl. 6, or so far as frauds may be prevented by prohibiting the use of the mails for fraudulent purposes. Art. I, Sec. 8, Cl. 7. In those areas in which Congress is the sole governing authority its police power is as full as is that of a state government, even fuller. In the state areas, since the legislative power of the national government is restricted to specified subject matters, its police power is likewise restricted to those same matters. Quite otherwise is it with a state, whose authority extends to all subject matters in the state not excepted by the grants to the national government. May the people of a state in governing themselves as to this wide range of subject matters regulate or prohibit conduct or impose duties or liabilities without limit? Is the "police power" of a state unlimited as to these subject matters? These several statements are made dogmatically in form,—without citation of authority—to challenge contradiction or verification by the student as he proceeds.—Editor.

"This statute passed in the exercise of that particular authority called the police power, the limitations of which no court has yet undertaken to precisely define * * *." Day, J., in Coppage v. Kansas (1915) 236 U. S. 1, 32, 59 L. ed. 441.

"The police power is incapable of exact definition and of a precise limitation. It seems to be a power to which are referred all governmental acts which are incapable of arrangement under any other distinct head, and which are at the same time justifiable, as internal regulations having in view facility of intercourse between citizen and citizen, the preservation of good order, good manners and morals, and the health of the public." George, C. J., in Town of Macon v. Patty (1879) 57 Miss. 378, 407, 34 Am. Rep. 451.

"It would be presumptuous for any court to attempt to formulate an exact definition of the term 'the police power of the state.' Legal definitions do not sum themselves up in single sentences. They are, and of necessity must be, more or less general and elastic in order that the courts may apply them to the infinite variety of circumstances which may arise in the relations and affairs of mankind in civilized society." Tillinghast, J., in State v. Dalton (1900) 22 R. I. 77, 80, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818.

"State police in its widest sense comprehends the whole system of internal regulation by which the state seeks not only to preserve the public order and to prevent offenses against her authority, but also to establish for the intercourse of one citizen with another those rules of justice, morality and good conduct which are calculated to prevent a conflict of interests and to insure to everyone the uninterrupted enjoyment of his own, as far as is reasonably consistent with a like enjoyment of equal rights by others." Clifford, J., in Tennessee v. Davis (1880) 100 U. S. 257, 300, 25 L. ed. 648.

"The learned counsel for the railway company seem to think that the adjudications relating to the police power of the state to protect the public health, the public morals and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals or the public safety. * * * We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety." Harlan, J., in Chicago, B. & Q. R. Co. v. Drainage Comrs. (1906) 200 U. S. 561, 592, 50 L. ed. 596.

"That there is a power, sometimes called the police power, which has never been surrendered by the states, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all the cases. Gibbons v. Ogden, 9 Wheat. 1, 203. In its broadest sense, as sometimes defined, it includes all legislation and almost every function of civil government. Barbier v. Connolly, 113 U. S. 27, 31. As thus defined, we may, not improperly, refer to that power the authority of the state to create educational and charitable institutions, and provide for the establishment, maintenance, and control of public highways, turnpike roads, canals, wharves, ferries, and telegraph lines, and the draining of swamps. Definitions of the police power must, however, be taken, subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land." Harlan, J., in New Orleans Gas Light Co. v. Louisiana Light &c. Mfg. Co. (1885) 115 U. S. 650, 661, 29 L. ed. 516.

"The term 'police power' is often used as a term of convenience and not of clearly ascertained legal principle. It was found to be the most convenient phrase for designating the extent of state legislation, when such legitimate legislation covered the same ground included in the exclusive power of legislation given to Congress; notably in the wide field covered by the power to regulate interstate and foreign commerce. As used in this connection the term has acquired a more definite meaning through the many decisions of the United States Supreme Court, but such meaning relates rather to what it has been decided to cover, than to what it may in fact cover." Hamersley, J., in In re Clark (1894) 65 Conn. 17, 40, 31 Atl. 522, 28 L. R. A. 242.

"Broadly speaking, the police power is all of the power of the state which has not been delegated to the general government and which is not restricted by the Constitution. While it is true that there are many definitions of that power and differentiations of the powers of the state, yet it is wholly immaterial what a power may be called, so long as it is known to exist. The General Assembly has all power for general legislation which is not delegated to the general government and which is not inhibited by the federal or state Constitution." Hill, C. J., in Hendricks v. Block (1906) 80 Ark. 333, 338-339, 97 S. W. 63.

"The phrase 'police power' has been sometimes used by writers upon legal subjects as if it denoted some peculiar and transcendent form of legislative authority. The word 'police' does not naturally carry any such meaning. Its use in this connection came into our law early in the nineteenth century. Russell, The Police Power of the State, 231. * * * So, as applied to the state, police laws are laws of general administration and government. Its power to enact such laws extends over all subjects within its territorial limits. Prigg v. Pennsylvania, 16 Pet. 539, 625. The police powers of a state, in the apt words of Chief Justice Taney, 'are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions.' The License Cases, 5 How. 504, 583. If they are exercised by legislation which violates any right guaranteed by the national or state Constitution, they are so far forth invalid. Leisy v. Hardin, 135 U. S. 100, 108; State v. Conlon, 65 Conn. 478." Baldwin, J., in McKeon v. N. Y., N. H. & H. R. Co. (1902) 75 Conn. 343, 347, 53 Atl. 656, 61 L. R. A. 736.

"Assuming that, in the formation of our government, certain powers necessary to the administration of their internal affairs are reserved to the states, and that among these powers are those for the preservation of good order, of the health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases, and other matters of legislation of like character, they [counsel] insist that the power here exercised falls within this class, and belongs rightfully to the states.

"This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.

"Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on which their enactments rest is examined, may be referred to different sources of power, and supported equally well under any of them. A statute may at the same time be an exercise of the taxing power and of the power of eminent domain. A statute punishing counterfeiting may be for the protection of the private citizen against fraud, and a measure for the protection of the currency and for the safety of the government which issues it. It must occur very often that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable.

"But, however difficult this may be, it is clear, from the nature of our complex form of government, that, whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states." Miller, J., in Henderson v. Mayor of New York (1875) 92 U. S. 259, 271-272, 23 L. ed. 543.

"The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights. * * * But neither the Amendment—broad and comprehensive as it is—nor any other Amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." Field, J., in Barbier v. Connolly (1885) 113 U. S. 27, 31, 28 L. ed. 923.

"What are the police powers of a state? They are nothing more or less than the powers of government. * * * And whether a state passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, * * * the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States." Taney, C. J., in License Cases (1847) 5 How. 504, 583, 12 L. ed. 256.

"Furthermore, the exercise of this power, embracing nearly all legislation of a local character, is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases.

"The federal Constitution and the laws passed within its authority are by the express terms of that instrument made the supreme law of the land. The Fourteenth Amendment protects life, liberty, and property from invasion by the states without due process of law." Day, J., in Buchanan v. Warley (1917) 245 U. S. 60, 74, 62 L. ed. 149.

WESTERVELT v. GREGG.

1854. New York Court of Appeals. 12 N. Y. 202.

[The proceedings below were before a surrogate to determine the alleged right of Gregg to a legacy given to Gregg's wife by a will of which Westervelt was executor, the testator having died in 1840. The opposition was based upon the New York statute of 1848 which declared the property of a wife to be her sole and separate property, destroying the common law right of the husband to reduce to his possession the wife's choses in action (including legacies). After holding that the terms of the statute prevented an interpretation that it was not intended to operate retrospectively.]

Denio, J. * * * I am of opinion that the act, in its application to this case, is a violation of the constitution of this state. Among the limitations of the powers of government contained in that instrument is the one which declares that "no person shall be deprived of life, liberty or *property*, without due process of law." (Const., art. 1, § 6.) That the right which the respondent had to this legacy, the instant before the act of 1848 took effect, was property, in the justest sense of that term, I cannot doubt. An immediate right of action for the recovery of money, which, when recovered, is to belong to the party in whom the right of action exists, subject to be defeated only by the contingency that a person in being may die before judgment can be obtained, is a valuable pecuniary interest, which deserves protection equally with rights which are absolute and unconditional. Besides, this was an interest which the respondent might sell, and for which he might receive the consideration to his own use. This property the act, if valid, has effectually deprived him of. It declares it shall no longer belong to him, but shall be the property of his wife, as though she were a single female. The act does not fall within the meaning of *due process of law*. That term according to Lord Coke, means being brought in to answer, according to the "old law of the land." (2 Inst, 50; and see, also, Taylor v. Porter, 4 Hill, 140, and cases cited by Bronson, J.; 2 Kent's Com., 13.)

The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government. It does not, of course, touch the right of the state to appropriate private property to public use upon making due compensation, which is fully recognized in another part of the constitution; but no power in the state can legally confer upon one person or class of persons the property of another person or class, without their consent, whatever motives of policy may exist in favor of such transfer.

I have intentionally forborne to rely upon the principle mentioned in some cases, of a supposed implied restriction upon legislative power, arising out of the nature of free institutions; firstly, because I suppose a judgment in favor of the respondent will stand firmly upon express constitutional provisions, but principally because, as at present advised, I am not prepared to assent to the doctrine that the courts can limit the authority of the legislature by exceptions which are not found in the constitution itself. (2 Kent's Com., 340, and cases cited in note (a); Taylor v. Porter, supra; Wilkinson v. Leland, 2 Pet., 657.)

* * * All the judges, except Ruggles, J., who took no part in the decision, concurred.

Judgment accordingly.

WYNEHAMER v. THE PEOPLE.

THE PEOPLE v. TOYNBEE.

1856. New York Court of Appeals. 13 N. Y. 378.

[Wynehamer was indicted in the court of general sessions for the county of Erie, N. Y., for selling intoxicating liquor in violation of a New York statute, entitled "An Act for the Prevention of Intemperance, Pauperism and Crime." The statute is sufficiently stated in the opinion. At the trial there was evidence that the defendant had made several sales of liquor at his bar, to be drunk on the premises. The jury found the defendant guilty. The trial court sentenced him to pay a fine of $50. On appeal the Supreme Court affirmed, and defendant took a writ of error to the New York Court of Appeals, assigning among other alleged errors the exclusion of evidence offered to show that the liquor sold had been lawfully acquired by the defendant before the prohibitory law became operative. The case of People v. Toynbee involved another provision of the statute which authorized trials at special sessions without a jury. Toynbee had been convicted by such procedure. Portions of the opinion of Hubbard, J., dealing with Toynbee's case are omitted. The disposition of his case is shown in the reporter's summary which follows below, after Hubbard's opinion. Wynehamer's case involved only the substantive operation of the statute.]

Hubbard, J. * * * The next question to be considered relates to the prohibitory character of the law, and its vindicatory provisions as it respects existing rights of property in liquor at the time the Act took effect. This is purely a question of legislative power, under the fundamental law. It is needless to say that the courts have no concern with the wisdom or expediency of the enactment to accomplish the beneficent ends indicated by the title. The policy of this government, from its foundation, certainly vindicates the political necessity and economy of stringent laws circumscribing the sale of spirituous liquors. I entertain no doubt of the constitutional competency of the legislature to prohibit entirely the commerce, within the state, in liquor as a beverage, by laws prospective in their operation. If, in the judgment of the legislature, the public welfare required it, the future production, manufacture, or acquisition of liquor might be prohibited. The sovereign power of the state in all matters pertaining to the public good, the health, good order, and morals of the people, is omnipotent. Laws intended to promote the welfare of society are within legislative discretion, and cannot be the just subject of judicial animadversion, except when it is seen that the constitutional guarantees of private property have been invaded. The police power is, of necessity, despotic in its character, commensurate with the sovereignty of the state; and individual rights of property, beyond the express constitutional limits, must yield to its exercise. And in emergencies, it may be exercised to the destruction of property, without compensation to the owner, and even without the formality of a legal investigation. It is upon this principle that health and quarantine laws are established; that a building is blown up to arrest a conflagration in a populous town; that the public market is purged of infectious articles; that merchandise on ship-board, infested with pestilence, is cast into the deep, and public nuisances are abated. It is the public exigency which demands the summary destruction, upon the maxim that the safety of society is the paramount law. It is the application of the personal right or principle of self-preservation to the body politic. I know of no limits to the exercise of the police power vested in the legislature, except the restrictions contained in the written constitution. Under our system of government, with co-ordinate branches, each independent within its sphere, and all deriving their powers from a common source, the fundamental law, one cannot exercise a supremacy over the other, except as it finds its warrant for it in that law. The judiciary possesses no legitimate authority over acts of the legislature, aside from the constitutional grant; and even this authority is exercised in an indirect manner, when its powers are appealed to, to carry a statutory law into effect; and then only as it respects the individual rights of property or person.

It is said that this idea of the omnipotency of the legislature, aside from the express constitutional restrictions, is a fallacy. It is conceded that all power emanates from the people, and that the written constitution clothes the legislature with all the power it possesses. But the grant of power in that instrument is general, of all the legislative power of the state; what this is precisely, is not and cannot well be defined. Aside from the express limitations, it is believed to embrace all the common-law power which the legislature would have possessed had the fundamental law remained, as in England, a part of the unwritten law of the state. This is by no means an alarming proposition. The Declaration of Rights, forming the guarantee of personal liberty and property in the first article of the [New York] Constitution, when construed according to its full spirit and intent, is quite ample to protect the citizen against the unauthorized encroachments of the legislature; to protect against all sumptuary laws and laws of kindred character, which have not the public good for their object. I am opposed to the judiciary attempting to set bounds to legislative authority, or declaring a statute invalid upon any fanciful theory of higher law or first principles of natural right outside the constitution. If the courts may imply limitation, there is no bound to implication except judicial discretion, which must place the courts above the legislature and also the constitution itself. This is hostile to the theory of the government. The constitution is the only standard for the courts to determine the question of statutory validity.

There is no constitutional restriction upon the power of the legislature in the regulation of the sale or traffic in intoxicating drinks, whether affecting existing rights of property in liquor or not. As a scheme of regulation, the degree of the limitation of the sale or traffic is a matter of legislative discretion. The fault of the present law is, that it does not profess to be a scheme of regulation. There is no attempted discrimination between liquor owned at the time the law took effect and that acquired afterwards. I have reflected with much attention to see whether the courts could not make the discrimination, for instance, as a question of fact, to be ascertained in a given case, but I have encountered the insurmountable difficulty, that the legislature plainly intended that there should be no such distinction. No defence on a trial could be admitted on such ground, for the reason that it would be against the manifest policy of the Act. It is the intent of the statute alone which the courts are authorized to execute.

The prohibitory feature of the law must, therefore, be regarded as extending to all liquor in the state at the time the Act took effect. In this aspect I will, in a few words, give my views of its unconstitutionality as it respects vested rights of property in liquor, under the organic law, which forbids the citizen being deprived of his property without due process of law. That liquor is recognized by the law as property, that the constitution knows no distinction in its guarantees of the rights of property of all kinds, that the constitutionality of the law is to be tested the same as though it related to some other and perhaps better species of property, is not questioned. The constitution surrounds liquor, as property, with the same inviolability as any other species of property. There can be no room, I think, for difference of opinion as to the meaning of the phrase, "due process of law," as used in the constitution. It means an ordinary judicial proceeding. In a criminal case, an arraignment, formal complaint, confronting of witnesses, a trial, and regular conviction and judgment. When a forfeiture of property is made a part of the punishment, as in this case, the judgment embracing it would, in its effect, deprive the offender of his property in the constitutional method. I think it competent for the legislature to declare a forfeiture of liquor, which an offender may have in possession, as a mode of punishment; and if the law in question was in other respects constitutional, I should uphold the judgment of forfeiture in this case as entirely proper. But the portion of the law which authorizes the seizure and destruction of liquor, where the prosecution or conviction of the owner is not contemplated, I should not hesitate to pronounce void, as property is thus destroyed or the citizen deprived of it without process of law. It is not pretended, nor can it be, that property which is not *per se* a nuisance can be annihilated by force of a statute alone, or by proceeding *in rem* for the punishment of a personal offence. Liquor is not a nuisance *per se,* nor can it be made so by a simple legislative declaration. It does not stand in the category of common nuisances which of themselves endanger the welfare or safety of society. It is its use and abuse as a beverage which gives it its offensive character. Otherwise it is entirely inoffensive. In my judgment, therefore, it cannot be confiscated to prevent its misuse, except through a prosecution against the owner *in personam.*

But it is said that this law does not assume to deprive any one of his property in liquor; that the owner is allowed to retain the unmolested custody and personal use of it, according to his pleasure. It is true that the owner may not be molested in this enjoyment, provided he keeps it in his dwelling-house, if fortunate enough to possess a domicil. I apprehend that by a fair construction of the law he is forbidden, under a severe penalty, from keeping it elsewhere, except for mechanical and other specified uses, although innocent of any intent to sell. I have examined the 1st section of the law with care, to see if it could not be construed in such manner as to make the keeping in any place except a dwelling-house, criminal only when accompanied with an intent to sell. But the section cannot be so construed. The language is too clear to admit of a doubt as to the intention of the legislature. The keeping or deposit in any place, except in a dwelling-house, or place where some trade or business is carried on requiring its use, is prohibited, and by the 4th section of the Act such keeping or deposit is a crime. This, certainly, is a most extraordinary provision, which must have the effect to render a person a criminal who was so unfortunate as to have a quantity of liquor on hand in a forbidden place at the time the law took effect, although he had no intent to violate the law by selling. A person thus circumstanced would have but one of two alternatives to avoid criminality, either just before the law took effect to remove the liquor to a dwelling-house, or to a shop for mechanical and other prescribed uses, or destroy it with his own hand. I can scarcely credit that the legislature designed the law to have this effect; but no other construction can be put upon the language of the 1st section of the law, and we are bound to suppose, judicially, that the legislature intended what their words import.

The law does not even countenance the exportation of the liquor after it took effect. The plain design of the law seems to have been to cut off the liquor itself, to insure its destruction, by circumscribing the keeping of it, and authorizing its seizure, if kept in a forbidden place, or with a criminal intent to sell. *The entire right of sale, within the state at least, is prohibited, and in this, in my judgment, consists the error of the law as it respects liquor owned when the law went into operation.* If there had been any right of sale within the state preserved, for instance, to a licensed vendor, although of minor importance, it would have been sufficient, perhaps, to have impressed the law with a character of regulation, and saved its validity.

But the abolition of all right of sale in the state is equivalent to and is a substantial deprivation of the owner of his property. The right of sale is of the very essence of property in any article of merchandise; it is its chief characteristic; take away its vendible quality and the article is practically destroyed. As applied to merchandise of any description, this effect can be judicially seen. Even if the law allowed exportation, that would be of such minor importance as not to save the law from the charge of effectually depriving the owner of his property in the liquor. It is but of trifling value after the entire domestic market is closed against it.

I am unable, therefore, to avoid the conclusion that the prohibition in the 1st section of the law is invalid, inasmuch as it makes no discrimination, nor allows the courts to make any, but extends to all liquor, irrespective of the time of its acquisition; and that, by closing the domestic or state market, it in effect substantially deprives the owner of liquor, acquired before the law took effect, of his vested right of property therein, without due process of law. * * *

I am of the opinion, therefore, that the judgment of the Supreme Court ought to be affirmed. * * *

[Opinions by COMSTOCK, A. S. JOHNSON, SELDEN, MITCHELL, T. A. JOHNSON, JJ., and by DENIO, C. J., are omitted. The reporter added:]

On deciding these cases, the court passed upon and affirmed the following propositions:

1. That the prohibitory Act, in its operation upon property in intoxicating liquors existing in the hands of any person within this State when the Act took effect, is a violation of the provision in the Constitution of this State which declares that no person shall be "deprived of life, liberty, or property, without due process of law." That the various provisions, prohibitions, and penalties contained in the Act do substantially destroy the property in such liquors in violation of the terms and spirit of the constitutional provision.

2. That inasmuch as the Act does not discriminate between such liquors existing when it took effect as a law, and such as might thereafter be acquired by importation or manufacture, and does not countenance or warrant any defence based upon the distinction referred to, it cannot be sustained in respect to any such liquor, whether existing at the time the Act took effect or acquired subsequently; although all the judges were of opinion that it would be competent for the legislature to pass such an Act as the one under consideration (except as to some of the forms of proceeding to enforce it), provided such Act should be plainly and distinctly prospective as to the property on which it should operate.

3. That the criminal proceeding in a court of special sessions authorized by the said Act is unconstitutional and void because the accused is thereby deprived of the right of trial by jury, guaranteed by the Constitution.

DENIO, C. J., A. S. JOHNSON, COMSTOCK, SELDEN, and HUBBARD, JS., concurred in the foregoing propositions.

Mitchell, J., dissented from the first and second, and concurred in the third.

T. A. Johnson and Wright, Js., dissented from all of them.

All the judges, except T. A. Johnson, Wright, and Mitchell, were in favor of reversing the judgment of the Supreme Court, and of the court of general sessions in the case of Wynehamer.

All the judges, except T. A. Johnson and Wright, were in favor of affirming the judgment of the Supreme Court, which reversed that of the court of special sessions in the case of Toynbee.

Judgments accordingly.

DRED SCOTT v. SANDFORD.

1857. Supreme Court of the United States. 19 How. 393.

[This case was brought up by writ of error from the Circuit Court of the United States for the district of Missouri to review a judgment by that court for the defendant in an action brought to question the asserted right of the defendant to hold Scott, his wife and two children as slaves in Missouri.]

Taney, C. J.: * * * The plaintiff was a negro slave, belonging to Dr. Emerson, who was a surgeon in the army of the United States. In the year 1834, he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling, from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at said Fort Snelling, unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and Harriet intermarried, at Fort Snelling, with the consent of Dr. Emerson, who then claimed to be their master and owner. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet, and their said daughter Eliza, from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, and Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them, and each of them, as slaves.

In considering this part of the controversy, two questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? * * *

The act of Congress, [the Missouri Compromise Act of 1820] upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the laws of any one of the states. * * *

At the time when the Territory in question was obtained by cession from France, it contained no population fit to be associated together and admitted as a state; and it therefore was absolutely necessary to hold possession of it, as a Territory belonging to the United States, until it was settled and inhabited by a civilized community capable of self-government, and in a condition to be admitted on equal terms with the other states as a member of the Union. But, as we have before said, it was acquired by the general government, as the representative and trustee of the people of the United States, and it must therefore be held in that character for their common and equal benefit; for it was the people of the several states, acting through their agent and representative, the federal government, who in fact acquired the Territory in question, and the government holds it for their common use until it shall be associated with the other states as a member of the Union. * * *

In some cases a government, consisting of persons appointed by the federal government, would best subserve the interests of the Territory, when the inhabitants were few and scattered, and new to one another. In other instances, it would be more advisable to commit the powers of self-government to the people who had settled in the Territory, as being the most competent to determine what was best for their own interests. But some form of civil authority would be absolutely necessary to organize and preserve civilized society, and prepare it to become a state; and what is the best form must always depend on the condition of the Territory at the time, and the choice of the mode must depend upon the exercise of a discretionary power by Congress, acting within the scope of its constitutional authority, and not infringing upon the rights of person or rights of property of the citizen who might go there to reside, or for any other lawful purpose. It was acquired by the exercise of this discretion, and it must be held and governed in like manner, until it is fitted to be a state.

But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of government. The powers of the government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the federal government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character, and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the Constitution. The Territory being a part of the United States, the government and the citizens both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the federal government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved.

A reference to a few of the provisions of the Constitution will illustrate this proposition.

For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the government for the redress of grievances.

Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the general government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the Fifth Amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law. * * *

Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States, in every state that might desire it, for twenty years. And the government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident. * * *

[WAYNE and GRIER, JJ., stated that they concurred fully in the opinion of the Chief Justice. DANIEL, CAMPBELL and CATRON, JJ., concurred in holding the statute invalid for reasons apart from Amendment V, without comment however upon the Chief Justice's application of the due process clause. NELSON, J., was of opinion that it was for Missouri law to say what effect if any the sojourn of the Scotts elsewhere might have upon their status in Missouri, that the latest decision of the Supreme Court of Missouri on like facts was that it should have no effect, irrespective of how the law of the place of sojourn regarded them while they were there, and this disposition of the issue made it unnecessary for him to express an opinion on the validity of the statute. McLEAN and CURTIS, JJ., dissented from the conclusion that the statute was invalid. The only expressions in the former's thirty-five page opinion that seem to bear on Amendment V are these, which follow a statement that Congress has power to legislate for and establish government in a Territory: "This being the case I do not see on what ground the Act is held to be void. It did not purport to forfeit property, or take it for public purposes. It only prohibited slavery; in doing which it followed the ordinance of 1787" (p. 547). CURTIS, J., stated that there were no limits to the power and discretion of Congress to govern the Territories "save those positive prohibitions to legislate, which are found in the Constitution," (p. 623), and recurring to this specific point on p. 626, he said:]

Nor, in my judgment, will the position, that a prohibition to bring slaves into a Territory deprives any one of his property without due process of law, bear examination.

It must be remembered that this restriction on the legislative power is not peculiar to the Constitution of the United States; it was borrowed from *Magna Charta;* was brought to America by our ancestors, as part of their inherited liberties, and has existed in all the states, usually in the very words of the great charter. It existed in every political community in America in 1787, when the ordinance prohibiting slavery north and west of the Ohio was passed.

And if a prohibition of slavery in a Territory in 1820 violated this principle of *Magna Charta,* the ordinance of 1787 also violated it; and what power had, I do not say the Congress of the Confederation alone, but the legislature of Virginia, or the legislature of any or all the states of the Confederacy, to consent to such a violation? The people of the states had conferred no such power. I think I may at least say, if the Congress did then violate *Magna Charta* by the ordinance, no one discovered that violation. Besides, if the prohibition upon all persons, citizens as well as others, to bring slaves into a Territory, and a declaration that if brought they shall be free, deprives citizens of their property without due process of law, what shall we say of the legislation of many of the slaveholding states which have enacted the same prohibition? As early as October, 1778, a law was passed in Virginia, that thereafter no slave should be imported into that commonwealth by sea or by land, and that every slave who should be imported should become free. A citizen of Virginia purchased in Maryland a slave who belonged to another citizen of Virginia, and removed with the slave to Virginia. The slave sued for her freedom, and recovered it; as may be seen in Wilson v. Isabel (5 Call's R., 425). See also Hunter v. Hulsher (1 Leigh, 172) and a similar law has been recognized as valid in Maryland, in Stewart v. Oaks (5 Har. and John., 107). I am not aware that such laws, though they exist in many states, were ever supposed to be in conflict with the principle of *Magna Charta* incorporated into the state constitutions. It was certainly understood by the convention which framed the Constitution, and has been so understood ever since, that, under the power to regulate commerce, Congress could prohibit the importation of slaves; and the exercise of the power was restrained till 1808. A citizen of the United States owns slaves in Cuba, and brings them to the United States, where they are set free by the legislation of Congress. Does this legislation deprive him of his property without due process of law? If so, what becomes of the laws prohibiting the slave trade? If not, how can a similar regulation respecting a Territory violate the Fifth Amendment of the Constitution? * * *

HEPBURN v. GRISWOLD (1870) 8 Wall. 603, 622-625, 626, 635, 637, 639: CHIEF JUSTICE CHASE (for the majority of the court, after concluding that a power in Congress to enact a statute making government notes legal tender to discharge private debts, including debts created by contracts made before the statute was enacted, could not be implied, or found included in the auxiliary legislative power conferred by Art. I, Sec. 8, Cl. 18):

"But there is another view, which seems to us decisive, to whatever express power the supposed implied power in question may be referred. In the rule stated by Chief Justice Marshall, the words appropriate, plainly adapted, really calculated, are qualified by the limitation that the means must be not prohibited, but consistent with the letter and spirit of the Constitution. Nothing so prohibited or inconsistent can be regarded as appropriate, or plainly adapted, or really calculated means to any end.

"Let us inquire, then, first, whether making bills of credit a legal tender, to the extent indicated, is consistent with the spirit of the Constitution.

"Among the great cardinal principles of that instrument, no one is more conspicuous or more venerable than the establishment of justice. And what was intended by the establishment of justice in the minds of the people who ordained it is, happily, not a matter of disputation. It is not left to inference or conjecture, especially in its relations to contracts.

"When the Constitution was undergoing discussion in the convention, the Congress of the Confederation was engaged in the consideration of the ordinance for the government of the territory northwest of the Ohio, the only territory subject at that time to its regulation and control. By this ordinance certain fundamental articles of compact were established between the original states and the people and states of the territory, for the purpose, to use its own language, 'of extending the fundamental principles of civil and religious liberty, whereon these republics' (the states united under the Confederation), 'their laws, and constitutions are erected.' Among these fundamental principles was this: 'And in the just preservation of rights and property it is understood and declared that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with or affect private contracts or engagements bona fide and without fraud previously formed.'

"The same principle found more condensed expression in the most valuable provision of the Constitution of the United States, ever recognized as an efficient safeguard against injustice, that 'no state shall pass any law impairing the obligation of contracts.'

"It is true that this prohibition is not applied in terms to the government of the United States. Congress has express power to enact bankrupt laws, and we do not say that a law made in the execution of any other express power, which, incidentally only, impairs the obligation of a contract, can be held to be unconstitutional for that reason.

"But we think it clear that those who framed and those who adopted the Constitution, intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution.

"Another provision, found in the Fifth Amendment, must be considered in this connection. We refer to that which ordains that private property shall not be taken for public use without compensation. This provision is kindred in spirit to that which forbids legislation impairing the obligation of contracts; but, unlike that, it is addressed directly and solely to the national government. It does not, in terms, prohibit legislation which appropriates the private property of one class of citizens to the use of another class; but if such property cannot be taken for the benefit of all, without compensation, it is difficult to understand how it can be so taken for the benefit of a part without violating the spirit of the prohibition.

"But there is another provision in the same Amendment, which, in our judgment, cannot have its full and intended effect unless construed as a direct prohibition of the legislation which we have been considering. It is that which declares that 'no person shall be deprived of life, liberty, or property, without due process of law.'

"It is not doubted that all the provisions of this Amendment operate directly in limitation and restraint of the legislative powers conferred by the Constitution. The only question is, whether an act which compels all those who hold contracts for the payment of gold and silver money to accept in payment a currency of inferior value deprives such persons of property without due process of law.

"It is quite clear, that whatever may be the operation of such an act, due process of law makes no part of it. Does it deprive any person of property? A very large proportion of the property of civilized men exists in the form of contracts. These contracts almost invariably stipulate for the payment of money. And we have already seen that contracts in the United States, prior to the act under consideration, for the payment of money, were contracts to pay the sum specified in gold and silver coin. And it is beyond doubt that the holders of these contracts were and are as fully entitled to the protection of this constitutional provision as the holders of any other description of property.

"But it may be said that the holders of no description of property are protected by it from legislation which incidentally only impairs its value. And it may be urged in illustration that the holders of stock in a turn-pike, a bridge, or a manufacturing corporation, or an insurance company, or a bank, cannot invoke its protection against legislation which, by authorizing similar works or corporations, reduces its price in the market. But all this does not appear to meet the real difficulty. In the cases mentioned the injury is purely contingent and incidental. In the case we are considering it is direct and inevitable.

"If in the cases mentioned the holders of the stock were required by law to convey it on demand to any one who should think fit to offer half its value for it, the analogy would be more obvious. No one probably could be found to contend that an act enforcing the acceptance of fifty or seventy-five acres of land in satisfaction of a contract to convey a hundred would not come within the prohibition against arbitrary privation of property.

"We confess ourselves unable to perceive any solid distinction between such an act and an act compelling all citizens to accept, in satisfaction of all contracts for money, half or three-quarters or any other proportion less than the whole of the value actually due, according to their terms. It is difficult to conceive what act would take private property without process of law if such an act would not.

"We are obliged to conclude that an act making mere promises to pay dollars a legal tender in payment of debts previously contracted, is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress; that such an act is inconsistent with the spirit of the Constitution; and that it is prohibited by the Constitution." * * *

Mr. Justice Miller (with whom concurred Swayne and Davis, JJ.), dissenting. * * *

"Certainly it seems to the best judgment that I can bring to bear upon the subject that this law was a necessity in the most stringent sense in which that word can be used. But if we adopt the construction of Chief Justice Marshall and the full court over which he presided, a construction which has never to this day been overruled or questioned in this court, how can we avoid this conclusion? Can it be said that this provision did not conduce towards the purpose of borrowing money, of paying debts, of raising armies, of suppressing insurrection? or that it was not calculated to effect these objects? or that it was not useful and essential to that end? Can it be said that this was not among the choice of means, if not the only means, which were left to Congress to carry on this war for national existence? * * *

"But it is said that the law is in conflict with the spirit, if not the letter, of several provisions of the Constitution. Undoubtedly it is a law impairing the obligation of contracts made before its passage. But while the Constitution forbids the states to pass such laws it does not forbid Congress. On the contrary, Congress is expressly authorized to establish a uniform system of bankruptcy, the essence of which is to discharge debtors from the obligation of their contracts; and in pursuance of this power Congress has three times passed such a law, which in every instance operated on contracts made before it was passed. Such a law is now in force, yet its constitutionality has never been questioned. How it can be in accordance with the spirit of the Constitution to destroy directly the creditor's contract for the sake of the individual debtor, but contrary to its spirit to affect remotely its value for the safety of the nation, it is difficult to perceive.

"So it is said that the provisions, that private property shall not be taken for public use without due compensation, and that no person shall be deprived of life, liberty, or property, without due course of law, are opposed to the acts under consideration.

"The argument is too vague for my perception, by which the indirect effect of a great public measure, in depreciating the value of lands, stocks, bonds, and other contracts, renders such a law invalid as taking private property for public use, or as depriving the owner of it without due course of law.

"A declaration of war with a maritime power would thus be unconstitutional, because the value of every ship abroad is lessened twenty-five or thirty per cent., and those at home almost as much.

The abolition of the tariff on iron or sugar would in like manner destroy the furnaces, and sink the capital employed in the manufacture of these articles. Yet no statesman, however warm an advocate of high tariff, has claimed that to abolish such duties would be unconstitutional as taking private property.

"If the principle be sound, every successive issue of government bonds during the war was void, because by increasing the public debt it made those already in private hands less valuable.

"This whole argument of the injustice of the law, an injustice which if it ever existed will be repeated by now holding it wholly void; and of its opposition to the spirit of the Constitution, is too abstract and intangible for application to courts of justice, and is, above all, dangerous as a ground on which to declare the legislation of Congress void by the decision of a court. It would authorize this court to enforce theoretical views of the genius of the government, or vague notions of the spirit of the Constitution and of abstract justice, by declaring void laws which did not square with those views. It substitutes our ideas of policy for judicial construction, an undefined code of ethics for the Constitution, and a court of justice for the national legislature. * * *

"If I had entertained doubts of the constitutionality of the law, I must have held the law valid until those doubts became convictions. But as I have a very decided opinion that Congress acted within the scope of its authority, I must hold the law to be constitutional, and dissent from the opinion of the court."[2]

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[2] The court divided 5 to 3. At the next term this decision was overruled 5 to 4 in the Legal Tender Cases, ante, p. 275, 283. For the changes in the number and membership of the court, see ante, p. 283 and footnote. The overruling majority followed the views of the above dissenters as to the non-applicability of the due process clause. Miller and Bradley, JJ., were members of this overruling majority. The student may interest himself in comparing the views of these two men in later cases as to the meaning to be found in the due process of law clause of the Fourteenth Amendment. Chief Justice Chase for the minority in the Legal Tender cases said: "We still think, notwithstanding the argument adduced to the contrary, that it does violate an express provision of the Constitution, and the spirit, if not the letter, of the whole instrument. It cannot be maintained that legislation justly obnoxious to such objections can be maintained as the exercise of an implied power. There can be no implication against the Constitution. Legislation to be warranted as the exercise of implied powers must not be "prohibited, but consistent with the letter and spirit of the Constitution."

"The fifth amendment provides that no person shall be deprived of life, liberty, or property without compensation or due process of law. The opinion of the former minority says that the argument against the validity of the legal tender clause, founded on this constitutional provision, is 'too vague for their perception.' It says that a 'declaration of war would be thus unconstitutional,' because it might depreciate the value of property; and 'the abolition of tariff on sugar, or iron,' because it might destroy the capital employed in those manufactures; and 'the successive issues of government bonds,' because they might make those already in private hands less valuable. But it seems to have escaped the attention of the then minority that to declare war, to lay and repeal taxes, and to borrow money, are all express powers, and that the then majority were opposing the prohibition of the Constitution to the claim of an implied power. Besides, what resemblance is there between the effect of the exercise of these

SLAUGHTER-HOUSE CASES.

1873. Supreme Court of the United States. 16 Wall. 36.

[For the facts and majority opinion see ante, p. 490 and recall the disposition made by the majority of the due process clause, ante, pp. 497-498.]

Mr. Justice Field, dissenting: * * *

In the law in question there are only two provisions which can properly be called police regulations—the one which requires the landing and slaughtering of animals below the city of New Orleans, and the other which requires the inspection of the animals before they are slaughtered. When these requirements are complied with, the sanitary purposes of the act are accomplished. In all other particulars the act is a mere grant to a corporation created by it of special and exclusive privileges by which the health of the city is in no way promoted. It is plain that if the corporation can, without endangering the health of the public, carry on the business of landing, keeping, and slaughtering cattle within a district below the city embracing an area of over a thousand square miles, it

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express powers and the operation of the legal tender clause upon pre-existing debts? The former are indirect effects of the exercise of undisputed powers. The latter acts directly upon the relations of debtor and creditor. It violates that fundamental principle of all just legislation that the legislature shall not take the property of A. and give it to B. It says that B., who has purchased a farm of A. for a certain price, may keep the farm without paying for it, if he will only tender certain notes which may bear some proportion to the price, or be even worthless. It seems to us that this is a manifest violation of this clause of the Constitution." (12 Wall. 579-80). Field, J., concurred with the opinion of Chase, C. J., and added a separate dissenting opinion, saying *inter alia*: "For acts of flagrant injustice such as those mentioned there is no authority in any legislative body, even though not restrained by any express constitutional prohibition. For as there are unchangeable principles of right and morality, without which society would be impossible, and men would be but wild beasts preying upon each other, so there are fundamental principles of eternal justice, upon the existence of which all constitutional government is founded, and without which government would be an intolerable and hateful tyranny. There are acts, says Mr. Justice Chase, in Calder v. Bull [(1798) 3 Dallas, 386] which the federal and state legislatures cannot do, without exceeding their authority. Among these he mentions a law which punishes a citizen for an innocent action; a law which destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; and a law that takes the property from A. and gives it to B. 'It is against all reason and right,' says the learned justice, 'for a people to intrust a legislature with such powers; and therefore it cannot be presumed that they have done it. The genius, the nature, and the spirit of our state governments amount to a prohibition of such acts of legislation, and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid, and punish; they may declare new crimes, and establish rules of conduct for all its citizens in future cases; they may command what is right and prohibit what is wrong but they cannot change innocence into guilt, or punish innocence as a crime, or violate the rights of an antecedent lawful private contract, or the right of private property. To maintain that our federal or state legislatures possess such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.'" p. 670.

would not endanger the public health if other persons were also permitted to carry on the same business within the same district under similar conditions as to the inspection of the animals. The health of the city might require the removal from its limits and suburbs of all buildings for keeping and slaughtering cattle, but no such object could possibly justify legislation removing such buildings from a large part of the state for the benefit of a single corporation. The pretence of sanitary regulations for the grant of the exclusive privileges is a shallow one, which merits only this passing notice. * * *

The question presented is, therefore, one of the gravest importance, not merely to the parties here, but to the whole country. It is nothing less than the question whether the recent amendments to the federal Constitution protect the citizens of the United States against the deprivation of their common rights by state legislation. In my judgment the Fourteenth Amendment does afford such protection, and was so intended by the Congress which framed and the states which adopted it. * * *

It is not necessary, however, as I have said, to rest my objections to the act in question upon the terms and meaning of the Thirteenth Amendment. The provisions of the Fourteenth Amendment, which is properly a supplement to the Thirteenth, cover, in my judgment, the case before us, and inhibit any legislation which confers special and exclusive privileges like these under consideration. The Amendment was adopted to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act, and to place the common rights of American citizens under the protection of the national government. * * *

What, then, are the privileges and immunities which are secured against abridgment by state legislation?

In the first section of the Civil Rights Act Congress has given its interpretation to these terms, or at least has stated some of the rights which, in its judgment, these terms include; it has there declared that they include the right "to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." That act, it is true, was passed before the Fourteenth Amendment, but the Amendment was adopted, as I have already said, to obviate objections to the act, or, speaking more accurately, I should say, to obviate objections to legislation of a similar character, extending the protection of the national government over the common rights of all citizens of the United States. Accordingly, after its ratification, Congress re-enacted the act under the belief that whatever doubts may have previously existed of its validity, they were removed by the Amendment.

The terms, privileges and immunities, are not new in the Amendment; they were in the Constitution before the Amendment was adopted. They are found in the Second Section of the Fourth Article, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and they have been the subject of frequent consideration in judicial decisions. In Corfield v. Coryell, Mr. Justice Washington said he had "no hesitation in confining these expressions to those privileges and immunities which were, in their nature, fundamental; which belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose the Union, from the time of their becoming free, independent, and sovereign;" and, in considering what those fundamental privileges were, he said that perhaps it would be more tedious than difficult to enumerate them, but that they might be "all comprehended under the following general heads; protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole." This appears to me to be a sound construction of the clause in question. The privileges and immunities designated are those *which of right belong to the citizens of all free governments.* Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons. In the discussions in Congress upon the passage of the Civil Rights Act repeated reference was made to this language of Mr. Justice Washington. It was cited by Senator Trumbull with the observation that it enumerated the very rights belonging to a citizen of the United States set forth in the first section of the act, and with the statement that all persons born in the United States, being declared by the act citizens of the United States, would thenceforth be entitled to the rights of citizens, and that these were the great fundamental rights set forth in the act; and that they were set forth "as appertaining to every freeman."

* * *

This equality of right, with exception from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition. The state may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name. The Fourteenth Amendment, in my judgment, makes it essential to the validity of the legislation of every state that this equality of right should be respected. How widely this equality has been departed from, how entirely rejected and trampled upon by the act of Louisiana, I have already shown. And it is to me a matter of profound regret that its validity is recognized by a majority of this court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated. As stated by the Supreme Court of Connecticut, in the case cited, grants of exclusive privileges, such as is made by the act in question, are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal and impartial laws.[3]

I am authorized by the CHIEF JUSTICE, MR. JUSTICE SWAYNE, and MR. JUSTICE BRADLEY, to state that they concur with me in this dissenting opinion.

MR. JUSTICE BRADLEY, also dissenting: [The first and greater part of this dissenting opinion expressed an interpretation of the "abridgment" clause of the Fourteenth Amendment in accord with that ot Justice Field. It then continued:]

If my views are correct with regard to what are the privileges and immunities of citizens, it follows conclusively that any law which establishes a sheer monopoly, depriving a large class of citizens of the privilege of pursuing a lawful employment, does abridge the privileges of those citizens.

The Amendment also prohibits any state from depriving any person (citizen or otherwise) of life, liberty, or property, without due process of law.

In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.

The constitutional question is distinctly raised in these cases; the constitutional right is expressly claimed; it was violated by state law, which was sustained by the state court, and we are called upon in a legitimate and proper way to afford redress. Our jurisdiction and our duty are plain and imperative. * * *

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[3] The student has doubtless noted that Justice Field did not make any express reference to the due process clause in the portion of his opinion above quoted, nor did he in the omitted portions.

MUNN v. ILLINOIS.

1877. Supreme Court of the United States. 94 U. S. 113.

Error to the Supreme Court of the State of Illinois.

Mr. Chief Justice Waite delivered the opinion of the court.

The question to be determined in this case is whether the General Assembly of Illinois can, under the limitations upon the legislative power of the states imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the state having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant—

1. To that part of sect. 8, art. 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States;"

2. To that part of sect. 9 of the same article which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;" and

3. To that part of amendment 14 which ordains that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the states, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several states of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guarantee against any encroachment upon an acknowledged right of citizenship by the legislatures of the states.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their state constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective states, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the states and of the people of the states was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the states, so that now the governments of the states possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private (Thorpe v. R. & V. Railroad Co., 27 Vt. 143); but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *Sic utere tuo ut alienum non lædas.* From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the states upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate * * * the rates of wharfage at private wharves, * * * the sweeping of chimneys, and to fix the rates of fees therefor, * * * and the weight and quality of bread," 3 Stat. 587, sect. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers," 9 Id. 224, sect. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the states from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris,* 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. * * * [Here follow passages from Sir Matthew Hale's writings, as to ferries and wharves.]

This statement of the law by Lord Hale was cited with approbation and acted upon by Lord Kenyon at the beginning of the present century, in Bolt v. Stennett, 8 T. R. 606.

And the same has been held as to warehouses and warehousemen. In Aldnutt v. Inglis, 12 East, 527, decided in 1810, it appeared that the London Dock Company had built warehouses in which wines were taken in store at such rates of charge as the company and the owners might agree upon. Afterwards the company obtained authority, under the general warehousing Act, to receive wines from importers before the duties upon the importation were paid; and the question was, whether they could charge arbitrary rates for such storage, or must be content with a reasonable compensation. * * * [Here follow long quotations from the opinions in this case, in which it is held that the charges must be reasonable.]

In later times, the same principle came under consideration in the Supreme Court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;" but the court said, "there is no motive * * * for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this State, tavern-keepers are licensed; * * * and the County Court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turn-pike roads, and other kindred subjects." Mobile v. Yuille, 3 Ala. N. S. 140.

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit:—

"And whereas divers wagoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," &c. 3 W. & M. c. 12, § 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. New Jersey Nav. Co. v. Merchants' Bank, 6 How. 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. * * * Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. * * * The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. * * * In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great states of the West with four or five of the states lying on the sea-shore, and forms the largest part of interstate commerce in these states. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. * * * They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great states of the West" must pass on the way "to four or five of the states on the sea-shore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, *viz.*, that he * * * take but reasonable toll." Certainly, if any business can be clothed "with a public interest and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the General Assembly to pass laws, "for the protection of producers, shippers, and receivers of grain and produce," art. 13, sect. 7; and by sect. 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, &c., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the Fourteenth Amendment which is relied upon, *viz.*, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Certainly, it cannot be claimed that this prevents the state from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other.

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the State Tax on Railway Gross Receipts, 15 Wall. 293, that "it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a state, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress, in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done.

The remaining objection, to wit, that the statute in its present form is repugnant to sect. 9, art. 1, of the Constitution of the United States, because it gives preference to the ports of one state over those of another, may be disposed of by the single remark that this provision operates only as a limitation of the powers of Congress, and in no respect affects the states in the regulation of their domestic affairs.

We conclude, therefore, that the statute in question is not repugnant to the Constitution of the United States, and that there is no error in the judgment. In passing upon this case we have not been unmindful of the vast importance of the questions involved. This and cases of a kindred character[4] were argued before us more

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[4] In these "cases of a kindred character" the court sustained statutes of Iowa and Wisconsin which prescribed maximum rates for the transportation of passengers and freight by railroads. Chicago, B. & Q. R. Co. v. Iowa (1877) 94 U. S. 155, 24 L. ed. 94; Peik v. Chicago & Northwestern R. Co. (1877) 94 U. S. 164, 24 L. ed. 97. The opinions were very short, the court considering that the issues were covered by the opinion in Munn v. Illinois. Waite, C. J., for the court (Field and Strong, JJ., dissenting) said: "Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and, under the decision in Munn v. Illinois, supra, p. 113, subject to legislative control as to their rates of fare and freight, unless protected by their charters." 94 U. S. p. 161. The court explained that a company's charter would be a protection only if in it there was a definite express provision for exemption from rate regulation without reservation by the state of power to amend or repeal.

In the second of these railway rate cases the court said: "As to the claim that the courts must decide what is reasonable, and not the legislature. This is not new to this case. It has been fully considered in Munn v. Illinois. Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change." 94 U. S. at p. 178. On this point these decisions have subsequently been materially modified to the effect that no legislation by a state legislature, by Congress, or by a state or federal commisthan a year ago by most eminent counsel, and in a manner worthy of their well-earned reputations. We have kept the cases long under advisement, in order that their decision might be the result of our mature deliberations.

Judgment affirmed.

MR. JUSTICE FIELD and MR. JUSTICE STRONG dissented.

MR. JUSTICE FIELD. * * * The power of the state over the property of the citizens under the constitutional guaranty is well defined. The state may take his property for public uses, upon just compensation being made therefor. It may take a portion of his property by way of taxation for the support of the government. It may control the use and possession of his property, so far as may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property. The doctrine that each one must so use his own as not to injure his

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sion can validly fix rates that are so low as not to allow the owner of a railroad or other public utility a fair return on the present value of the property used and useful in serving the public. A rate below this point is styled "confiscatory" and held to be a violation of the requirement against deprivation of property without due process of law; that the only range of reasonableness within which the legislative determination (legislature or commission) is final, in the sense of not subject to judicial review, is a range above the point of confiscatoriness as above defined; that it is a judicial function to review a legislature or commission made schedule of rates to determine whether it is confiscatory and if found to be such to set it aside. Beginning with dictum to this effect in Railroad Commission Cases (1886) 116 U. S. 307, 331, 29 L. ed. 636, the modification was announced as a settled principle in Smyth v. Ames (1898) 169 U. S. 466, 526-528, 42 L. ed. 819, where the court said: "While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry. * * *

"What are the considerations to which weight must be given when we seek to ascertain the compensation that a railroad company is entitled to receive, and a prohibition upon the receiving of which may be fairly deemed a deprivation by legislative decree of property without due process of law? Undoubtedly that question could be more easily determined by a commission composed of persons whose special skill, observation and experience qualifies them to so handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people. But despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a state enactment is in harmony with that law simply because the legislature of the state has declared such to be the case; for that would make the state legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. Art. VI. The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the neighbor—*sic utere tuo ut alienum non lœdas*—is the rule by which every member of society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of state authority. Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent a public calamity, the power of the state over the property of the citizens does not extend beyond such limits.

It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community, comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the police power of the state, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects. The compensation which the owners of property, not having any special rights or privileges from the government in connection with it, may demand for its use, or for their own services in union with it, forms no element of consideration in prescribing regulations for that purpose. If one construct a building in a city, the state, or the municipality exercising a delegated power from the state, may require its walls to be of sufficient thickness for the uses intended; it may forbid the employment of inflammable materials in its construction, so as not to endanger the safety of his neighbors; if designed as a theatre, church, or public hall, it may prescribe ample means of egress so as to afford facility for escape in case of accident; it may forbid the storage in it of powder, nitroglycerine, or other explosive material; it may require its occupants daily to remove decayed vegetable and animal matter, which would otherwise accumulate and engender disease; it may exclude from it all occupations and business calculated to disturb the neighborhood

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theory of our institutions. The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land." The complex difficulties of determining what is a "fair return," the rate, the base, and the elements to be considered as constituting the base are dealt with in courses on public service businesses. See Cases and Readings on Rates by Robert L. Hale, in Smith and Dowling, Cases on Public Utilities (1926) pp. 943-1190; Robinson, Cases on Public Utilities (1926) pp. 307-423. See the latter work for an extensive bibliography, Prefix, pp. XI-XII, XV.

or infect the air. Indeed, there is no end of regulations with respect to the use of property which may not be legitimately prescribed, having for their object the peace, good order, safety, and health of the community, thus securing to all the equal enjoyment of their property; but in establishing these regulations it is evident that compensation to the owner for the use of his property, or for his services in union with it, is not a matter of any importance: whether it be one sum or another does not affect the regulation, either in respect to its utility or mode of enforcement. One may go, in like manner, through the whole round of regulations authorized by legislation, state or municipal, under what is termed the police power, and in no instance will he find that the compensation of the owner for the use of his property has any influence in establishing them. It is only where some right or privilege is conferred by the government or municipality upon the owner, which he can use in connection with his property, or by means of which the use of his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that the compensation to be received by him becomes a legitimate matter of regulation. Submission to the regulation of compensation in such cases is an implied condition of the grant, and the state, in exercising its power of prescribing the compensation, only determines the conditions upon which its concession shall be enjoyed. When the privilege ends, the power of regulation ceases. * * *

There is nothing in the character of the business of the defendants as warehousemen which called for the interference complained of in this case. Their buildings are not nuisances; their occupation of receiving and storing grain infringes upon no rights of others, disturbs no neighborhood, infects not the air, and in no respect prevents others from using and enjoying their property as to them may seem best. The legislation in question is nothing less than a bold assertion of absolute power by the state to control at its discretion the property and business of the citizen, and fix the compensation he shall receive. The will of the legislature is made the condition upon which the owner shall receive the fruits of his property and the just reward of his labor, industry, and enterprise.

* * *

In the case decided by the Supreme Court of Alabama, where a power granted to the city of Mobile to license bakers, and to regulate the weight and price of bread, was sustained so far as regulating the weight of the bread was concerned, no question was made as to the right to regulate the price. 3 Ala. 137. There is no doubt of the competency of the state to prescribe the weight of a loaf of bread, as it may declare what weight shall constitute a pound or a ton. But I deny the power of any legislature under our government to fix the price which one shall receive for his property of any kind. If the power can be exercised as to one article, it may as to all articles, and the prices of every thing, from a calico gown to a city mansion, may be the subject of legislative direction.

Other instances of a similar character may, no doubt, be cited of attempted legislative interference with the rights of property. The act of Congress of 1820, mentioned by the court, is one of them. There Congress undertook to confer upon the city of Washington power to regulate the rates of wharfage at private wharves, and the fees for sweeping chimneys. Until some authoritative adjudication is had upon these and similar provisions, I must adhere, notwithstanding the legislation, to my opinion, that those who own property have the right to fix the compensation at which they will allow its use, and that those who control services have a right to fix the compensation at which they will be rendered. The chimney-sweeps may, I think, safely claim all the compensation which they can obtain by bargain for their work. In the absence of any contract for property or services, the law allows only a reasonable price or compensation; but what is a reasonable price in any case will depend upon a variety of considerations, and is not a matter for legislative determination. * * *[4a]

CAMPBELL v. HOLT.

1885. Supreme Court of the United States. 115 U. S. 620.

[This was an action begun in a Texas court in 1874 by a legatee of Malvina Stamps against the administrator of her father, John Stamps, on a cause of action which accrued to her before the Civil War, while she was a minor. During her minority and during the war Texas suspended the statute of limitation of actions. In 1866 by statute Texas restored the suspended statute. Malvina was then of age. By 1868 the restored statute had completely run to bar Malvina's claim. In 1869 a new constitution of Texas was adopted which contained a clause to the effect that the statute of limitations should be regarded as having been suspended from 1861 to the date upon which the new constitution should go into effect. The Texas court held that the provision in the constitution removed the bar of the statute and gave judgment for the plaintiff. The Supreme Court of Texas affirmed and now upon writ of error:]

[4a] It was in the next term after Munn v. Illinois was decided that the court, by Chief Justice Waite, delivered the opinion in Davidson v. New Orleans, ante, p. 546, containing the dictum that "a statute which declares in terms, and without more, that the full and exclusive title to a described piece of land, which is now in A, shall be and is hereby vested in B would, if effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision," and that beyond this the court would avoid risk of generalization and leave "the intent and application of such an important phrase" to the "gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require."

MR. JUSTICE MILLER delivered the opinion of the court. * * *

The action is based on contract. It is for hire of the negroes used by the father, and for the money received for the land of his daughter, sold by him. The allegation is of indebtedness on this account, and the plea is that the action is barred by the statute of limitations. It is not a suit to recover possession of real or personal property, but to recover for the violation of an implied contract to pay money. The distinction is clear, and, in the view we take of the case, important.

By the long and undisturbed possession of tangible property, real or personal, one may acquire a title to it, or ownership, superior in law to that of another, who may be able to prove an antecedent and, at one time, paramount title. This superior or antecedent title has been lost by the laches of the person holding it, in failing within a reasonable time to assert it effectively; as, by resuming the possession to which he was entitled, or asserting his right by suit in the proper court. What the primary owner has lost by his laches, the other party has gained by continued possession, without question of his right. * * *

It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of his property without due process of law.

But we are of opinion that to remove the bar which the statute of limitations enables a debtor to interpose to prevent the payment of his debt stands on a very different ground. * * *

In all this class of cases the ground taken is, that there exists a contract, but, by reason of no remedy having been provided for its enforcement, or the remedy ordinarily applicable to that class having, for reasons of public policy been forbidden or withheld, the legislature, by providing a remedy where none exists, or removing the statutory obstruction to the use of the remedy, enables the party to enforce the contract, otherwise unobjectionable.

Such is the precise case before us. The implied obligation of defendant's intestate to pay his child for the use of her property remains. It was a valid contract, implied by the law before the statute began to run in 1866. Its nature and character were not changed by the lapse of two years, though the statute made that a valid defense to a suit on it. But this defense, a purely arbitrary creation of the law, fell with the repeal of the law on which it depended.

It is much insisted that this right to defence is a vested right, and a right of property which is protected by the provisions of the Fourteenth Amendment.

It is to be observed that the word vested right is nowhere used in the Constitution, neither in the original instrument nor in any of the amendments to it.

We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution.

We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted and especially by this court, are founded in public needs and public policy—are arbitrary enactments by the law-making power. Tioga Railroad v. Blossburg and Corning Railroad, 20 Wall. 137, 150. And other statutes, shortening the period or making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete. The right does not enter into or become a part of the contract. No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says, time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost.

* * *

We are unable to see how a man can be said to have *property* in the bar of the statute as a defence to his promise to pay. In the most liberal extension of the use of the word property, to choses in action, to incorporeal rights, it is new to call the defence of lapse of time to the obligation to pay money, property. It is no natural right. It is the creation of conventional law.

We can understand a right to enforce the payment of a lawful debt. The Constitution says that no state shall pass any law impairing this obligation. But we do not understand the right to satisfy that obligation by a protracted failure to pay. We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the legislature from repealing that law, because its effect is to make him fulfill his honest obligations. * * *

The judgment of the Supreme Court of Texas is Affirmed.

Mr. Justice Bradley, with whom concurred Mr. Justice Harlan, dissenting.

I feel obliged to dissent from the opinion of the court in this case. I think that when the statute of limitations gives a man a defence to an action, and that defence has absolutely accrued, he has a right which is protected by the Fourteenth Amendment of the Constitution from legislative aggression. That clause of the amendment which declares that "no state shall deprive any person of life, liberty, or property without due process of law," was intended to protect every valuable right which a man has. The words life, liberty, and property are constitutional terms, and are to be taken in their broadest sense. They indicate the three great subdivisions of all civil right. The term "property," in this clause, embraces all valuable interests which a man may possess outside of himself, that is to say, outside of his life and liberty. It is not confined to mere tangible property, but extends to every species of vested right. In my judgment, it would be a very narrow and technical construction to hold otherwise. In an advanced civilization like ours, a very large proportion of the property of individuals is not visible and tangible, but consists in rights and claims against others, or against the government itself. * * *

MUGLER v. STATE OF KANSAS.

1887. Supreme Court of the United States. 123 U. S. 623.

[Mugler was tried and convicted upon two separate prosecutions, in Kansas, in one for selling beer and in the other for manufacturing beer, in violation of a Kansas statute, enacted in 1881, which prohibited the manufacture or sale of intoxicating liquor in the state except for medical, scientific and mechanical uses. He built and owned the brewery in which the beer was made, before the statute was enacted. The Supreme Court of Kansas sustained each conviction, and writs of error were taken. The cases were considered together in the United States Supreme Court.]

Mr. George G. Vest, for plaintiff in error. * * *

There was no allegation in the indictment, and no proof or attempt to prove, that the beer was manufactured for sale or barter.

The naked proposition contained in the Kansas constitution and statute, is, that no citizen shall manufacture even for his own use, or for exportation, any intoxicating liquors. * * *

The right to manufacture for his own use either food or drink is certainly an absolute or natural right, reserved to every citizen—one guaranteed by the Fourteenth Amendment, * * *.

There is no pretence or claim that the legislature has not the right to prohibit the sale of beer, or its manufacture for sale or barter in the future, but that is very different from the question here presented, as to the power of the legislature to destroy the value of vested rights by legislative enactment without compensation, * * *.

It is not claimed that the plaintiff in error, in the language of the learned judge who delivered the opinion of the Supreme Court of Kansas, "could go on with or without legislation, and with or without a license, manufacturing beer forever," or that, "he founds his right to continue to manufacture beer solely and exclusively upon his supposed vested right to operate his brewery in undisturbed tranquility forever." No such claim has ever existed, except in the judicial imagination. But the plaintiff does claim, most earnestly and confidently, that his right to operate his brewery as vested in him by the laws of Kansas, cannot be taken away by the state without just compensation. For an exhaustive discussion of the question, see Wynehamer v. People, 13 N. Y. 378; Beebe v. State, 6 Ind. 501, 63 Am. Dec. 391; In the matter of Jacobs (Tenement House Cigar Case), 98 N. Y. 98.

MR. JUSTICE HARLAN delivered the opinion of the court. * * *

That legislation by a state prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States, is made clear by the decisions of this court, rendered before and since the adoption of the Fourteenth Amendment; to some of which, in view of questions to be presently considered, it will be well to refer. * * *

It is, however, contended, that, although the state may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, "no convention or legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others." The argument made in support of the first branch of this proposition, briefly stated, is, that in the implied compact between the state and the citizen certain rights are reserved by the latter, which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty, or property, without due process of law, and with which the state cannot interfere; that among those rights is that of manufacturing for one's use either food or drink; and that while, according to the doctrines of the Commune, the state may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. As was said in Munn v. Illinois, 94 U. S. 113, 124, while power does not exist with the whole people to control rights that are purely and exclusively private, government may require "each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another."

But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. * * *

The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the state, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a state deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the Constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

This conclusion is unavoidable, unless the Fourteenth Amendment of the Constitution takes from the states of the Union those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in Barbier v. Connolly, 113 U. S. 27, 31, that the Fourteenth Amendment had no such effect. * * *

It is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the state, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments.

This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the states intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. * * *

The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the states at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. Beer Co. v. Massachusetts, 97 U. S. 25, 32; Commonwealth v. Alger, 7 Cush. 53. * * *

It is supposed by the defendants that the doctrine for which they contend is sustained by Pumpelly v. Green Bay Co., 13 Wall. 166. But in that view we do not concur. That was an action for the recovery of damages for the overflowing of the plaintiff's land by water, resulting from the construction of a dam across a river. The defence was that the dam constituted a part of the system adopted by the state for improving the navigation of Fox and Wisconsin rivers; and it was contended that as the damages of which the plaintiff complained were only the result of the improvement, under legislative sanction, of a navigable stream, he was not entitled to compensation from the state or its agents. The case, therefore, involved the question whether the overflowing of the plaintiff's land, to such an extent that it became practically unfit to be used, was a taking of property, within the meaning of the constitution of Wisconsin, providing that "the property of no person shall be taken for public use without just compensation therefor." This court said it would be a very curious and unsatisfactory result, were it held that, "if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." pp. 177, 178.

These principles have no application to the case under consideration. * * *

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the state did not forbid the manufacture of intoxicating liquors. But the state did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in Stone v. Mississippi, above cited, the supervision of the public health and the public morals is a governmental power, "continuing in its nature," and "to be dealt with as the special exigencies of the moment may require;" and that, "for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." So in Beer Co. v. Massachusetts, 97 U. S. 32: "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer."* * *

Judgments affirmed.

SAMUELS v. McCURDY, SHERIFF OF DE KALB COUNTY, GEORGIA.

1925. Supreme Court of the United States. 267 U. S. 188.

[Samuels filed a petition in the Superior Court of DeKalb County, Georgia, for an injunction to restrain the sheriff from destroying a large quantity of whiskeys, wines, beer, cordials and liquors which under a search warrant the latter had carried away from Samuels' residence. The sheriff acted under Georgia statutes of 1915 and 1917 which declared it unlawful for any person to have or possess any intoxicating liquor "whether intended for personal use or otherwise," except for medicinal, mechanical or sacramental purposes on special permits, and authorized seizure and destruction of liquor unlawfully kept. The petition averred that the liquor seized had been acquired by Samuels in manners that were lawful at the time of acquisition and were kept by him for the use of his family and friends at his own home. A general demurrer to the petition was sustained and the case dismissed. The Supreme Court of Georgia affirmed the judgment and this writ of error was taken.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the court. * * *

First. This law is not an ex post facto law. It does not provide a punishment for a past offense. It does not fix a penalty for the owner for having become possessed of the liquor. The penalty it imposes is for continuing to possess the liquor after the enactment of the law. * * *

Second. Does the seizure of this liquor and its destruction deprive the plaintiff in error of his property without due process of law, in violation of the Fourteenth Amendment?

In Crane v. Campbell, 245 U. S. 304, Crane was arrested for having in his possession a bottle of whiskey for his own use, and not for the purpose of giving away or selling the same to any person. This was under a provision of the statute of Idaho that it should be unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors. It was held that the law was within the police power of the state. The court said:

"It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a state has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors, within its borders without violating the guarantees of the Fourteenth Amendment." Citing Bartemeyer v. Iowa, 18 Wall. 129; Beer Company v. Massachusetts, 97 U. S. 25, 33; Mugler v. Kansas, 123 U. S. 623, 662; Crowley v. Christensen, 137 U. S. 86, 91; Purity Extract Co. v. Lynch, 226 U. S. 192, 201; Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311, 330, 331.

The court pointed out that as the state had the power to prohibit, it might adopt such measures as were reasonably appropriate or needful to render exercise of that power effective; and that considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, the court was unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose, that the right to hold intoxicating liquor for personal use was not one of those fundamental privileges of a citizen of the United States which no state could abridge, and that a contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles —the only feasible ways of getting them. It did not appear in that case when the liquor seized had been acquired, but presumably after the prohibitory act.

In Barbour v. Georgia, 249 U. S. 454, it was held that the Georgia prohibitory law, approved November 18, 1915, but which did not become effective until May 1, 1916, was not invalid under the Fourteenth Amendment when applied to the possession of liquor by one who had acquired it after the approval of the law and before it became effective.

These cases it is said do not apply, because the liquor here was lawfully acquired by Samuels before the Act of 1917 making it unlawful for one to be possessed of liquor in his residence for use of his family and his guests.

[Mugler v. Kansas is here stated and quotations made from the opinion.]

In view of this language and the agreed statement of facts the decision necessarily was that the sale of beer made and owned before the Prohibition Law could be punished by that law as a nuisance and that no compensation was necessary, if the legislature deemed this to be necessary for the health and morals of the community. * * *

The ultimate legislative object of prohibition is to prevent the drinking of intoxicating liquor by any one because of the demoralizing effect of drunkenness upon society. The state has the power to subject those members of society who might indulge in the use of such liquor without injury to themselves to a deprivation of access to liquor in order to remove temptation from those whom its use would demoralize and to avoid the abuses which follow in its train. Accordingly laws have been enacted by the states, and sustained by this court, by which it has been made illegal to manufacture liquor for one's own use or for another's, to transport it or to sell it or to give it away to others. The legislature has this power whether it affects liquor lawfully acquired before the prohibition or not. Without compensation it may thus seek to reduce the drinking of liquor. It is obvious that if men are permitted to maintain liquor in their possession, though only for their own consumption, there is danger of its becoming accessible to others. Legislation making possession unlawful is therefore within the police power of the states as a reasonable mode of reducing the evils of drunkenness, as we have seen in the Crane and Barbour cases. The only question which arises is whether for the shrunken opportunity of the possessor of liquor who acquired it before the law, to use it only for his own consumption, the state must make compensation. By valid laws, his property rights have been so far reduced that it would be difficult to measure their value. That which had the qualities of property has, by successive provisions of law in the interest of all, been losing its qualities as property. For many years, every one who has made or stored liquor has known that it was a kind of property which because of its possible vicious uses might be denied by the state the character and attributes as such; that legislation calculated to suppress its use in the interest of public health and morality was lawful and possible, and this without compensation. Why should compensation be made now for the mere remnant of the original right if nothing was paid for the loss of the right to sell the liquor, give it away or transport it? The necessity for its destruction is claimed under the same police power to be for the public betterment as that which authorized its previous restrictions. It seems to us that this conclusion finds support in the passage quoted above from the opinion in the Mugler Case and its application to the agreed facts, and in Gardner v. Michigan, 199 U. S. 325, and Reduction Company v. Sanitary Works, 199 U. S. 306. See also American Storage Company v. Chicago, 211 U. S. 306, and Adams v. Milwaukee, 228 U. S. 572, 584; Lawton v. Steele, 152 U. S. 133, 136; United States v. Pacific Railroad, 120 U. S. 227, 239. In Gardner v. Michigan a municipal ordinance was held valid which required the owner to deliver to the agent of the city all garbage with vegetable and animal refuse, although it was shown that it was property of value because it could be advantageously used for the manufacture of commercial fat. It was decided that the police power justified the legislature or its subordinate, the city council, in the interest of the public in removing and destroying the garbage, as a health measure, without compensation.

Finally, it is said that the petitioner here has no day in court provided by the law, and therefore that in this respect the liquors have been taken from him without due process. The Supreme Court of Georgia has held in Delaney v. Plunkett, 146 Ga. 547, 565, that, under the 20th Section of the Act of November 17, 1915 (Georgia Laws, Extra Session 1915, p. 77,) quoted above, which declares that no property rights of any kind shall exist in prohibited liquors and beverages, no hearing need be given the possessor of unlawfully held liquors, but that they may be destroyed by order of the court. In the Plunkett Case the seizure was of liquor held in excess of an amount permitted by the law of 1915. By the amendment of 1917, as already pointed out, possession even for home use is now forbidden. As in the Plunkett Case, the petitioner does not deny that the liquor seized was within the condemnation of the law and that he has no defense to his possession of it except as he asserts a property right protected by the Fourteenth Amendment which we have found he does not have. As a search warrant issued the seizure was presumably valid. The law provides for an order of destruction by a court, but it does not provide for notice to the previous possessor of the liquor and a hearing before the order is made. Under the circumstances prima facie the liquor existed contrary to law and it was for the possessor to prove the very narrow exceptions under which he could retain it as lawful. If he desired to try the validity of the seizure or the existence of the exception by which his possession could be made to appear legal, he could resort to suit to obtain possession and to enjoin the destruction under the Georgia law, as he has done in this case. This under the circumstances, it seems to us, constitutes sufficient process of law under the federal Constitution as respects one in his situation. Lawton v. Steele, 152 U. S. 133, 142. What might be necessary, if he were claiming to hold the liquor lawfully for medicinal or some other specially excepted purpose we need not consider.

The averment in the petition was that the sheriff intended to destroy the liquor. There is no averment in the petition that he did not intend to do this by order of court upon his application. We must take it for granted on the demurrer, therefore, as against the pleader that the sheriff did not intend to depart from section 20 of the act of 1915, and that the question made here is on the validity of that section. Judgment affirmed.[5]

[Mr. Justice Butler delivered a dissenting opinion.]

POWELL v. COMMONWEALTH OF PENNSYLVANIA.

1888. Supreme Court of the United States. 127 U. S. 678.

[Powell was indicted for selling oleomargarine in violation of a Pennsylvania statute of 1885 which made it a criminal offense to manufacture, sell, offer for sale, or keep for sale any article designed to take the place of butter, made from any oleaginous substance other than unadulterated milk or cream. For the purpose of the trial it was agreed that the two packages sold were sold and bought as butterine and not as butter and were plainly marked, "Oleomargarine Butter." The defendant offered evidence to show that the article sold was made of pure animal fats; that it contained all the elements of butter, including butterine though in a smaller proportion than butter contains; that butterine only gives flavor to butter and has nothing to do with its wholesomeness, and that the process of manufacture was clean and wholesome. He also offered evidence that the packages sold had been owned by him before the statute was enacted. This evidence was excluded as irrelevant. The State Supreme Court sustained a conviction, and now on writ of error:]

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[5] "It is urged that, as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted and is confined to the party offending, their sale should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation.

"There is in this position an assumption of fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him."—Field, J., in Crowley v. Christensen (1890) 137 U. S. 86, 90, 34 L. ed. 620.

A state may prohibit the sale of malt beverages without alcoholic content because a legislature may reasonably believe that this is necessary to effective enforcement of its statutes against the sale of intoxicants. Purity Extract &c. Co. v. Lynch (1912) 226 U. S. 192, 57 L. ed. 184. Compare Powell v. Pennsylvania, supra, and Silz v. Hesterberg (1908) 211 U. S. 31, 53 L. ed. 75.

Mr. Justice Harlan delivered the opinion of the court. * * *

This case in its important aspects is governed by the principles announced in Mugler v. Kansas, 123 U. S. 623. * * *

The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law. But it cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects. Mugler v. Kansas, 123 U. S. 623, 661. The court is unable to affirm that this legislation has no real or substantial relation to such objects.

It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact. "Every possible presumption," Chief Justice Waite said, speaking for the court in Sinking Fund Cases, 99 U. S. 700, 718, "is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." See, also, Fletcher v. Peck, 6 Cranch, 87, 128; Dartmouth College v. Woodward, 4 Wheat. 518, 625; Livingston v. Darlington, 101 U. S. 407.

Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property; and while, according to the principles upon which our institutions rest, "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself;" yet, "in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage." Yick Wo v. Hopkins, 118 U. S. 370.

The case before us belongs to the latter class. The Legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.

It is argued, in behalf of the defendant, that if the statute in question is sustained as a valid exercise of legislative power, then nothing stands in the way of the destruction by the legislative department of the constitutional guarantees of liberty and property. But the possibility of the abuse of legislative power does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist. Besides, the judiciary department is bound not to give effect to statutory enactments that are plainly forbidden by the Constitution. This duty, the court has said, is always one of extreme delicacy; for, apart from the necessity of avoiding conflicts between co-ordinate branches of the government, whether state or national, it is often difficult to determine whether such enactments are within the powers granted to or possessed by the legislature. Nevertheless, if the incompatibility of the Constitution and the statute is clear or palpable, the courts must give effect to the former. And such would be the duty of the court if the state legislature, under the pretence of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty, or property, or other rights, secured by the supreme law of the land. * * * Judgment affirmed.[6]

[MR. JUSTICE FIELD delivered a dissenting opinion.]

WEAVER v. PALMER BROTHERS COMPANY.

1926. Supreme Court of the United States. 270 U. S. 402.

Appeal from a decree of the District Court of the United States for the Western District of Pennsylvania granting an injunction to restrain the defendant (appellant), an official of Pennsylvania, from enforcing against the plaintiff (appellee), a manufacturer and seller of bedding, a statute of Pennsylvania in so far as the statute forbade the use of shoddy in the manufacture of comfortables. The statute defined shoddy as any material which has been spun into yarn, knit or woven into fabric, and subsequently cut up, torn up, broken up or ground up.

MR. JUSTICE BUTLER delivered the opinion of the court. * * *

The question for decision is whether the provision purporting absolutely to forbid the use of shoddy in comfortables violates the due process clause or the equal protection clause. The answer depends on the facts of the case. Legislative determinations express or implied are entitled to great weight; but it is always open to interested parties to show that the Legislature has transgressed the limits of its power. Penna. Coal Co. v. Mahon, 260 U. S. 393, 413. Invalidity may be shown by things which will be judicially noticed (Quong Wing v. Kirkendall, 223 U. S. 59, 64) or by facts established by evidence. The burden is on the attacking party to establish the invalidating facts. See Minnesota Rate Cases, 230 U. S. 352, 452.

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[6] So a statute is not unconstitutional which forbids sale of a not unwholesome product composed of condensed skimmed milk and cocoanut oil and although its ingredients are correctly and plainly shown on labels of its containers. Hebe Co. v. Shaw (1919) 248 U. S. 297, 63 L. ed. 255. Compare statutes sustained in Plumley v. Massachusetts (1894) 155 U. S. 461, 39 L. ed. 223 (forbidding sale of oleomargarine colored in imitation of butter) and in Hutchinson Ice Cream Co. v. State of Iowa (1916) 242 U. S. 153, 61 L. ed. 217, Ann. Cas. 1917B, 643 (forbidding sale as "ice cream" any article not containing a specified percentage of butter-fat).

For many years prior to the passage of the act comfortables made in appellee's factories had been sold in Pennsylvania. In 1923 its business in that state exceeded $558,000, of which more than $188,000 was for comfortables filled with shoddy. About 5,000 dozens of these were filled with shoddy made of new materials, and about 3,000 dozens with secondhand shoddy. Appellee makes approximately 3,000,000 comfortables annually, and about 750,000 of these are filled with materials defined by the act as shoddy. New material from which appellee makes shoddy consists of clippings and pieces of new cloth obtained from cutting tables in garment factories; secondhand shoddy is made of secondhand garments, rags, and the like. The record shows that annually many million pounds of fabric, new and secondhand, are made into shoddy. It is used for many purposes. It is rewoven into fabric, made into pads to be used as filling material for bedding, and is used in the manufacture of blankets, clothing, underwear, hosiery, gloves, sweaters and other garments. The evidence is to the effect that practically all the woolen cloth woven in this country contains some shoddy. That used to make comfortables is a different grade from that used in the textile industry. Some used by appellee for that purpose is made of clippings from new woolen underwear and other high grade and expensive materials. Comfortables made of secondhand shoddy sell at lower prices than those filled with other materials.

Appellant claims that, in order properly to protect health, bedding material should be sterilized. The record shows that, for the sterilization of secondhand materials from which it makes shoddy, appellee uses effective steam sterilizers. There is no controversy between the parties as to whether shoddy may be rendered harmless by disinfection or sterilization. While it is sometimes made from filthy rags, and from other materials that have been exposed to infection, it stands undisputed that all dangers to health may be eliminated by appropriate treatment at low cost. In the course of its decision the District Court said:

"It is conceded by all parties that shoddy may be rendered perfectly harmless by sterilization."

The act itself impliedly determines that proper sterilization is practicable and effective. It permits the use of secondhand materials and new and secondhand feathers when sterilized, and it regulates processes for such sterilization.

There was no evidence that any sickness or disease was ever caused by the use of shoddy, and the record contains persuasive evidence, and by citation discloses the opinions of scientists eminent in fields related to public health that the transmission of disease-producing bacteria is almost entirely by immediate contact with, or close proximity to, infected persons; that such bacteria perish rapidly when separated from human or animal organisms; and that there is no probability that such bacteria or vermin likely to carry them survive after the period usually required for the gathering of the materials, the production of shoddy, and the manufacture and the shipping of comfortables. This evidence tends strongly to show that in the absence of sterilization or disinfection there would be little, if any, danger to the health of the users of comfortables filled with shoddy, new or secondhand; and confirms the conclusion that all danger from the use of shoddy may be eliminated by sterilization.

The state has wide discretion in selecting things for regulation. We need not consider whether the mere failure to forbid the use of other filling materials that are mentioned in the act is sufficient in itself to invalidate the provision prohibiting the use of shoddy, as a violation of the equal protection clause. But the number and character of the things permitted to be used in such manufacture properly may be taken into account in deciding whether the prohibition of shoddy is a reasonable and valid regulation or is arbitrary and violative of the due process clause. Shoddy-filled comfortables made by appellee are useful articles for which there is much demand; and it is a matter of public concern that the production and sale of things necessary or convenient for use should not be forbidden. They are to be distinguished from things that the state is deemed to have power to suppress as inherently dangerous.

Many states have enacted laws to regulate bedding for the protection of health. Legislation in Illinois (Laws 1915, p. 375) went beyond mere regulation, and prohibited the sale of secondhand quilts or comfortables, even when sterilized, or when remade from sterilized secondhand materials. In People v. Weiner, 271 Ill. 74, the state Supreme Court held that to prohibit the use of material not inherently dangerous and that might be rendered safe by reasonable regulation transgresses the constitutional protection of personal and property rights.

The appellant insists that this case is ruled by Powell v. Pennsylvania, 127 U. S. 678. But the cases are essentially different. A law of Pennsylvania prohibited the manufacture, sale, or possession for sale, of oleomargarine. An indictment against Powell charged a sale and possession with intent to sell. At the trial he admitted the allegations and, for his defense, offered to prove certain facts which were excluded as immaterial. The question for decision was whether these facts were sufficient to show that, as applied, the law was invalid. Mr. Justice Harlan, speaking for the court, said (p. 682) that the purpose of these offers of proof was to "show that the article sold was a new invention, not an adulteration of dairy products, nor injurious to the public health, but wholesome and nutritious as an article of food. * * * It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact." And see Powell v. Commonwealth, 114 Pa. St. 265, 279, 295.

"Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way." Quong Wing v. Kirkendall, supra. This is well illustrated by the Powell Case, compared with Schollenberger v. Pennsylvania, 171 U. S. 1. Every opinion is to be read, having regard to the facts of the case and the question actually decided. Cohens v. Virginia, 6 Wheat. 264, 399. The facts clearly distinguish this case from the Powell Case. There it was assumed that most kinds of oleomargarine in the market were or might become injurious to health. Here it is established that sterilization eliminates the dangers, if any, from the use of shoddy. As against that fact, the provision in question cannot be sustained as a measure to protect health; and the fact that the act permits the use of numerous materials, prescribing sterilization if they are secondhand, also serves to show that the prohibition of the use of shoddy, new or old, even when sterilized, is unreasonable and arbitrary.

Nor can such prohibition be sustained as a measure to prevent deception. In order to ascertain whether the materials used and the finished articles conform to its requirements, the act expressly provides for inspection of the places where such articles are made, sold or kept for sale. Every article of bedding is required to bear a tag showing the materials used for filling and giving the names and addresses of makers and vendors, and bearing the word "secondhand" where there has been prior use, and giving the number of the permit for sterilizing and disinfecting where secondhand materials or feathers are used for filling. Obviously, these regulations or others that are adequate may be effectively applied to shoddy-filled articles.

The constitutional guaranties may not be made to yield to mere convenience. Schlesinger v. Wisconsin, 270 U. S. 230. The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the ~~due process~~ clause of the Fourteenth Amendment. Adams v. Tanner, 244 U. S. 590, 596; Meyer v. Nebraska, 262 U. S. 390; Burns Baking Co. v. Bryan, 264 U. S. 504.

Decree affirmed.

MR. JUSTICE HOLMES, dissenting. If the Legislature of Pennsylvania was of opinion that disease is likely to be spread by the use of unsterilized shoddy in comfortables I do not suppose that this Court would pronounce the opinion so manifestly absurd that it could not be acted upon. If we should not, then I think that we ought to assume the opinion to be right for the purpose of testing the law. The Legislature may have been of opinion further that the actual practice of filling comfortables with unsterilized shoddy gathered from filthy floors was wide spread, and this again we must assume to be true. It is admitted to be impossible to distinguish the innocent from the infected product in any practicable way, when it is made up into the comfortables. On these premises, if the Legislature regarded the danger as very great and inspection and tagging as inadequate remedies, it seems to me that in order to prevent the spread of disease it constitutionally could forbid any use of shoddy for bedding and upholstery. Notwithstanding the broad statement in Schlesinger v. Wisconsin the other day, I do not suppose that it was intended to overrule Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, and other cases to which I referred there. * * *

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concur in this opinion.

CHICAGO, B. & Q. R. CO. v. CHICAGO.

1897. Supreme Court of the United States. 166 U. S. 226.

[The City of Chicago in opening a street across the right of way of the railroad company proceeded in a local court to have determined by a jury the just compensation required by the constitution of Illinois to be paid upon taking private property for a public use. The company excepted to the jury's award of one dollar and to instructions given the jury as to the rules to be applied in ascertaining just compensation, contending that thereby it was deprived of its property without due process of law, in violation of the Fourteenth Amendment. From affirmance by the Illinois Supreme Court of a judgment in execution of this award, this writ of error was taken.]

MR. JUSTICE HARLAN delivered the opinion of the court.

The questions presented on this writ of error relate to the jurisdiction of this court to reëxamine the final judgment of the Supreme Court of Illinois, and to certain rulings of the state court which, it is alleged, were in disregard of that part of the Fourteenth Amendment declaring that no state shall deprive any person of his property without due process of law * * *.

The city contends that the question as to the amount of compensation to be awarded to the railroad company was one of local law merely, and as that question was determined in the mode prescribed by the constitution and laws of Illinois, the company appearing and having full opportunity to be heard, the requirement of due process of law was observed. If this position be sound, it is an end of the case, and we need not determine whether the state court erred in not recognizing the principles of law embodied in the instructions asked by the railroad company.

It is, therefore, necessary to inquire at the outset whether "due process of law" requires compensation to be made or secured to the owner of private property taken for public use, and also as to the circumstances under which the final judgment of the highest court of a state in a proceeding instituted to condemn such property for public use may be reviewed by this court.

It is not contended, as it could not be, that the constitution of Illinois deprives the railroad company of any right secured by the Fourteenth Amendment. For the state constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state, "violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state." * * *

It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject-matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. United States v. Cruikshank, 92 U. S. 542, 554; Leeper v. Texas, 139 U. S. 462, 468. But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. * * * If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that Amendment.

It is proper now to inquire whether the due process of law enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a state.

In Davidson v. New Orleans, 96 U. S. 97, it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the Fourteenth Amendment. See also Missouri Pacific Railway v. Nebraska, 164 U. S. 403, 417. Such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three coordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated not as an exertion of legislative power, but as a sentence—an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of republican institutions. "Next in degree to the right of personal liberty," Mr. Broom in his work on Constitutional Law says, "is that of enjoying private property without undue interference or molestation." (p. 228.) The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." 2 Story Const. § 1790; 1 Bl. Com. 138, 139; Cooley's Const. Lim. § 559; People v. Platt, 17 Johns. 195, 215; Bradshaw v. Rodgers, 20 Johns. 103, 106; Petition of Mt. Washington Road Co., 35 N. H. 134, 142; Parham v. The Justices &c., 9 Georgia, 341, 348; Martin et al., Ex parte, 13 Arkansas, 198, 206 *et seq.;* Johnston v. Rankin, 70 N. C. 550, 555.

But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the state to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.

In Fletcher v. Peck, 6 Cranch, 87, 135-136, this court, speaking by Chief Justice Marshall, said: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation. To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of legislative power, is well worthy of serious reflection."

In Loan Association v. Topeka, 20 Wall. 655, 663, Mr. Justice Miller, delivering the judgment of this court, after observing that there were private rights in every free government beyond the control of the state, and that a government, by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was, after all, but a despotism, said: "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." No court, he said, would hesitate to adjudge void any statute declaring that "the homestead now owned by A should no longer be his, but should henceforth be the property of B." In accordance with these principles it was held, in that case, that the property of the citizen could not be taken, under the power of taxation to promote private objects,[7] and, therefore, that a statute authorizing a town to issue its bonds in aid of a manufacturing enterprise of individuals was void because the object was a private, not a public, one. See also Cole v. La Grange, 113 U. S. 1.

In the early case of Gardner v. Newburgh, 2 Johns. Ch. 162, there being no provision in the constitution of the State of New York on the subject, Chancellor Kent said that it was a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice, that fair compensation be made to the owner of private property taken for public use. In Sinnickson v. Johnson, 17 N. J. Law, 129, 145, it was held to be a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation was an incident to the exercise of the power of eminent domain; that the one was so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle; and that the legislature "can no more take private property for public use without just compensation than if this restraining principle were incorporated into and made part of its state constitution." These cases are referred to with approval in Pumpelly v. Green Bay Co., 13 Wall. 166, 178, and in Monongahela Nav. Co. v. United States, 148 U. S. 312, 325, this court saying in the latter case: "And in this there is a natural equity which commends it to every one. It in nowise detracts from the power of the public to take whatever may be necessary for its uses; while on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that, when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." * * *

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[7] This case was decided in 1874 during what might be called the gestation period of the due process limitation. Apparently the federal courts had jurisdiction in the case because of diversity of citizenship of the parties. The opinion purported to find a rule in the constitution of the State of Kansas, independent of any express provision, forbidding taxation for any purpose which was not "public." The opinion did not refer to the Fourteenth Amendment. See ante, p. 11, note 12, and Fallbrook Irrigation District v. Bradley (1896) 164 U. S. 112, 155, 41 L. ed. 369. As late as 1905 Justice Holmes thought the rule could not be "rested on the Fourteenth Amendment," but now it seems to be subsumed under the due process limitation. See Green v. Frazier (1920) 253 U. S. 233, 238, 64 L. ed. 878. Study of what is a "public" purpose is postponed to the chapter on taxation.

Similar in origin and development is another present day rule of state taxation. In the case of State Tax on Foreign-Held Bonds (1873) 15 Wall. (U. S.) 300, 21 L. ed. 179, it was stated as an unattached principle that a state statute taxing property located outside the state was not "a legitimate exercise of the taxing power." This has evolved into the rule that a state may not levy a property tax upon a resident with respect to tangible property permanently located outside the state, and the rule is subsumed under or imputed to the due process of law limitation. Union Refrigerator Transit Co. v. Kentucky (1905) 199 U. S. 194, 50 L. ed. 150, 4 Ann. Cas. 493.

In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.

It remains to inquire whether the necessary effect of the proceedings in the court below was to appropriate to the public use any property right of the railroad company without compensation being made or secured to the owner. * * *

[The court further held that as to whether one dollar was a correct valuation of the easement acquired or taken by the city that fact having been found by a jury, as required by the constitution of Illinois, no federal court could re-examine that question because of the prohibition of the Seventh Amendment of the Constitution of the United States that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

After saying: "We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation," the court concluded that the instructions to the jury were correct.] Judgment affirmed.

[MR. JUSTICE BREWER dissented but only as to the points included in the brackets above.]

CHICAGO, B. & Q. R. CO. v. DRAINAGE COMMISSIONERS.

1906. Supreme Court of the United States. 200 U. S. 561.

[Acting in accordance with an Illinois statute, known as the Farm Drainage Act, the Drainage Commissioners, upon petition of several owners of land, formed a drainage district and determined upon a plan of drainage into Rob Roy Creek, a natural watercourse. The railway company's right of way crossed this stream. Over the stream it had erected a bridge or culvert with a foundation of timber and stone in the bed of the stream, without the removal of which the channel could not be widened and deepened at that point as required by the commissioners' plan. The removal of this foundation would destroy the bridge. After notice to the company to widen and deepen the channel through its right of way, at its own expense, as expressly required by the statute, and refusal of the company to do so, the commissioners petitioned the local state court for a mandamus. Judgment granting the writ was affirmed, on appeal, by the Supreme Court of Illinois, 212 Ill. 103, and this writ of error taken.]

MR. JUSTICE HARLAN delivered the opinion of the court. * * *

The concrete case arising upon the petition and the demurrer is this: A public corporation, charged by law with the duty of causing a large body of lands, principally swamp and slough lands, to be drained and made capable of cultivation, has, under direct legislative authority, adopted a reasonable and suitable plan to accomplish that object. That plan requires the enlarging and deepening of the channel of a natural watercourse running through the District, which is the only natural outlet or way of drainage of the lands of the District—the best and only practicable mode by which the lands can be made tillable. But that plan cannot be carried out unless the timbers and stones in the creek—placed there by the railway company when it constructed the foundation for its present bridge—are removed. The timber and stones referred to cannot, however, be removed without destroying the foundations of the present bridge and rendering it necessary (if the railway company continues to operate its road, which we assume it intends to do) to construct another bridge with an opening underneath wide enough to permit a channel sufficient to carry off the water of the creek as increased in volume under the drainage system adopted by the Commissioners.

The contention of the railway company is that, as its present bridge was lawfully constructed, under its general corporate power to build, construct, operate and maintain a railroad, in the county and township aforesaid, and as the depth and width of the channel under it were sufficient, at the time, to carry off the water of the creek as it then flowed, and now flows—the foundation of the bridge cannot be removed and its use of the bridge disturbed, unless compensation be first made or secured to it in such amount as will be sufficient to meet the expense of removing the timbers and stones from the creek and of constructing a new bridge of such length and with such opening under it as the plan of the Commissioners requires. The company insists that to require it to meet these expenses out of its own funds will be, within the meaning of the Constitution, a *taking* of its property for public use without compensation, and, therefore, without due process of law, as well as a denial to it of the equal protection of the laws.

The importance of these questions will justify a reference to some of the adjudged cases; referring first to those recognizing the distinction between an incidental injury to rights of private property resulting from the exercise of governmental powers, lawfully and reasonably exerted for the public good, and the *taking,* within the meaning of the Constitution, of private property for public use.

In Transportation Co. v. Chicago, 99 U. S. 635, 642, which involved a claim for damages directly resulting from the construction by the city of Chicago of a tunnel under Chicago River, whereby for a very long time the plaintiff was prevented from using its dock and other property for purposes of its business; in Mugler v. Kansas, 123 U. S. 623, 669, which related in part, to the lawful prohibition by the state of the use of private property in a particular way, whereby its value was materially diminished, if not practically destroyed; in N. Y. & N. E. Railroad Co. v. Bristol, 151 U. S. 556, 567, 571, which involved the question whether a railroad company could be required, at its sole expense, to remove a grade crossing which it had lawfully established and used and to establish another crossing at a different place; * * * and in Scranton v. Wheeler, 179 U. S. 141, 164, which involved the question whether the United States was required to compensate an owner of land fronting on a public navigable river, when his access from the shore to the navigable part of such river was permanently obstructed by a pier erected in the river under the authority of Congress for the purpose of improving navigation;—in each of those cases, this court recognized the principle that injury may often come to private property as the result of legitimate governmental action, reasonably taken for the public good and for no other purpose, and yet there will be no *taking* of such property within the meaning of the constitutional guarantee against the deprivation of property without due process of law, or against the taking of private property for public use without compensation. * * *

We assume that the drainage statute in question is entirely consistent with the constitution of Illinois. It is so regarded by the Supreme Court of the state, and that is all-sufficient in this case. We assume, also, without discussion—as from the decisions of the state court we may properly assume—that the drainage of this large body of lands so as to make them fit for human habitation and cultivation, is a public purpose, to accomplish which the state may by appropriate agencies exert the general powers it possesses for the common good. By the removal of water from large bodies of land, the state court has said, and by "the subjection of such lands to cultivation they are made to bear their proper proportionate burden to the support of the inhabitants and commerce of the state. Their value is increased, and thereby their contribution in taxes to the state and local governments is increased." C., B. & Q. Ry. Co. v. The People, 212 Illinois, 103, 119. * * * When the railway company laid the foundations of its bridge in Rob Roy Creek it did so subject to the rights of the public in the use of that watercourse, and also subject to the possibility that new circumstances and future public necessities might, in the judgment of the state, reasonably require a material change in the methods used in crossing the creek with cars. It may be—and we take it to be true—that the opening under the bridge as originally constructed was sufficient to pass all the water then or now flowing through the creek. But the duty of the company, implied in law, was to maintain an opening under the bridge that would be adequate and effectual for such an increase in the volume of water as might result from lawful, reasonable regulations established by appropriate public authority from time to time for the drainage of lands on either side of the creek. Angell on Watercourses, 6th ed. 640, § 465b.

The Supreme Court of Illinois said in this case: "The right of drainage through a natural watercourse or a natural waterway is a natural easement appurtenant to the land of every individual through whose land such natural watercourse runs, and every owner of land along such watercourse is obliged to take notice of the natural easement possessed by other owners along the same watercourse." Again, in the same case: "Where lands are valuable for cultivation, and the country, as this, depends so much upon agriculture, the public welfare demands that the lands shall be drained, and in the absence of any constitutional provision in relation to such laws they have been sustained, upon high authority, as the exercise of the police power." * * * "The great weight of authority is, that where there is a natural waterway, or where a highway already exists and is crossed by a railroad company under its general license to build a railroad, and without any specific grant by the legislative authority to obstruct the highway or waterway, the railroad company is bound to make and keep its crossing, at its own expense, in such condition as shall meet all the reasonable requirements of the public as the changed conditions and increased use may demand." * * * The recent case of New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453 * * * would seem to be decisive of the question before us. It there appeared that a gas company had acquired an exclusive right to supply gas to the city of New Orleans and its inhabitants through pipes and mains laid in the streets. In the exercise of that right it had laid its pipes in the streets. Subsequently a Drainage Commission, proceeding under statutory authority, devised a system of drainage for the city, and in the execution of its plans it became necessary to change the location in some places of the mains and pipes laid by the gas company. * * * This court said: "* * * The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria.*"

The learned counsel for the railway company seem to think that the adjudications relating to the police power of the state to protect the public health, the public morals and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals or the public safety. Hence, he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the Drainage District, but only avers that the system of drainage adopted by the Commissioners will reclaim the lands of the District and make them tillable or fit for cultivation. We cannot assent to the view expressed by counsel. We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. Lake Shore & Mich. South. Ry. v. Ohio, 173 U. S. 285, 292; Gilman v. Philadelphia, 3 Wall. 713, 729; Pound v. Turck, 95 U. S. 459, 464; Railroad Co. v. Husen, 95 U. S. 470. And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare. The foundations upon which the power rests are in every case the same. This power, as said in Village of Carthage v. Frederick, 122 N. Y. 268, has always been exercised by municipal corporations, "by making regulations to preserve order, to promote freedom of communication and to facilitate the transaction of business in crowded communities. Compensation has never been a condition of its exercise, even when attended with inconvenience or peculiar loss, as each member of a community is presumed to be benefited by that which promotes the general welfare." The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If in the execution of any power, no matter what it is, the Government, federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner. * * * Upon the general subject there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a "taking" of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case. * * *

It remains to deal with a particular aspect of the case. The opening under the present bridge, we assume from the record, was sufficient, when the bridge was constructed, to pass all the water naturally flowing in the creek from lands in that locality. It is sufficient if the channel of the river be left as it is now. * * * The duty of the company will end when it removes the obstructions which it has placed in the way of enlarging, deepening and widening of the channel. It follows, upon principles of justice, that while the expense attendant upon the removal of the present bridge and culvert and the timbers and stones placed by the company in the creek, as well as the expense of the erection of any new bridge which the company may elect to construct in order to conform to the plan of the Commissioners, should be borne by the railway company, the expense attendant merely upon the removal of soil in order to enlarge, deepen and widen the channel must be borne by the District. * * *

Affirmed.[8]

Mr. Justice Holmes, with whom agreed Mr. Justice White and Mr. Justice McKenna, concurring.

I concur in the main with the judgment of the court. I agree that the public authority has a right to widen or deepen a channel

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[8] "It is universally conceded that when land or other property is actually taken from the owner and put to use by the public authorities, the constitutional obligation to make just compensation arises, however much the use to which the property is put may enhance the public health, morals or safety. No one would seriously contend that private land or buildings or other property might be taken for a hospital, or for a prison, or for the abolition of a dangerous grade crossing without as complete a liability for compensation arising as if the land were to be used for a street or for a city hall. Similarly when a noxious swamp is taken in fee by the public authorities and filled, the owners are entitled to payment; and this rule applies to all property put to use by the party condemning it."—1 Nichols, Eminent Domain, 2d ed. (1917) 282-283.

Compare with the principal case, Lake Shore &c. R. Co. v. Clough (1917) 242 U. S. 375, 61 L. ed. 374. (Along the southern shore of Lake Michigan in Indiana ran a high sandy strip a mile wide. On this strip parallel with the shore two railroads had been laid out. South of the strip and parallel with it if it sees fit, and that any cost that the railroad is put to in rebuilding a bridge the railroad must bear. But the public must pay for the widening or deepening, and I think that it does not matter whether what it has to remove is the original earth or some other substance lawfully put in the place of the original earth. * * *

MR. JUSTICE BREWER, dissenting.

The question in this case is a narrow one, yet of profound importance, and, involving, as in my judgment it does, a grievous wrong to owners of private property, I am constrained to dissent. Conceding the regularity of the proceedings and the power of the state to drain the lands in the Drainage District, and if necessary therefor to compel the building of a new and enlarged bridge over Rob Roy Creek, I dissent from the conclusion that the state may cast the entire cost of such rebuilding upon the railroad company. * * * The question in the case is not how far the state may go in compelling a railroad company to expend money in increasing its

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ran the Little Calumet River in an east to west course emptying far to the west, in Illinois, into the Big Calumet and thence into Lake Michigan. The railroads' rights of way did not cross the Little Calumet. Years later, to better drain the area south of the strip, which naturally drained into the Little Calumet, an wholly artificial drainage canal was cut from south to north across the sandy strip and the railroads' rights of way. The cost of railroad bridges over the cut, two hundred feet wide at the top, was $100,000 each. Held, that the railway companies need not be compensated therefor. The decision was rested on the authority of the principal case.)

Compare also Missouri Pacific R. Co. v. Omaha (1914) 235 U. S. 121, 59 L. ed. 157. (In order to abolish a dangerous grade crossing a railroad company was compelled at its own expense to build an overhead viaduct to carry the street traffic and the tracks of a street railway not owned by it.) See also West Chicago R. Co. v. Chicago (1905) 201 U. S. 506, 50 L. ed. 845, Union Bridge Co. v. United States (1907) 204 U. S. 364, 51 L. ed. 523; Chicago, M. &c. R. v. Minneapolis (1914) 232 U. S. 430, 58 L. ed. 671.

A New Jersey state board authorized thereto by state statute ordered the Erie Railroad Company to abolish fifteen grade crossings in the streets of Patterson, New Jersey, the necessary reconstruction being estimated as costing the company two million dollars. The latter objected that its assets were insufficient to make the changes without interference with the proper development of its interstate commerce. Sustaining the order Holmes, J., for the court, said: "Most of the streets concerned were laid out later than the railroads and this fact is relied upon, so far as it goes, as an additional reason for denying the power of the state to throw the burden of this improvement upon the railroad. * * *

"Grade crossings call for a necessary adjustment of two conflicting interests, —that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same require-facilities for transportation, but how far it can go in charging upon the company the cost of improving farms along the line of its road. * * * It has used its present bridge for over forty years, meeting in that time all the demands of the public for transportation. So that, receiving no benefit, it is charged with the cost of reconstruction, about $13,000, in order to improve the value of the lands belonging to private owners in this Drainage District, when if a highway crossed at the same place and a new bridge or culvert was required the cost of it would be paid out of the public funds. I cannot conceive how this can be looked upon as "the equal protection of the laws." * * *

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ment were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. Denver & R. G. R. Co. v. Denver, 250 U. S. 241, 246. To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the state for the safety of its citizens. * * * If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce. Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396. Intelligent self-interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty. In the opinion of the courts below the evidence justified the conclusion of the board that the expense would not be ruinous. * * *

"If we could see that the evidence plainly did not warrant a finding that the particular crossings were dangerous, there might be room for the argument that the order was so unreasonable as to be void. * * * The order should be regarded as stating a condition that must be complied with if the company continues to use the New Jersey soil. Probably the conclusion that we have reached could be supported upon the narrower ground that a continuing obligation was imposed by the charters of the plaintiff in error's lessors, and was assumed by the plaintiff in error, but that which we have stated seems to us free from doubt." Erie Railroad Co. v. Public Utility Commissioners (1921) 254 U. S. 394, 409, 410, 411, 412, 65 L. ed. 322.

Sustaining a like order and commenting on the above case, Taft, C. J., for the court said: "This is not to be construed as meaning that danger to the public will justify great expenditures, unreasonably burdening the railroad, when less expenditure can reasonably accomplish the object of the improvements and avoid the danger. If the danger is clear, reasonable care must be taken to eliminate it, and the police power may be exerted to that end. But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits.

This follows from principles clearly established by this court. (Citations omitted.) We emphasize this, not because there is doubt about it, but because we deprecate the impression, apparently entertained by some, that in the safeguarding of railroad crossings by order of state or local authority the exercise of police power escapes the ordinary constitutional limitation of reasonableness of cost. This is apt to give to local boards a sense of freedom which tempts to arbitrariness and extravagance. The case before us is one which is near the line of reasonableness, but for the reasons given we think it does not go beyond the line." Lehigh Valley R. Co. v. Board of Public Utility Commissioners (1928) 278 U. S. 24, 34-35, 73 L. ed. 161.

"The beclouding effect of the vague notion that the constitutional prohibition of the taking of property for the public use without compensation has no application to the police power is nowhere more forcibly illustrated than in the cases arising out of the laying out of highways across existing railroads. In such cases many courts hold that the railroad company is not entitled to recover

OMNIA COMMERCIAL COMPANY v. UNITED STATES.

1923. Supreme Court of the United States. 261 U. S. 502.

Appeal from a judgment of the Court of Claims dismissing a petition on demurrer.

Mr. Justice Sutherland delivered the opinion of the Court.

The appellant, on May 19, 1917, by assignment, became the owner of a contract, by which it acquired the right to purchase a large quantity of steel plate from the Allegheny Steel Company, of Pittsburgh, at a price under the market. The contract was of great value, and if carried out would have produced large profits.

In October, 1917, before any deliveries had been made, the United States government requisitioned the steel company's entire production of steel plate for the year 1918, and directed that company not to comply with the terms of appellant's contract, declaring that if an attempt was made to do so the entire plant of the steel company would be taken over and operated for the public use.

Appellant brought an action in the Court of Claims alleging, in addition to the foregoing, that by the orders of the government the performance of the contract by the steel company had been rendered unlawful and impossible; that the effect was to take for the public use appellant's right of priority to the steel plate expected to be produced by the steel company and thereby appropriate for public use appellant's property in the contract. As a result it alleged that it had incurred losses in a large sum which it sought to recover, as just compensation, by virtue of Article V of [the Amendments to] the Constitution. To this petition the United States interposed a demurrer, which was sustained, and the petition dismissed. From this judgment the case comes here by appeal.

* * *

The contract in question was property within the meaning of the Fifth Amendment, Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 690; Cincinnati v. Louisville & Nashville Ry. Co., 223 U. S. 390, 400, and if taken for public use the government would be liable. But destruction of, or injury to, property is frequently accomplished without a "taking" in the constitutional sense. To pre-

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the expense of making the crossing safe, because the obligation to construct and maintain the necessary structures is imposed upon it as an exercise of the police power. The same reasoning would deny an owner of a building, part of which was cut off in the widening of a street, the right to compensation for the expense of making the remaining portion of the building safe for use, since he might be obliged by the public authorities to take this course or else tear down the building, so that the lives of travellers on the street and of occupants of the building would not be endangered, but no court would on this account hold that the owner could not recover this expense."—1 Nichols, The Law of Eminent Domain 290 (1917).

vent the spreading of a fire, property may be destroyed without compensation to the owner, Bowditch v. Boston, 101 U. S. 16, 18; a doctrine perhaps to some extent resting on tradition. Pennsylvania Coal Co., Inc. v. Mahon, 260 U. S. 393.

There are many laws and governmental operations which injuriously affect the value of or destroy property—for example, restrictions upon the height or character of buildings, destruction of diseased cattle, trees, etc., to prevent contagion—but for which no remedy is afforded. Contracts in this respect do not differ from other kinds of property. See Calhoun v. Massie, 253 U. S. 170, where an act of Congress invalidating contracts made with attorneys for compensation exceeding a certain percentage for the prosecution of claims against the government was sustained, although it had the effect of putting an end to an existing contract. This court said (pp. 175-176):

"An appropriate exercise by a state of its police power is consistent with the Fourteenth Amendment, although it results in serious depreciation of property values, and the United States may, consistently with the Fifth Amendment, impose for a permitted purpose, restrictions upon property which produce like results. Lottery Case, 188 U. S. 321, 357; Hipolite Egg Co. v. United States, 220 U. S. 45, 58; Hoke v. United States, 227 U. S. 308, 323; Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146. The sovereign right of the government is not less because the property affected happens to be a contract. Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 484; Union Dry Goods Company v. Georgia Public Service Corporation, 248 U. S. 372."

In Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, it was held that an act of Congress, prohibiting the issuance of free transportation by interstate common carriers, which invalidated a contract for transportation previously entered into and valid when made, did not have the effect of taking private property without compensation. The court, speaking through Mr. Justice Harlan, said (p. 484):

"It is not determinative of the present question that the commerce act as now construed will render the contract of no value for the purposes for which it was made. In Knox v. Lee, 12 Wall. 457, above cited, the court, referring to the Fifth Amendment, which forbids the taking of private property for public use without just compensation or due process of law, said: 'That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts.' "

The conclusion to be drawn from these and other cases which might be cited is that for consequential loss or injury resulting from lawful governmental action the law affords no remedy. The character of the power exercised is not material. Chicago, Burlington & Quincy Ry. Co. v. Drainage Commissioners, 200 U. S. 561, 583-585, 592-593. If, under any power, a contract or other property is *taken* for public use, the government is liable; but, if injured or destroyed by lawful action, without a taking, the government is not liable. What was here requisitioned was the future product of the steel company, and, since this product in the absence of governmental interference would have been delivered in fulfillment of the contract, the contention seems to be that the contract was so far identified with it that the taking of the former, ipso facto, took the latter. This, however, is to confound the contract with its subject-matter. The essence of every executory contract is the obligation which the law imposes upon the parties to perform it. "It [the contract] may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other." Dartmouth College v. Woodward, 4 Wheat. 629, 656. Plainly here there was no acquisition of the obligation or the right to enforce it. If the steel company had failed to comply with the requisition, what would have been the remedy? Not enforcement of the contract, but enforcement of the statute. If the government had failed to pay for what it got, what would have been the right of the steel company? Not to the price fixed by the contract, but to the just compensation guaranteed by the Constitution.

In exercising the power to requisition, the government dealt only with the steel company, which company thereupon became liable to deliver its product to the government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated, but ended. * * *

The judgment of the court below is affirmed.

JACKMAN v. ROSENBAUM COMPANY.

1922. Supreme Court of the United States. 260 U. S. 22.

Error to the Supreme Court of the State of Pennsylvania.

Mr. Justice Holmes delivered the opinion of the court.

The plaintiff in error, the original plaintiff, owned a theatre building in Pittsburgh, Pennsylvania, a wall of which went to the edge of his line. Proceeding under a statute of Pennsylvania, the defendant, owner of the adjoining land, began to build a party wall, intending to incorporate the plaintiff's wall. The city authorities decided that the latter was not safe and ordered it to be removed, which was done by the contractor employed by the defendant. The plaintiff later brought this suit. The declaration did not set up that the entry upon the plaintiff's land was unlawful, but alleged wrongful delay in completing the wall and the use of improper methods. It claimed damages for the failure to restore the plaintiff's building to the equivalent of its former condition, and for the delay, which, it was alleged, caused the plaintiff to lose the rental for a theatrical season. At the trial the plaintiff asked for a ruling that the statute relating to party walls, if interpreted to exclude the recovery of damages without proof of negligence, was contrary to the Fourteenth Amendment. This was refused, the court ruling that the defendant was not liable for damages necessarily resulting from the exercise of the right given by the statute, to build a party wall upon the line, and, more specifically, was not liable for the removal of the plaintiff's old wall. There were further questions as to whether the work was done by an independent contractor and as to negligence, on which the jury brought in a verdict for the plaintiff for $25,000; but the Court of Common Pleas held that the party employed was an independent contractor and that the defendant was entitled to judgment *non obstante veredicto*. The Supreme Court affirmed the judgment, holding among other things that the statute imposed no liability for damages necessarily caused by building such a party wall as it permitted, and that, so construed, it did not encounter the Fourteenth Amendment of the Constitution of the United States, 263 Pa. St. 158.

In the state court the judgment was justified by reference to the power of the state to impose burdens upon property or to cut down its value in various ways without compensation, as a branch of what is called the police power. The exercise of this has been held warranted in some cases by what we may call the average reciprocity of advantage, although the advantages may not be equal in the particular case. Wurts v. Hoagland, 114 U. S. 606; Fallbrook Irrigation District v. Bradley, 164 U. S. 112; Noble State Bank v. Haskell, 219 U. S. 104, 111. The Supreme Court of the state adverted also to increased safety against fire and traced the origin to the great fire in London in 1666. It is unnecessary to decide upon the adequacy of these grounds. It is enough to refer to the fact, also brought out and relied upon in the opinion below, that the custom of party walls was introduced by the first settlers in Philadelphia under William Penn and has prevailed in the state ever since. It is illustrated by statutes concerning Philadelphia going back to 1721; 1 Dallas, Laws of Pennsylvania, 152; and by an Act of 1794 for Pittsburgh, 3 Dallas, Laws, 588, 591, referring to the Act incorporating the borough of Reading. 2 Dallas, Laws, 124, 129.

The Fourteenth Amendment, itself a historical product, did not destroy history for the states and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by Ownbey v. Morgan, 256 U. S. 94, 104, 112. See Louisville & Nashville R. R. Co. v. Barber Asphalt Co., 197 U. S. 430, 434. Such words as "right" are a constant solicitation to fallacy. We say a man has a right to the land that he has bought and that to subject a strip six inches or a foot wide to liability to use for a party wall therefore takes his right to that extent. It might be so and we might be driven to the economic and social considerations that we have mentioned if the law were an innovation, now heard of for the first time. But if, from what we may call time immemorial, it has been the understanding that the burden exists, the land owner does not have the right to that part of his land except as so qualified and the statute that embodies that understanding does not need to invoke the police power.

Of course a case could be imagined where the modest mutualities of simple townspeople might become something very different when extended to buildings like those of modern New York. There was a suggestion of such a difference in this case. But, although the foundations spread wide, the wall above the surface of the ground was only thirteen inches thick, or six and a half on the plaintiff's land, and as the damage complained of was a necessary incident to any such building, the question how far the liability might be extended does not arise. It follows, as stated by the Supreme Court of Pennsylvania that "when either lot-owner builds upon his own property up to the division line, he does so with the knowledge that, in case of the erection of a party wall, that part of his building which encroaches upon the portion of the land subject to the easement will have to come down, if not suitable for incorporation into the new wall." In a case involving local history as this does, we should be slow to overrule the decision of courts steeped in the local tradition, even if we saw reasons for doubting it, which in this case we do not.

Judgment affirmed.

LAUREL HILL CEMETERY v. SAN FRANCISCO.

1910. Supreme Court of the United States. 216 U. S. 358.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to restrain the City and County of San Francisco and its officers from enforcing an ordinance forbidding the

burial of the dead within the City and County limits. The allegations of the complaint are lengthy, but the material facts set forth are as follows: The plaintiff was incorporated in 1867 as a rural cemetery under a general act. The land in question had been dedicated as a burying ground, being at that time outside the city limits and a mile or two away from dwellings and business. It was conveyed to the plaintiff, and later a grant of the same was obtained from the city in consideration of $24,139.79, which sum the city retains. The land has been used as a cemetery ever since; forty thousand lots have been sold and over two million dollars have been spent by the lot owners and other large sums by the plaintiff in preparing and embellishing the grounds. By the terms of the abovementioned general statute the lots, after a burial in them, are inalienable and descend to the heirs of the owner, and the plaintiff is bound to apply the proceeds of sales to the improvement, embellishment and preservation of the grounds. There is land still unsold estimated to be worth $75,000. There now are many dwellings near the cemetery, but it is alleged to be in no way injurious to health or offensive, or otherwise an interference with the enjoyment of property or life. There also is an allegation that there are within the city large tracts, some of them vacant and some of them containing several hundred acres, in several of which interments could be made more than a mile distant from any inhabitants or highway. The ordinance in question begins with a recital that "the burial of the dead within the City and County of San Francisco is dangerous to life and detrimental to the public health," and goes on to forbid such burial under a penalty of fine, imprisonment, or both. The complaint sets up that it violates Article I, § 8, and the Fourteenth Amendment of the Constitution of the United States.
* * *

The only question that needs to be answered, if not the only one before us, is whether the plaintiff's property is taken contrary to the Fourteenth Amendment. * * *

To aid its contention and in support of the averment that its cemetery, although now bordered by many dwellings, is in no way harmful, the plaintiff refers to opinions of scientific men who have maintained that the popular belief is a superstition. Of these we are asked, by implication, to take judicial notice, to adopt them, and on the strength of our acceptance to declare the foundation of the ordinance a mistake and the ordinance void. It may be, in a matter of this kind, where the finding of fact is merely a premise to laying down a rule of law, that this court has power to form its own judgment without the aid of a jury. Prentis v. Atlantic Coast Line, 211 U. S. 210, 227. But whatever the tribunal, in questions of this kind, great caution must be used in overruling the decision of the local authorities, or in allowing it to be overruled. No doubt this court has gone a certain distance in that direction. Dobbins v. Los Angeles, 195 U. S. 222; Lochner v. New York, 198 U. S. 45, 58 *et seq.* * * * But the propriety of deferring a good deal to the tribunals on the spot is not the only ground for caution. If every member of this Bench clearly agreed that burying grounds were centers of safety and thought the Board of Supervisors and the Supreme Court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. On the contrary, evidence that vaccination was deleterious was held properly to have been excluded. Jacobson v. Massachusetts, 197 U. S. 11; s. c., 183 Massachusetts, 242. See Otis v. Parker, 187 U. S. 606, 608, 609. Again there may have been other grounds fortifying the ordinance besides those recited in the preamble. And yet again the extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic. Since, as before the making of constitutions, regulation of burial and prohibition of it in certain spots, especially in crowded cities, have been familiar to the Western World. This is shown sufficiently by the cases cited by the court below; e. g. Coates v. New York, 7 Cow. 585; Kincaid's Appeal, 66 Pa. St. 411; Sohier v. Trinity Church, 109 Massachusetts, 1, 21; Carpenter v. Yeadon, 158 Fed. Rep. 766; s. c., 86 C. C. A. 122. The plaintiff must wait until there is a change of practice or at least an established consensus of civilized opinion before it can expect this court to overthrow the rules that the lawmakers and the court of his own state uphold.

Judgment affirmed.[9]

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[9] Compare Hadacheck v. Sebastian (1915) 239 U. S. 394, 60 L. ed. 348, 1 Ann. Cas. 1917B, 927, in which was sustained an ordinance of the city of Los Angeles prohibiting the manufacture of brick within a defined area of the city, as against an owner who alleged that his eight acres of brick clay therein were worth $800,000 for manufacture of bricks but not more than $60,000 for residential or any other purpose; that the city embraced 107.62 square miles in area, 75% of it devoted to residences, and that the area defined in the ordinance was only sparsely settled. McKenna, J., for a unanimous court, said:

"There was no specific denial of the value of the property or that it contained deposits of clay or that the latter could not be removed and manufactured into brick elsewhere. There was, however, a general denial that the enforcement of the ordinance would 'entirely deprive petitioner of his property and the use thereof.'

"How the Supreme Court dealt with the allegations, denials and affidavits we can gather from its opinion. The court said, through Mr. Justice Sloss, 165 California, p. 416: 'The district to which the prohibition was applied contains about three square miles. The petitioner is the owner of a tract of land, containing eight acres, more or less, within the district described in the ordinance. He acquired his land in 1902, before the territory to which the ordinance was

PENNSYLVANIA COAL COMPANY v. MAHON, ET AL.

1922. Supreme Court of the United States. 260 U. S. 393.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface but in express terms reserves the right to remove all the coal under the same and the grantee takes the premises with the risk and waives all claim for damages

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directed had been annexed to the city of Los Angeles. His land contains valuable deposits of clay suitable for the manufacture of brick, and he has, during the entire period of his ownership, used the land for brickmaking, and has erected thereon kilns, machinery and buildings necessary for such manufacture. The land, as he alleges, is far more valuable for brickmaking than for any other purpose.'

"The court considered the business one which could be regulated and that regulation was not precluded by the fact 'that the value of investments made in the business prior to any legislative action will be greatly diminished,' and that no complaint could be based upon the fact that the petitioner had been carrying on the trade in that locality for a long period.

"And, considering the allegations of the petition, the denials of the return and the evidence of the affidavits, the court said that the latter tended to show that the district created had become primarily a residential section and that the occupants of the neighboring dwellings are seriously incommoded by the operations of petitioner. * * *

"The police power and to what extent it may be exerted we have recently illustrated in Reinman v. Little Rock, 237 U. S. 171. * * * There was a prohibition of a business, lawful in itself, there as here. It was a livery stable there; a brick yard here. * * *

"There is a distinction between Reinman v. Little Rock and the case at bar. There a particular business was prohibited which was not affixed to or dependent upon its locality; it could be conducted elsewhere. Here, it is contended, the latter condition does not exist, and it is alleged that the manufacture of brick must necessarily be carried on where suitable clay is found and that the clay on petitioner's property cannot be transported to some other locality. This is not urged as a physical impossibility but only, counsel say, that such transportation and the transportation of the bricks to places where they could be used in construction work would be prohibitive 'from a financial standpoint.' But upon the evidence the Supreme Court considered the case, as we understand its opinion, from the standpoint of the offensive effects of the operation of a brick yard and not from the deprivation of the deposits of clay, and distinguished Ex parte Kelso, 147 California, 609, wherein the court declared invalid an ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within a certain portion of the city and county of San Francisco. The court there said that the effect of the ordinance was 'to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership,—viz., the right to extract therefrom such rock and stone as they might find it to their advantage to dispose of.' The court expressed the view that the removal could be regulated but that 'an absolute prohibition of such removal under the circumstances,' could not be upheld.

"In the present case there is no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks. And to this feature of the ordinance our opinion is addressed. Whether other questions would arise if the ordinance were broader, and opinion on such questions, we reserve."

that may arise from mining out the coal. But the plaintiffs say that whatever may have been the Coal Company's rights, they were taken away by an Act of Pennsylvania, approved May 27, 1921, P. L. 1198, commonly known there as the Kohler Act. The Court of Common Pleas found that if not restrained the defendant would cause the damage to prevent which the bill was brought, but denied an injunction, holding that the statute if applied to this case would be unconstitutional. On appeal the Supreme Court of the State agreed that the defendant had contract and property rights protected by the Constitution of the United States, but held that the statute was a legitimate exercise of the police power and directed a decree for the plaintiffs. A writ of error was granted bringing the case to this court.

The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person. As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. Rideout v. Knox, 148 Mass. 368. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. Wesson v. Washburn Iron Co., 13 Allen (Mass.) 95, 103. The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

But the case has been treated as one in which the general validity of the act should be discussed. The Attorney General of the State, the City of Scranton and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, "For practical purposes, the right to coal consists in the right to mine it." Commonwealth v. Clearview Coal Co., 256 Pa. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.

It is true that in Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property, that, with the pillar on the other side of the line, would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. Bowditch v. Boston, 101 U. S. 16. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. Spade v. Lynn & Boston R. R. Co., 172 Mass. 488, 489. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act. Block v. Hirsh, 256 U. S. 135; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170; Levy Leasing Co. v. Siegel, 258 U. S. 242.

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Decree reversed.

MR. JUSTICE BRANDEIS dissenting.

The Kohler Act prohibits, under certain conditions, the mining of anthracite coal within the limits of a city in such a manner or to such an extent "as to cause the * * * subsidence of any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed." Coal in place is land, and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance, and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use. Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment?

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious—as it may because of further change in local or social conditions—the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

The restriction upon the use of this property cannot, of course, be lawfully imposed, unless its purpose is to protect the public. But the purpose of a restriction does not cease to be public, because incidentally some private persons may thereby receive gratuitously valuable special benefits. Thus, owners of low buildings may obtain, through statutory restrictions upon the height of neighboring structures, benefits equivalent to an easement of light and air. Welch v. Swasey, 214 U. S. 91. Compare Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61; Walls v. Midland Carbon Co., 254 U. S. 300. Furthermore, a restriction, though imposed for a public purpose, will not be lawful, unless the restriction is an appropriate means to the public end. But to keep coal in place is surely an appropriate means of preventing subsidence of the surface; and ordinarily it is the only available means. Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put. The liquor and the oleomargarine cases settled that. Mugler v. Kansas, 123 U. S. 623, 668, 669; Powell v. Pennsylvania, 127 U. S. 678, 682. See also Hadacheck v. Los

Angeles, 239 U. S. 394; Pierce Oil Corporation v. City of Hope, 248 U. S. 498.

Nor is a restriction imposed through exercise of the police power inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense. Every restriction upon the height of buildings might be secured through acquiring by eminent domain the right of each owner to build above the limiting height; but it is settled that the state need not resort to that power. Compare Laurel Hill Cemetery v. San Francisco, 216 U. S. 358; Missouri Pacific Ry. Co. v. Omaha, 235 U. S. 121. * * *

The fact that this suit is brought by a private person is, of course, immaterial. To protect the community through invoking the aid, as litigant, of interested private citizens is not a novelty in our law. That it may be done in Pennsylvania was decided by its Supreme Court in this case. And it is for a state to say how its public policy shall be enforced.

This case involves only mining which causes subsidence of a dwelling house. But the Kohler Act contains provisions in addition to that quoted above; and as to these, also, an opinion is expressed. These provisions deal with mining under cities to such an extent as to cause subsidence of—

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theaters, hotels, and railroad stations.

(b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.

(c) Any tract, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company Law.

A prohibition of mining which causes subsidence of such structures and facilities is obviously enacted for a public purpose; and it seems, likewise, clear that mere notice of intention to mine would not in this connection secure the public safety. Yet it is said that these provisions of the act cannot be sustained as an exercise of the police power where the right to mine such coal has been reserved. The conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be "an average reciprocity of advantage" as between the owner of the property restricted and the rest of the community; and that here such reciprocity is absent. Reciprocity of advantage is an important consideration, and may even be an essential, where the state's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects, Wurts v.

Hoagland, 114 U. S. 606; Fallbrook Irrigation District v. Bradley, 164 U. S. 112; or upon adjoining owners, as by party wall provisions, Jackman v. Rosenbaum Co., 260 U. S. 22. But where the police power is exercised, not to confer benefits upon property owners but to protect the public from detriment and danger, there is in my opinion, no room for considering reciprocity of advantage. There was no reciprocal advantage to the owner prohibited from using his oil tanks in 248 U. S. 498; his brickyard, in 239 U. S. 394; his livery stable, in 237 U. S. 171; his billiard hall, in 225 U. S. 623; his oleomargarine factory, in 127 U. S. 678; his brewery, in 123 U. S. 623; unless it be the advantage of living and doing business in a civilized community. That reciprocal advantage is given by the act to the coal operators.

FORBES PIONEER BOAT LINE v. BOARD OF COMMISSIONERS.

1922. Supreme Court of the United States. 258 U. S. 338.

Error to a judgment of the Supreme Court of Florida which reversed a judgment recovered by the present plaintiff in error in its action to recover sums of money it had paid to the defendant Board as tolls for the passage of its boats through locks in one of the canals of a drainage system supervised and controlled by the Board under the state law.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit, begun in 1917, to recover tolls unlawfully collected from the plaintiff, the plaintiff in error, for passage through the lock of a canal. The Supreme Court of Florida sustained the declaration, 77 Fla. 742, but on the day of the decision the legislature passed an act, c. 7865, Acts of 1919, that purported to validate the collection. The act was pleaded. The plaintiff demurred setting up Article I, § 10, and the Fourteenth Amendment of the Constitution of the United States, but the Supreme Court rendered judgment for the defendant on the ground that the plea was good. 80 Fla. 252.

Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed. The argument that prevailed below was based on the supposed analogy of United States v. Heinszen & Co., 206 U. S. 370, (Rafferty v. Smith, Bell & Co., 257 U. S. 226,) which held that Congress could ratify the collection of a tax that had been made without authority of law. That analogy, however, fails. A tax may be imposed in respect of past benefits, so that if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power. Wagner v. Baltimore, 239 U. S. 207, 216, 217. Stockdale v. Atlantic Insurance Co., 20 Wall. 323. But generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act. Bird v. Brown, 4 Exch. 786, 799. If we apply that principle this statute is invalid. For if the legislature of Florida had attempted to make the plaintiff pay in 1919 for passages through the lock of a canal, that took place before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls.

It is true that the doctrine of ratification has been carried somewhat beyond the point that we indicate, in regard to acts done in the name of the government by those who assume to represent it.[10] Tiaco v. Forbes, 228 U. S. 549, 556. It is true also that when rights are asserted on the ground of some slight technical defect or contrary to some strongly prevailing view of justice, courts have allowed them to be defeated by subsequent legislation and have used various circumlocutions, some of which are collected in Danforth v. Groton Water Co., 178 Mass. 472, 477. Dunbar v. Boston & Providence R. R. Co., 181 Mass. 383, 385. In those cases it is suggested that the meaning simply is that constitutional principles must leave some play to the joints of the machine.

But courts can not go very far against the literal meaning and plain intent of a constitutional text. Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force shall be at the plaintiff's disposal is less absolute than it is when the claim is for goods sold. Yet no one would say that a claim for goods sold could be abolished without compensation. It would seem from the first decision of the court below that the transaction was not one for which payment naturally could have been expected. To say that the legislature simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We must assume that the plaintiff went through the canal relying upon its legal rights and it is not to be deprived of them because the legislature forgot.

Judgment reversed.

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[10] For an example see Charlotte Harbor &c. R. Co. v. Welles (1922) 260 U. S. 8, 67 L. ed. 100, distinguishing the above case.

NOBLE STATE BANK v. HASKELL.

1911. Supreme Court of the United States. 219 U. S. 104.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a proceeding against the Governor of the state of Oklahoma and other officials who constitute the state banking board, to prevent them from levying and collecting an assessment from the plaintiff under an act approved December 17, 1907. This act creates the board and directs it to levy upon every bank existing under the laws of the state an assessment of one per cent. of the bank's average daily deposits, with certain deductions, for the purpose of creating a depositors' guaranty fund. There are provisos for keeping up the fund, and by an act passed March 11, 1909, since the suit was begun, the assessment is to be 5 per cent. The purpose of the fund is shown by its name. It is to secure the full repayment of deposits. When a bank becomes insolvent and goes into the hands of the bank commissioner, if its cash immediately available is not enough to pay depositors in full, the banking board is to draw from the depositors' guaranty fund (and from additional assessments if required) the amount needed to make up the deficiency. A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund. The plaintiff says that it is solvent and does not want the help of the guaranty fund, and that it cannot be called upon to contribute toward securing or paying the depositors in other banks consistently with article 1, § 10, and the Fourteenth Amendment of the Constitution of the United States. The petition was dismissed on demurrer by the Supreme Court of the state. 22 Okl. 48.

The reference to article 1, § 10, does not strengthen the plaintiff's bill. The only contract that it relies upon is its charter. That is subject to alteration or repeal, as usual, so that the obligation hardly could be said to be impaired by the act of 1907 before us, unless that statute deprives the plaintiff of liberty or property without due process of law. See Sherman v. Smith, 1 Black. 587. Whether it does so or not is the only question in the case.

In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a nolumus mutare as against the law-making power.

The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up (see Receiver of Danby Bank v. State Treasurer, 39 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. Clark v. Nash, 198 U. S. 361; Strickley v. Highland Boy Mining Co., 200 U. S. 527, 531; Offield v. New York, New Haven & Hartford R. R. Co., 203 U. S. 372; Bacon v. Walker, 204 U. S. 311, 315. And in the next, it would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See Ohio Oil Co. v. Indiana, 177 U. S. 190. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said.

It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object and is justified in the same way. The powers to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. See Charlotte, Columbia & Augusta R. R. Co. v. Gibbes, 142 U. S. 386. The power to compel, beforehand, coöperation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. Gundling v. Chicago, 177 U. S. 183, 188. So far is that from being the case that the device is a familiar one. It was adopted by some states the better part of a century ago, and seems never to have been questioned until now. Receiver of Danby Bank v. State Treasurer, 39 Vt. 92; People v. Walker, 17 N. Y. 502. Recent cases going not less far are Lemieux v. Young, 211 U. S. 489, 496; Kidd. Dater & Price Co. v. Musselman Grocer Co., 217 U. S. 461.

It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. Hudson County Water Co. v. McCarter, 209 U. S. 349, 355. It will serve as a datum on this side, that in our opinion the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. Loan Association v. Topeka, 20 Wall. 655; Lowell v. Boston, 111 Mass. 454.

The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the states may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control. On the contrary we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection and the above-described coöperation are necessary safeguards, this court certainly cannot say that it is wrong. North Dakota v. Woodmansee, 1 N. D. 246; Brady v. Mattern, 125 Iowa, 158; Weed v. Bergh, 141 Wis. 569; Commonwealth v. Vrooman, 164 Pa. 306; Myers v. Irwin, 2 Serg. & R. (Pa.) 368; Myers v. Manhattan Bank, 20 Ohio, 283, 302; Attorney General v. Utica Insurance Co., 2 Johns. Ch. (N. Y.) 371, 377. Some further details might be mentioned, but we deem them unnecessary. Of course objections under the state constitution are not open here.

Judgment affirmed.

MILLER v. SCHOENE.

1928. Supreme Court of the United States. 276 U. S. 272.

Mr. Justice Stone delivered the opinion of the court.

Acting under the Cedar Rust Act of Virginia, Va. Acts 1914, c. 36, as amended by Va. Acts 1920, c. 260, now embodied in Va. Code (1924) as §§ 885 to 893, defendant in error, the state entomologist, ordered the plaintiffs in error to cut down a large number of ornamental red cedar trees growing on their property, as a means of preventing the communication of a rust or plant disease with which they were infected to the apple orchards in the vicinity. The plaintiffs in error appealed from the order to the Circuit Court of Shenandoah county which, after a hearing and a consideration of evidence, affirmed the order and allowed to plaintiffs in error $100 to cover the expense of removal of the cedars. Neither the judgment of the court nor the statute as interpreted allows compensation for the value of the standing cedars or the decrease in the market value of the realty caused by their destruction whether considered as ornamental trees or otherwise. But they save to plaintiffs in error the privilege of using the trees when felled. On appeal the Supreme Court of Appeals of Virginia affirmed the judgment. Miller v. State Entomologist, 146 Va. 175. Both in the Circuit Court and the Supreme Court of Appeals plaintiffs in error challenged the constitutionality of the statute under the due process clause of the Fourteenth Amendment and the case is properly here on writ of error. Jud. Code § 237(a).

The Virginia statute presents a comprehensive scheme for the condemnation and destruction of red cedar trees infected by cedar rust. By § 1 it is declared to be unlawful for any person to "own, plant or keep alive and standing" on his premises any red cedar tree which is or may be the source or "host plant" of the communicable plant disease known as cedar rust, and any such tree growing within a certain radius of any apple orchard is declared to be a public nuisance, subject to destruction. Section 2 makes it the duty of the state entomologist, "upon the request in writing of ten or more reputable freeholders of any county or magisterial district, to make a preliminary investigation of the locality * * * to ascertain if any cedar tree or trees * * * are the source of, harbor or constitute the host plant for the said disease * * * and constitute a menace to the health of any apple orchard in said locality, and that said cedar tree or trees exist within a radius of two miles of any apple orchard in said locality." If affirmative findings are so made, he is required to direct the owner in writing to destroy the trees and, in his notice, to furnish a statement of the "fact found to exist whereby it is deemed necessary or proper to destroy" the trees and to call attention to the law under which it is proposed to destroy them. Section 5 authorizes the state entomologist to destroy the trees if the owner, after being notified, fails to do so. Section 7 furnishes a mode of appealing from the order of the entomologist to the circuit court of the county, which is authorized to "hear the objections" and "pass upon all questions involved," the procedure followed in the present case.

As shown by the evidence and as recognized in other cases involving the validity of this statute, Bowman v. Virginia State Entomologist, 128 Va. 351; Kelleher v. Schoene, 14 F. (2d) 341, cedar rust is an infectious plant disease in the form of a fungoid organism which is destructive of the fruit and foliage of the apple, but without effect on the value of the cedar. Its life cycle has two phases which are passed alternately as a growth on red cedar and on apple trees. It is communicated by spores from one to the other over a radius of at least two miles. It appears not to be communicable between trees of the same species, but only from one species to the other, and other plants seem not to be appreciably affected by it. The only practicable method of controlling the disease and protecting apple trees from its ravages is the destruction of all red cedar trees, subject to the infection, located within two miles of apple orchards.

The red cedar, aside from its ornamental use, has occasional use and value as lumber. It is indigenous to Virginia, is not cultivated or dealt in commercially on any substantial scale, and its value throughout the state is shown to be small as compared with that of the apple orchards of the state. Apple growing is one of the principal agricultural pursuits in Virginia. The apple is used there and exported in large quantities. Many millions of dollars are invested in the orchards, which furnish employment for a large portion of the population, and have induced the development of attendant railroad and cold storage facilities.

On the evidence we may accept the conclusion of the Supreme Court of Appeals that the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other. Compare Bacon v. Walker, 204 U. S. 311; Missouri, Kansas & Texas Ry. v. May, 194 U. S. 267; Chicago, Terre Haute & Southeastern Ry. v. Anderson, 242 U. S. 283; Perley v. North Carolina, 249 U. S. 510. And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property. Mugler v. Kansas, 123 U. S. 623; Hadacheck v. Los Angeles, 239 U. S. 394; Village of Euclid v. Ambler Realty Co., 272 U. S. 365; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Northwestern Laundry v. Des Moines, 239 U. S. 486; Lawton v. Steele, 152 U. S. 133; Sligh v. Kirkwood, 237 U. S. 52; Reinman v. Little Rock, 237 U. S. 171.

We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute. See Hadacheck v. Los Angeles, supra, 411. For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process. The injury to property here is no more serious, nor the public interest less, than in Hadacheck v. Los Angeles, supra; Northwestern Laundry v. Des Moines, supra; Reinman v. Little Rock, supra, or Sligh v. Kirkwood, supra.

The statute is not, as plaintiffs in error argue, subject to the vice which invalidated the ordinance considered by this Court in Eubank v. Richmond, 226 U. S. 137. That ordinance directed the committee on streets of the city of Richmond to establish a building line, not less than five nor more than thirty feet from the street line whenever requested to do so by the owners of two-thirds of the property abutting on the street in question. No property owner might build beyond the line so established. Of this the Court said (p. 143), "It [the ordinance] leaves no discretion in the committee on streets as to whether the street [building, *semble*] line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent."

The function of the property owners there is in no way comparable to that of the "ten or more reputable freeholders" in the Cedar Rust Act. They do not determine the action of the state entomologist. They merely request him to conduct an investigation. In him is vested the discretion to decide, after investigation, whether or not conditions are such that the other provisions of the statute shall be brought into action; and his determination is subject to judicial review. The property of plaintiffs in error is not subjected to the possibly arbitrary and irresponsible action of a group of private citizens.

The objection of plaintiffs in error to the vagueness of the statute is without weight. The state court has held it to be applicable and that is enough when, by the statute, no penalty can be incurred or disadvantage suffered in advance of the judicial ascertainment of its applicability. Compare Connally v. General Construction Co., 269 U. S. 385.

Affirmed.

BILLBOARD REGULATION.[11]

The strictly utilitarian trend of the body of law from which ours derives need hardly be argued at length. The fact that most civilized nations find a Ministry of the Fine Arts an indispensable adjunct of government, whereas the English-speaking peoples look upon it as a superfluity * * * is eloquent of a cultural predisposition which the law but reflects. It is no surprise, then, to find that in the past the arts, and the eye, have not been ministered unto by English law, and that while the inferior[12] sense of smell has been protected against nuisances, the superior claims of the eye have been suspect as "sentimental" and have therefore gone begging in the courts. Untoward noises and odors are subject to control since they manifestly may adversely affect repose and health. These latter essentials are in a class with light and air, which Chief Justice Wray, in Queen Elizabeth's reign, declared in the King's Bench to be necessities, to protect which an action on the case lies.[13] But, he goes on to say, of the marring of the view:

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[11] The above extracts and the footnotes to them are from an article, Billboard Regulation and the Aesthetic Viewpoint with reference to California Highways, by Chauncey Shafter Goodrich (1929) 17 Cal. L. Rev. 120-134, 214-231.

[12] Authorities on aesthetics agree in granting a superiority to the senses of sight and hearing, because of their larger scope, over those of smell and touch. *Aesthetics*, 1 ENCYC. BRIT. (11th ed.) 280. *Cf.* PLATO, TIMAEUS (Jowett's transl.) pars. 45-47, 67.

[13] Bland v. Moseley (1587), reported in William Aldred's Case, 9 Coke 57b, 58b, 77 Eng. Reprint 816, 821; 3 BL. COMM. c. 13; 11 HALSBURY, LAWS OF ENGLAND, 329.

"that for prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect, *unde dicitur, laudaturque domus longos qui prospicit agros.* But the law does not give an action for such things of delight.[14]

This decision expressed the attitude of English law for more than three centuries. * * *

THE EARLIER ATTITUDE OF AMERICAN LAW

The colonial fathers were if anything less concerned with the protection of "things of delight" than was Chief Justice Wray. To many of them matters only of delight were anathema. Their reaction against Elizabethan exuberance and Carolingian laxity insured that the claims of the eye would for a long time go suspect. Until lately their influence has been dominant. The natural bias of their descendants was reinforced by the practical necessities of the pioneer period, which required that individual energy should be unchecked save by the most elementary social regulation.[15] It is no wonder, then, that a note of contempt has often crept into judicial or legislative strictures on "merely aesthetic" claims for recognition. These were not essentials such as the law recognized and protected. Two brief quotations, supported by others in a footnote, will serve to give the general judicial tone of a period recent enough, but rapidly passing where not entirely gone:

> "Aesthetic considerations are *a matter of luxury and indulgence* rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."[16]
>
> "It [the police power] cannot justify such a taking for the promotion of *merely* aesthetic purposes."[17]

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[14] So customary has it become to depreciate the eye as the seat of one of the senses that one British advocate, in defending the billboard, goes so far as to deny the existence of sight as a *sense,* though unconsciously admitting it in his next sentence:

"It cannot be said of a boarding that it *will offend* against *any sense;* the utmost that can be said against it is that it is *a blot on the landscape.*" (Italics ours.) Nussey v. Provincial Bill Posting Co. (1909) 1 Ch. 734, 736-7, 2 Br. Ru. Cas. 425.

[15] The classical statement of this period is that attributed by William Dean Howells to his hero, Silas Lapham, who rose through bold advertising of Lapham's Mineral Paint: "I've heard a good deal of talk about that S. T. 1860-X man, and the stove-blacking man, and the kidney-cure man, because they advertised in that way. * * * So long as the people that own the barns and fences don't object, I don't see what the public has got to do with it. And I never saw anything so very sacred about a big rock, along a river or in a pasture, that it wouldn't do to put mineral paint on it in three colours. * * * There ain't any man enjoys a sightly bit of nature—a smooth piece of interval with half-a-dozen good-sized wine-glass elms in it—more than I do. But I ain't a-going to stand up for every big ugly rock I come across, as if we were all a set of dumn Druids. I say the landscape was made for man, and not man for the landscape." HOWELLS, THE RISE OF SILAS LAPHAM (1884) 18.

[16] Passaic v. Paterson Bill Posting Co. (1905) 72 N. J. L. 285, 287, 62 Atl. 267, 268. Italics added.

[17] Commonwealth v. Boston Advtg. Co. (1905) 188 Mass. 348, 352, 74 N. E. 601, 603. Italics added.

"The law can know no distinction between citizens of the superior cultivation of the one over the other. It is with common humanity that legislatures and courts must deal; and that use of property which in all common sense and rea-

CHANGE IN ATTITUDE IN THE UNITED STATES

The world moves, *eppur si muove*. And prevailing ideas, as to what constitutes taste, change with its revolutions. Matters of delight that were judicially accounted "sentiment" or "luxury" yesterday are the necessities of a more sophisticated today.[18] The

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son is *not a nuisance to the average man* cannot be prohibited because repugnant to some sentiment of a particular class." (Marine view case.) Quintini v. Bay St. Louis (1886) 64 Miss. 483, 490, 1 So. 625, 628, 60 Am. Rep. 62. Italics added.

"The purpose of sections 4 and 5 seems to be *mainly sentimental*, and to prevent signs which may be offensive to the aesthetic sensibilities of certain individuals residing in or passing through the vicinity of the bill-boards." Chicago v. Gunning System (1905) 214 Ill. 628, 642, 73 N. E. 1035, 70 L. R. A. 230, 2 Ann. Cas. 892. Italics added. Section 4 prohibited billboards along boulevards, pleasure driveways and in residential districts, save with the consent of three-fourths of the adjoining landowners.

Nor is the judgment of the city council to be accepted as that of the "average man" when it passes on matters aesthetic. For:

"as a matter of fact, a billboard may not be unsightly to the eyes of any other person than those of the members of councils." Bryan v. Chester (1905) 212 Pa. 259, 262, 61 Atl. 894, 108 Am. St. Rep. 870;

"rights guaranteed by the Constitution [which] cannot be invaded for purely aesthetic purposes under the guise of police power." Byrne v. Maryland Realty Co. (1916) 129 Md. 202, 209, 98 Atl. 547, 549, L. R. A. 1917A, 1216 (zoning case);

"it has never been thought that the legislature could invade private rights so far as to prescribe the course to be pursued in these and other matters, although the highly cultured may find on every street in every town and city many things that are not only open to criticism but shocking to the aesthetic taste. The courts of this country have with great unanimity held that the police power cannot interfere with private property rights for purely aesthetic purposes." Haller Sign Works v. Physical, etc. School (1911) 249 Ill. 436, 443, 94 N. E. 920, 34 L. R. A. (N. S.) 998 (billboard case);

"the cut of the dress, the color of the garment worn, the style of the hat, the architecture of the building or its color, may be distasteful to the refined senses of some; yet government can neither control nor regulate in such affairs." Curran Bill Posting Co. v. Denver (1910) 47 Colo. 221, 227, 107 Pac. 261, 264, 27 L. R. A. (N. S.) 548 (billboard case). The argument that the architecture of city-buildings is in the same unimpeachable category with individual taste in dress, an argument also adopted in Haller Sign Works v. Physical, etc. School, *supra*, is answered effectively by Ralph Straub (1924) 28 LAW NOTES 68, 70.

"A nuisance is anything that worketh hurt, inconvenience, or damage to another, and the fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful, or such as would affect only *one of fastidious taste*, but it must be such as would affect *an ordinary, reasonable man*." Italics added.

"A purpose which, although conceded to be public, is a purpose which may be described *as a luxury rather than necessity*." GA. CIV. CODE, § 3861; § 4457 in PARK'S ANN. CODE, GA. (1914) 3, 2717; *ibid.* (1922) 9, 1411; *ibid.* (1926) 12, 715; *ibid.* (1928) 14, 579. Parker v. Commonwealth (1901) 178 Mass. 199, 204, 59 N. E. 634 (zoning case).

"The municipal authority, in endeavoring to regulate the dimensions, etc., of billboards, must refrain from making restrictions which by *pandering to some aesthetic or illegal consideration* amount to an interference with proprietary right beyond the extent of legal authority." Note (1909) 132 Am. St. Rep. 94. Italics added.

[18] The Massachusetts court recognized this trend even thirty years ago: "Many things which a century ago were luxuries, or were altogether unknown, have now become necessaries. It is only within a few years that lands have been taken in this country for public parks. Now the right to take land for this purpose is generally recognized and frequently exercised." Attorney General v. Williams

United States has seen grow, alongside its higher standards of living, a different conception of the fitness of things. * * *

But the world, while moving, is often checked by its efficient brakes. Both Federal and state constitutions guard vested rights; any impingement upon such rights, in the public interest, becomes a social process of some duration; while this process takes place, judicial opinion must lag a considerable distance behind the public opinion that eventually shapes it. * * *

In matters of health, or of moral judgment, the police power admittedly tends to keep more nearly abreast of the times than it does in the mooted field of aesthetics, where its exercise must yet in many instances be justified by indirection. Whether this difference will continue remains to be seen. Not so long ago the charge that a law was in any degree motivated by "aesthetic" considerations was enough to damn it utterly; now, that word no longer spells folly to the ears of many of the courts; some day, it may spell wisdom, as it already does to one or two. Today, in the matter of billboards, especially of those that deface the countryside, as opposed to those in the cities, the process of change is by no means complete. The day of Silas Lapham is past; the day when a phrase such as "the preservation of the amenities of the landscape" is generally accepted has not yet dawned. For this reason there may be value in digressing, for a moment, to consider an integrally allied subject,—that of protecting and amplifying the beauty of our cities,—where the process is already fairly complete.

THE GROWTH OF ZONING IN AMERICAN CITIES

This need not take us long. The legislative and judicial facts are readily available. After a certain period of trial, during which ancient and new standards measured strength, zoning has swept the country. Prior to October, 1921, only 48 cities and towns had adopted zoning ordinances; by the end of 1923 this number had grown to 218; on January 1, 1926, "there were at least 425 zoned municipalities, comprising more than half the urban population of the country";[19] on July 1, 1927, the zoned municipalities had grown to 553;[20] by January 1, 1928, their number had increased to 583, and thirty-one millions lived within the zoned areas.[21] The list includes New York, Chicago, St. Louis, Boston, Baltimore, Pittsburgh, Los Angeles and South San Francisco. San Francisco is not listed; it is zoned as to the *use* of buildings, but not as to their

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(Copley Square case) (1899) 174 Mass. 476, 479, 55 N. E. 77, 78, 47 L. R. A. 314.

[19] A STANDARD STATE ZONING ENABLING ACT, Department of Commerce, Washington (1926).

[20] *Zoning Progress in the United States,* Department of Commerce, Washington, July, 1927.

[21] *Ibid.* Supplement of Jan. 1, 1928.

height or *bulk*. California, with 60 zoned municipalities, is third on the list of the states.

The statutes adopted by some thirty of the states, authorizing municipalities to zone themselves, and the municipal zoning ordinances where not unreasonable or discriminatory, have in general been upheld. The process, though in its later years achieved with cumulative rapidity, passed through several stages. At first, the movement was largely suspect; then followed a growing tendency to support the legislation, and to find adequate reasons for such support other than "purely aesthetic" ones;[22] in an intermediate stage, if grounds of public health and safety could be adduced to justify a zoning ordinance, even the admitted presence of *"incidental"* aesthetic considerations would not wholly vitiate the otherwise proper legislation; eventually, and somewhat timidly, it becomes recognized that the satisfaction of the aesthetic sense has a distinct bearing on the general welfare, and that it may properly receive a certain measure of recognition, "as auxiliary" to other more established social wants.[23] Thus the needs of the eye, denied

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[22] "Long before the days of comprehensive zoning, the American courts laid down the rule that esthetic considerations did not constitute an interest of the community sufficient to justify the interference with individual rights. As a result many laws which were passed for esthetic reasons had to be justified in terms that would bring them within the police power formula of health, safety, morals, or general welfare. For example, billboards could not be suppressed because they were unsightly but were suppressed as having a tendency to afford a shield for immoral practices. The zoning cases have also displayed a tendency to justify zoning under the police power verbiage. With two exceptions they deprecate argument based on esthetic considerations, although it is a matter of common knowledge that esthetic considerations are very powerful motives with the city council which enacts the zoning law." Note (1925) 13 CALIFORNIA L. REV. 418.

"However, it is certain that much of the municipal legislation and regulation of late years, particularly during the past two or three decades, has been induced largely by aesthetic or artistic considerations, and this desire to render the urban centers more attractive has found a firm lodgment in the popular mind. It is destined to increase with the years, and in the development of the law in this respect courts will incline more and more to give a broader interpretation to such regulations, and finally sanction restrictions imposed solely to advance material attractiveness and artistic beauty." 3 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS (2d ed. 1928) § 943.

[23] Welch v. Swasey (1909) 214 U. S. 91, 108, 53 L. Ed. 923, 29 Sup. Ct. 567; St. Louis Poster Advg. Co. v. St. Louis (1919) 249 U. S. 269, 274, 63 L. Ed. 599, 39 Sup. Ct. 274; State v. New Orleans (1923) 154 La. 271, 284, 97 So. 440, 444, 33 A. L. R. 260; York Harbor v. Libby (1928) 126 Maine 537, 542, 140 Atl. 382, 386; Welch v. Swasey (1907) 193 Mass. 364, 375, 79 N. E. 745, 746, 23 L. R. A. (N. S.) 1160; Opinion of the Justices (1920) 234 Mass. 597, 127 N. E. 524; Ayer v. Commissioners (1922) 242 Mass. 30, 136 N. E. 338; Wulfsohn v. Burden, *supra* n. 40; *In re* Liggett (1927) 291 Pa. 109, 116, 139 Atl. 619, 623. In Opinion of the Justices, *supra*, a zoning bill was awarded constitutional rating even though it expressly stated that its provisions were to be carried out "in such manner as will best promote the health, safety, convenience and welfare of the inhabitants, will lessen the danger from fire, *will tend to improve and beautify the city or town, will harmonize with its natural development*, and will assist the carrying out of any schemes for municipal improvement put forth by any municipal planning board or board of survey or other like authority." 234 Mass. at 599. Italics added.

And the Court goes so far as to point out that the Supreme Court of the admittance to the main portal of the judicial edifice, are at last permitted access to the tradesmen's entrance. The next logical step is obvious.[24] * * *

BILLBOARD REGULATION IN THE UNITED STATES: TENDENCY OF DECISIONS

The older phase of billboard regulation, in the main concerned with their control by municipalities, need not concern us here at any length. Its history may be readily found elsewhere.[25] In general, the courts have eventually found it possible to sustain ordinances licensing or taxing billboards, and regulating them as to size and kind, on the grounds that if flimsily built they are a menace to passers-by or from fire, and that if built down to the ground they may conceal garbage dumps, or crime, or immorality.[26] Moreover, in aid of a zoning policy, they may be restricted, as to location. Yet even today, these mild extensions of the police power in general permitted against billboards are the grounds of protest for dissenting opinions and, on occasion, for those of the majority of a court, which refuses to follow the road taken by more socially minded tribunals.[27] And the language of these protests, to the effect that the ordinances attempt to impose an aesthetic criterion, have in this respect a ring of sincerity not always present in the more socially advanced opinions which support the legislation in question, ingeniously but at

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United States has never squarely decided "that the exercise of the police power cannot rest on aesthetic considerations alone as its sole basis," although it admits the inference that "at present at all events" such would be its decision. 234 Mass. at 604. *Cf.* (1913) 26 HARVARD L. REV. 367, 368. New York's Municipal Empowering Act expressly recognizes "the promotion of beauty" as a public purpose. N. Y. Laws 1913, c. 247, § 21.

[24] "The operation of zoning proceeds apace, forcing the jurisprudence of the acquisitive process to yield, slowly indeed but inexorably, before the movement of social forces." Beard, *Conflicts in City Planning* (1927) 17 YALE REVIEW No. 1.

Cf. Judge Charles M. Hough: "The direct appeal of property to due process has for the most part failed; and apparent successes have but taught legislators how to arrive at the same result in another way. The indirect appeal through liberty is still going on, for the American belief that every freeman can do what he likes, where and when he pleases, as long as he does not infringe the moral law as expressed in the usual criminal code, dies very hard. But it is dying, and the courts, when invoked today under the due-process clause, are doing little more than easing the patient's later days." Hough, *Due Process of Law Today* (1919) 32 HARVARD L. REV. 218, 233.

[25] BAKER, LEGAL ASPECTS OF ZONING (1927) 10, 14 *et seq.;* WILLIAMS, THE LAW OF CITY PLANNING AND ZONING (1922) part VI; 3 MCQUILLIN, *op. cit., supra* n. 41, § 986; 2 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 697; Sachs, *Aesthetics and the Law* (1911) 15 LAW NOTES 126; Millard, *Present Legal Aspect of the Billboard Problem* (1916) 11 ILLINOIS L. REV. 29.

[26] In one case an affidavit supporting the validity of the ordinance argued that billboards "intensified the heat by reflecting the sun's rays in the streets," an ingenious objection not elsewhere met with. Kansas City Gunning Adv'g Co. v. Kansas City (1912) 240 Mo. 659, 144 S. W. 1099, 1102.

[27] Anderson v. Shackleford (1917) 74 Fla. 36, 76 So. 343; State v. Lamb (N. J. Sup. 1916) 98 Atl. 459; Cain v. State (1926) 105 Tex. Crim. 204, 287 S. W. 262.

times somewhat disingenuously, on the sole grounds of public safety and morality.[28]

Since control of advertising along highways, especially on private property, must eventually be justified, constitutionally speaking, even after the needs of public health, morals and safety have been recognized to the utmost, by a franker admission that the aesthetic sense does contribute to the larger definition of public welfare or well-being, it may be well to turn to those instances where some recognition has been given to this essential fact. These are few, but significant. Professor Freund wrote in 1904:

> "It is generally assumed that the prohibition of unsightly advertisements (provided they are not indecent), is entirely beyond the police power, and an unconstitutional interference with the rights of property. Probably, however, this is not true. It is conceded that the police power is adequate to restrain offensive odors and noises. A similar protection to the eye, it is conceived, would not establish a new principle, but carry a recognized principle to further applications."[29]

He also said:

> "The question whether mere ugliness not involving any consideration of decency can be placed under police restraint has hardly advanced beyond the range of tentative discussion."[30]

Yet, as early as 1900, in an opinion upholding on other grounds a Los Angeles ordinance regulating billboards, Judge Ross could not refrain from adding:

> "Moreover, the views in and about a city, if beautiful and unobstructed, constitute one of its chief attractions, and in that way add to the comfort and well-being of its people."[31]

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[28] Thus one justice, dissenting, could see in the ordinance no possible justification save the improper one of aesthetics. According to him, the city council had "adopted the aesthetic view of a civic league or confederation of civic leagues" and in the ordinance "the very definition of a billboard bespeaks aesthetics, rather than public safety, public morals, public health, or general welfare." St. Louis Gunning Adv'g Co. v. St. Louis (1911) 235 Mo. 99, 202, 137 S. W. 929, 961, 964, 967.

[29] FREUND, THE POLICE POWER (1904) § 182.

[30] *Op. cit.* § 180, p. 162. At the same time, before zoning had become general, Professor Freund wrote of American cities (§ 181):

"General municipal building regulations in this country are enacted exclusively in the interest of health or safety. * * * In America buildings have never been controlled by law with a view to securing beauty or symmetry."

Cf. "Thus, esthetic considerations, it would seem, fall outside the scope of the police power until the sensibilities of the community as a whole become so highly developed that the public is shocked and disturbed by what is ugly." Note (1914) 27 HARVARD L. REV. 571, 572.

A Maryland judge twenty years ago thus recorded his glimpse of a new day: "It may be that, in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the fine arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this power, even for such purposes." Cochran v. Preston (1908) 108 Md. 220, 70 Atl. 113, 129 Am. St. Rep. 432, 15 Ann. Cas. 1048, 23 L. R. A. (N. S.) 1163.

[31] *In re* Wilshire (C. C. S. D. Cal. 1900) 103 Fed. 620, 623. *Cf.* "It is difficult to understand, why an easement of view from every part of a public street is not, like light and air, a valuable right, of which the owner of a building on the street ought not to be deprived by an encroachment on the highway by a co-

In a decision sustaining legislation against billboards, on approved grounds, a Missouri judge without stress, however, of aesthetic predilections, indulges in the dictum:

> "My individual opinion is that this class of advertising as now conducted is not only subject to control and regulation by the police power of the State, but that it might be entirely suppressed by statute, and that, too, without offending against either the State or Federal Constitution."[32]

And a New York trial judge, holding that whether billboards constitute a nuisance in the Adirondacks State Park, portions of which are still privately owned, is a question of fact, to be decided on the evidence, says:

> "We have reached a point in the development of the police power where an aesthetic purpose needs but little assistance from a practical one in order to withstand an attack on constitutional grounds."[33]

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terminous or adjacent owner. The right of view or prospect is one implied, like other rights, from the dedication of a street to public uses." First Nat'l Bank v. Tyson (1902) 133 Ala. 459, 32 So. 144, 150, 59 L. R. A. 399, 91 Am. St. Rep. 46.

[32] St. Louis Gunning Adv'g Co. v. St. Louis (1911) 235 Mo. 99, 146, 137 S. W. 929. That this expression of opinion is far from unsupported can be seen from Mr. Justice Holmes's statement:

"If the city desires to discourage billboards by a high tax we know of nothing to hinder, even apart from the right to prohibit them altogether asserted in the Cusack Co. Case." St. Louis Poster Adv'g Co. v. St. Louis (1919) 249 U. S. 269, 274, 63 L. ed. 599, 39 Sup. Ct. 274.

[33] People v. Sterling (1927) 128 Misc. 650, 220 N. Y. Supp. 315, 318; *aff'd* (1928) 222 App. Div. 849, 226 N. Y. Supp. 881. The modern note, admitting Beauty to full legal partnership, is also struck in a number of zoning cases:

"It is time that courts recognize the aesthetic as a factor in life. Beauty and fitness enhance values in public and private structures." State v. Houghton (1920) 144 Minn. 13, 20, 176 N. W. 159, 162. The majority opinion is expressed by Holt, J., the dissenting opinion by Dibell, J., thus reversing their relative positions on the first hearing (1919) 144 Minn. 1, 174 N. W. 885. The final dissenting opinion upholds the continuing validity of the doctrine of *laissez faire:* "Heretofore the people in this country have been permitted to work out their own social relations unaided by direct legislation." 144 Minn. at 13, 23, 176 N. W. at 164.

The Kansas Court said: "With the march of the times, however, the scope of the legitimate exercise of the police power is not so narrowly restricted by judicial interpretation as it used to be. There is an aesthetic and cultural side of municipal development which may be fostered within reasonable limitations." Ware v. Wichita (1923) 113 Kans. 153, 157, 214 Pac. 99, 101.

In Wisconsin it has been said: "It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined, and that which formerly did not offend cannot now be endured. * * * The rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. * * * But whether they should be permitted to plague the average or dominant human sensibilities well may be pondered." State v. Harper (1923) 182 Wis. 148, 196 N. W. 451, 455.

"The aesthetic taste is not to be frowned on, or classed as prejudice." State v. Roberge (1927) 144 Wash. 74, 80, 256 Pac. 780, 783.

The frankest and most modern viewpoint is expressed by the Louisiana Court, when it says: "If by the term 'aesthetic considerations' is meant a regard merely for outward appearances, for good taste in the matter of the beauty of the neighborhood itself, we do not observe any substantial reason for saying that such a consideration is not a matter of general welfare. * * * Why should not the police power avail, as well to suppress or prevent a nuisance committed

As, in the matter of zoning, the frankest judicial recognition of the eye, as a sense organ entitled to protection, comes from Louisiana,[34] a Civil Law state, so the first decision unequivocally to state the real objection to billboards comes from an American judge sitting in another Civil Law jurisdiction, the Philippine Islands. This pioneer decision, whose language may some day become judicially popular, deserves more than passing quotation.[35]

A statute[36] taxed billboards, and also gave the Collector of Internal Revenue the power summarily to remove any sign or billboard exposed to public view which, after due investigation, he decided was "offensive to the sight or otherwise a nuisance." Section 5 of the Philippine Bill of July 1, 1902, the fundamental act of the Islands, contains the familiar prohibition of laws which deprive "any person of life, liberty or property without due process of law, or deny to any person therein the equal protection of the laws."[37] Yet Mr. Justice Trent, speaking for a Court of American and Filipino jurists, says:[38]

> "Without entering into the realm of psychology, we think it quite demonstrable that sight is as valuable to a human being as any of his other senses, and that the proper ministration to this sense conduces as much to his contentment as the care bestowed upon the senses of hearing or smell, and probably as much as both together. Objects may be offensive to the eye as well as to the nose or ear. Man's aesthetic feelings are constantly being appealed to through his sense of sight. * * *
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> "The sense of sight is the primary essential to advertising success. Billboard advertising, as it is now conducted, is a comparatively recent form of advertising. It is conducted out of doors and along the arteries of travel, and compels attention by the strategic locations of the boards, which obstruct the range of vision at points where travelers are most likely to direct their eyes. Beautiful landscapes are marred or may not be seen at all by the traveler because of the gaudy array of posters announcing a particular kind of breakfast food, or underwear, the coming of a circus, an incomparable soap, nostrums or medicines for the curing of all the ills to which the flesh is heir, etc., etc. It is quite natural for people to protest against this indiscriminate and wholesale use of the landscape by advertisers and the intrusion of tradesmen upon their hours of leisure and relaxation from work. Outdoor life must lose much of its charm and pleasure if this form of advertising is permitted to continue unhampered

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by offending the sense of sight, as to suppress or prevent a nuisance committed by offending the sense of hearing, or the olfactory nerves? An eyesore in a neighborhood of residences might be as much a public nuisance, and as ruinous to property values in the neighborhood generally, as a disagreeable noise, or odor, or a menace to safety or health. The difference is not in principle, but only in degree. In fact, we believe that the billboard case, Cusack v. Chicago, 242 U. S. 526, 37 Sup. Ct. 190, 61 L. ed. 472, L. R. A. 1918A, 136, Ann. Cas. 1917C, 594, or St. Louis Poster Advertising Co. v. St. Louis, 249 U. S. 269, 39 Sup. Ct. 274, 63 L. ed. 599, or the skyline case, Welch v. Swasey, 214 U. S. 91, 29 Sup. Ct. 567, 53 L. ed. 923, or the case of Hubbard v. Taunton, 140 Mass. 467, 5 N. E. 157, might have rested as logically upon the so-called aesthetic considerations as upon the supposed other considerations of general welfare." State v. New Orleans (1923) 154 La. 271, 283, 97 So. 440, 444, 33 A. L. R. 260.

[34] State v. New Orleans, *supra* n. 59.

[35] Churchill v. Rafferty (1915) 32 Philippine Rep. 580; appeal dismissed (1918) 248 U. S. 591, 36 L. ed. 436, 39 Sup. Ct. 20.

[36] Act No. 2339, § 100(b) (1914).

[37] 32 Stat. 691, 692 (1902), 48 U. S. C. § 1088 (1926).

[38] 32 Philippine Rep. at 608.

> until it converts the streets and highways into veritable canyons through which the world must travel in going to work or in search of outdoor pleasure."

Mr. Justice Trent then cuts to the heart of the matter, by recognizing that the general public, in taxing itself to build the highways, has thereby *created* for the private owners, alongside, the opportunity to sell space for advertising, and that it therefore has a right to control the use or abuse of this added value conferred by its highways. He says:[39]

> "The success of billboard advertising depends not so much upon the use of private property as it does upon the use of the channels of travel used by the general public. Suppose that the owner of private property, who so vigorously objects to the restriction of this form of advertising, should require the advertiser to paste his posters upon the billboards so that they would face the interior of the property instead of the exterior. Billboard advertising would die a natural death if this were done, and its real dependency not upon the unrestricted use of private property but upon the unrestricted use of the public highways is at once apparent. Ostensibly located on private property, the real and sole value of the billboard is its proximity to the public thoroughfares. Hence, we conceive that the regulation of billboards and their restriction is not so much a regulation of private property as it is a regulation of the use of the streets and other public thoroughfares."[40]

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[39] 32 Philippine Rep. at 609.

[40] This standpoint, that the owner adjacent to highways, who sells the eyesight of the public to the advertisers, is abusing a public right, is obtaining recognition: "The property which the landowner claims is, in the last analysis, the attention of the public, and why may not the public, through the municipal authorities, prohibit him from exercising his vantage point to seize that which belongs not to him but to the public * * * its privacy of mind? The truth is that the billboard is not so much an unaesthetic structure as the courts would have it, but a violent intruder on the public peace and comfort." Ralph Straub (1924) 28 LAW NOTES 68, 71.

Col. Frederick S. Greene, State Superintendent of Public Works of New York, in a report to the Governor and Legislature says: "Such a tax is recommended not only to produce revenue, but also to lessen the number of unsightly signs which are now a blot upon the scenery of this state. Aside from this esthetic point, a sign tax is eminently just. *As everyone knows, a dirt road has no advertising value, but after the state has expended $50,000 and more a mile to convert a dirt road into an improved highway, traffic is immediately attracted and signs inevitably follow the traffic.* Signboard companies thus reap, without any return to the state, a benefit which the state has provided through expenditure of millions of dollars." Italics ours. ANNUAL REPORT FOR 1926 (Feb. 14th, 1927). *Cf.* ANNUAL REPORT FOR 1927 (Jan. 24th, 1928) p. 6.

"In the case of a billboard statute there is in a sense a regulation of the use of a public way, since the value of the private use arises entirely from the adjoining public way. It would not involve a great advance to allow regulation of private property adjoining public places for aesthetic reasons." Note (1916) 29 HARVARD L. REV. 860, 862.

See also Editorial, San Francisco Examiner, July 12th, 1928: "The people are expending literally billions to make travel easy and pleasant, and the signboard companies for a negligible outlay in comparison, are seriously depreciating that investment." *Ibid.*, July 24th, 1928: "As fast as the American people invest a million to make a roadbed attractive to motorists the signboard companies, by spending a few hundreds of dollars, make the roadsides hideous."

In recognition of the added value conferred by highways and roads on adjacent property, County Assessors in New Jersey are substantially increasing assessments on the land, in proportion to the amount of advertising matter it carries. (Letter from N. J. State Board of Taxes and Assessments, August 7, 1928.)

The decisions in the United States which hamper the regulation of the billboards he conceives to be[41]

> "an unwarranted restriction upon the scope of the police power by the courts. If the police power may be exercised to encourage a healthy social and economic condition in the country, and if the comfort and convenience of the people are included within those subjects, everything which encroaches upon such territory is amenable to the police power. A source of annoyance and irritation to the public does not minister to the comfort and convenience of the public. And we are of the opinion that the prevailing sentiment is manifestly against the erection of billboards which are offensive to the sight."

He freely grants that the opinion he is expressing for the Supreme Court of the Philippine Islands is at variance with a number of continental decisions to the effect that the police power cannot interfere with private property rights for purely aesthetic purposes:[42]

> "The courts, taking this view, rest their decisions upon the proposition that the aesthetic sense is disassociated entirely from any relation to the public health, morals, comfort, or general welfare and is, therefore, beyond the police power of the state. But we are of the opinion, as above indicated, that unsightly advertisements or signs, signboards, or billboards which are offensive to the sight, are not disassociated from the general welfare of the public. This is not establishing a new principle, but carrying a well recognized principle to further application."[43]

On denying a rehearing, he further says:[44]

> "It might be well to note that billboard legislation in the United States is attempting to eradicate a business which has already been firmly established. This business was allowed to expand unchecked until its very extent called attention to its objectionable features. In the Philippine Islands such legislation has almost anticipated the business, which is not yet of such proportions that it can be said to be fairly established. It may be that the courts in the United States have committed themselves to a course of decisions with respect to billboard advertising, the full consequences of which were not perceived for the reason that the development of the business has been so recent that the objectionable features of it did not present themselves clearly to the courts nor to the people. We, in this country, have the benefit of the experience of the people of the United States and may make our legislation preventive rather than corrective."

And he adds the economic argument which suggests itself so naturally in a jurisdiction which enjoys an annual tourist-crop:[45]

> "There are in this country, moreover, on every hand in those districts where Spanish civilization has held sway for so many centuries, examples of architecture now belonging to a past age, and which are attractive not only to the residents of the country but to visitors. If the billboard industry is permitted without constraint or control to hide these historic sites from the passerby, the country will be less attractive to the tourist and the people will suffer a distinct economic loss."

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[41] 32 Philippine Rep. at 610.

[42] 32 Philippine Rep. at 611.

[43] FREUND, THE POLICE POWER (1904) 166.

[44] 32 Philippine Rep. at 618.

[45] 32 Philippine Rep. at 618.

VILLAGE OF EUCLID, OHIO ET AL. v. AMBLER REALTY CO.

1926. Supreme Court of the United States. 272 U. S. 365.

[Bill by the Ambler Realty Co. to enjoin enforcement by the Village of Euclid of a comprehensive zoning ordinance.[46] From a decree for plaintiff in the District Court of the United States for the Northern District of Ohio defendants appeal.]

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[46] "A comprehensive zoning ordinance is one that affects all parts of the city and 'treats each section according to its own peculiar needs, present and prospective.' Under this system the land placed in each of the different districts will benefit by the plan, the land zoned for business or industry as well as the residence sections, for each will have been zoned for its 'highest and most valuable use.' Piecemeal zoning ordinances are not so easily defended as are comprehensive plans. Piecemeal zoning ordinances apply only to certain parts of a city and very often they are adjudged unreasonable, arbitrary, and discriminatory because a store or garage in one district may receive different treatment from one situated in like circumstances in another part of the city. In fact, it is hardly correct to call block, or residential, or piecemeal districts 'zones.' The usual type of such ordinances is one that sets off a particular street or section of the city and then ordains that certain trades or business concerns shall be excluded. Some provide that if a majority of the houses within a radius of a certain number of feet are residential, the lot specified shall be used only for residential building. Many of the opponents of zoning cite cases of this nature as reflecting upon the constitutionality of comprehensive zoning." Newman F. Baker, Constitutionality of Zoning (1925) 20 Ill. L. Rev. 213, 216.

"The first comprehensive zone ordinance may be said to be that of New York City, enacted in 1916. * * * Comprehensiveness may be of two kinds. First, an ordinance may include all three of the types of regulation, height, use, and bulk, or it may be limited to one or two of these. Districting by height alone has been sustained in the few cases which have reached the courts, including a decision of the United States Supreme Court. Welch v. Swasey, 214 U. S. 91 (1909), affirming 193 Mass. 364, 79 N. E. 745 (1907); Ayer v. Commrs. on Height of Buildings in Boston, 242 Mass. 30, 136 N. E. 338 (1922); Cochran v. Preston, 108 Md. 220, 70 Atl. 113 (1908). See also Atkinson v. Piper, 195 N. W. 544 (Wis., 1923), upholding statute fixing maximum heights. There are cases upholding use regulations exclusively. Ex parte Hadacheck, 165 Cal. 416, 132 Pac. 584 (1913), aff'd under name of Hadacheck v. Sebastian, 239 U. S. 394 (1915); In re Montgomery, 163 Cal. 457, 125 Pac. 1070 (1912). * * * The combination of all three types of regulation is more thorough, more scientific and, therefore, more reasonable than any one of these types of regulation applied alone. The comprehensive ordinance, consequently, has an obviously greater reasonableness than mere height or use districting.

"The comprehensiveness of the ordinance relates also to its geographical extent, that is, the extent to which it covers the territory of the municipality. In failing to realize the significance of this aspect, a few courts and many who have written about zoning have fallen into some confusion of terminology. A city might decide to zone a large portion of its territory less than the whole, that is, to divide this large portion into the various types of height, use, and bulk districts, and such a plan might, without great inaccuracy, be called a comprehensive zone plan." Alfred Bettman, Constitutionality of Zoning (1924) 37 Har. L. Rev. 834, 842-843.

During the regime of piecemeal or sporadic exclusions the courts usually found many occupations and industries sufficiently obnoxious to be validly excluded from residential blocks or districts, such as livery stables, laundries, lumber yards, brick kilns, undertaking establishments, slaughter houses, filling stations, sanitariums, fertilizer workers, carpet-beating machines, foundries, asylums (see cases collected in (1925) 20 Ill. L. Rev. 215-216, and in (1922) 7 Iowa L. B. 216), but it was widely held that "store-buildings" were not sufficiently obnoxious to justify prevention of their erection in residential sections, the courts finding no justification except the inadequate one of aesthetic gratification. Willison v. Cooke (1913) 54 Colo. 320, 130 Pac. 828, 44 L. R. A. (N. S.) 1030; People v. Chicago (1913) 261 Ill. 16, 103 N. E. 609, 49 L. R. A. (N. S.)

Mr. Justice Sutherland delivered the opinion of the Court.

The village of Euclid is an Ohio municipal corporation. It adjoins and practically is a suburb of the city of Cleveland. Its estimated population is between 5,000 and 10,000, and its area from 12 to 14 square miles, the greater part of which is farm lands or unimproved acreage. It lies, roughly, in the form of a parallelogram measuring approximately 3½ miles each way. East and west it is traversed by three principal highways: Euclid avenue, through the southerly border, St. Clair avenue, through the central portion, and Lake Shore boulevard, through the northerly border, in close proximity to the shore of Lake Erie. The Nickel Plate Railroad lies from 1,500 to 1,800 feet north of Euclid avenue, and the Lake Shore Railroad 1,600 feet farther to the north. The three highways and the two railroads are substantially parallel.

Appellee is the owner of a tract of land containing 68 acres, situated in the westerly end of the village, abutting on Euclid avenue to the south and the Nickel Plate Railroad to the north. Adjoining this tract, both on the east and on the west, there have been laid out restricted residential plats upon which residences have been erected.

On November 13, 1922, an ordinance was adopted by the village council, establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc. * * *

Before proceeding to a consideration of the case, it is necessary to determine the scope of the inquiry. The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it

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438, Ann. Cas. 1915A, 292; Stubbs v. Scott (1915) 127 Md. 86, 95 Atl. 1060 (motor vehicle sales-room); State ex rel. Lachtman v. Houghton (1916) 134 Minn. 226, 158 N. W. 1017; Spann v. Dallas (1921) 111 Tex. 350, 235 S. W. 513, 19 A. L. R. 1387; St. Louis v. Dorr (1898) 145 Mo. 466, 46 S. W. 976, 42 L. R. A. 686, 68 Am. Rep. 575 (ordinance invalid which provided that land along a certain street should be for residential purposes only). The decisions in every state down to 1925, both as to piecemeal and comprehensive zoning, are stated and discussed by Newman F. Baker (1925) 20 Ill. L. Rev. 213-248.

For constitutional and other aspects of zoning see also: Newman F. Baker, Aesthetic Zoning Regulations (1926) 25 Mich. L. Rev. 124-142; Zoning Ordinances, (1926) 11 Iowa L. Rev. 152-173 (framing and contents of zoning ordinances); Zoning Legislation (1926) 11 Cornell L. Q. 164-178; The Zoning Board of Appeals (1926) 10 Minn. L. Rev. 277-308; Newman F. Baker, Legal Aspects of Zoning (Chicago University Press, 1927); Alfred Bettman, Constitutionality of Zoning (1924) 37 Har. L. Rev. 834-859; Thomas A. Byrne, The Constitutionality of a General Zoning Ordinance (1927) 11 Marquette L. Rev. 189-215; George D. Hott, Constitutionality of Municipal Zoning (1927) 33 W. Va. L. Q. 332-349; Eugene McQuillan, Constitutional Validity of Zoning under the Police Power (1926) 11 St. Louis L. Rev. 76-106; M. T. Van Hecke, Zoning Ordinances and Restrictions in Deeds (1928) 37 Yale L. J. 407-425; Frank Backus Williams, The Law of City Planning and Zoning (1922).

is especially adapted, being immediately in the path of progressive industrial development; that for such uses it has a market value of about $10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of $2,500 per acre; that the first 200 feet of the parcel back from Euclid avenue, if unrestricted in respect to use, has a value of $150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of $50 per front foot. * * *

The record goes no farther than to show, as the lower court found, that the normal and reasonably to be expected use and development of that part of appellee's land adjoining Euclid avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal and reasonably to be expected use and development of the residue of the land is for industrial and trade purposes. * * *

The motion [to dismiss the bill] was properly overruled, the effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses, and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. * * * Is the ordinance invalid, in that it violates the constitutional protection "to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory"?

Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning,* but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim "sic utere tuo ut alienum non laedas," which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus the question whether the power to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. Sturgis v. Bridgeman, L. R. 11 Ch. 852, 865. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. Radice v. New York, 264 U. S. 292, 294.

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. See Welch v. Swasey, 214 U. S. 91; Hadacheck v. Los Angeles, 239 U. S. 394; Reinman v. Little Rock, 237 U. S. 171; Cusack Co. v. City of Chicago, 242 U. S. 526, 529, 530.

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. Hebe Co. v. Shaw, 248 U. S. 297, 303; Pierce Oil Corp.

v. City of Hope, 248 U. S. 498, 500. The inclusion of a reasonable margin, to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect "passes the bounds of reason and assumes the character of a merely arbitrary fiat." Purity Extract Co. v. Lynch, 226 U. S. 192, 204. Moreover, the restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures, presently to be discussed.

We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the provisions of the ordinance excluding from residential districts apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny it altogether or narrowly limit it, and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. We shall not attempt to review these decisions at length, but content ourselves with citing a few as illustrative of all. [Citations omitted.] As evidence of the decided trend toward the broader view, it is significant that in some instances the state courts in later decisions have reversed their former decisions holding the other way. * * *

The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops, and factories. Another ground is that the construction and repair of streets may be rendered easier and less expensive, by confining the greater part of the heavy traffic to the streets where business is carried on.

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. Cusack Co. v. City of Chicago, supra, pages 530-531; Jacobson v. Massachusetts, 197 U. S. 11, 30-31.

It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not made, it cannot be said that the land-owner has suffered or is threatened with an injury which entitles him to challenge their constitutionality. * * * Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

And this is in accordance with the traditional policy of this court. In the realm of constitutional law, especially, this court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.

Decree reversed.[47]

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER dissent.

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[47] In Zahn v. Board of Public Works, Los Angeles (1927) 274 U. S. 325, 71 L. ed. 1074, a Los Angeles ordinance was sustained which established an exclusively residence zone of an area including the complainant's land, though the

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GORIEB v. FOX ET AL.

1927. Supreme Court of the United States. 274 U. S. 603.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

For the declared purpose of establishing building lines and regulating and restricting the construction and location of buildings, and for other purposes, an ordinance of Roanoke, Va., divides the city into "business" and "residential" districts. Another ordinance, as amended July 11, 1924, creates a set-back or building line, with relation to the street, to which all buildings subsequently erected must conform. The line must be at least as far from the street as that occupied by sixty per cent. of the existing houses in the block; the word "block" being defined to mean only that portion on the same side of the street where the new building is proposed, bounded by the nearest intersecting streets to the right and left thereof. The city council by a proviso reserved to itself the authority to make exceptions and permit the erection of buildings closer to the street.

Petitioner owns several building lots within the residential district, upon one of which he has a dwelling house. He applied to the city council for a permit to erect a brick store building upon an adjoining lot, and, after investigation, the council by resolution gave him permission to erect a brick store thirty-four and two-thirds feet back from the street line. He thereupon sought by mandamus to compel the council to issue a permit to occupy the lot for his building up to the street line, alleging the unconstitutionality of the set-back ordinance. The judgment of the court of first instance was against him, sustaining the validity of the ordinance and the action of the council. This judgment was affirmed by the state supreme court, 145 Va. 554, which held that the ordinance was valid and within the legislative grant of power. Acts of Assembly, 1922, p. 46.

The ordinances summarized above were those in effect when the permit was granted by the council, and they alone are involved in this inquiry. The attack here is upon the set-back ordinance, and that is assailed as contravening the due process of law and equal protection clauses of the Fourteenth Amendment to the federal Constitution.

It is said, first, that the standard furnished is so vague and uncertain as in reality to be no standard at all, since the houses, or sixty per cent. of them, in any block, may stand at a variety of distances from the street, in which event it cannot be determined from

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latter would have a greatly enhanced value if available for business purposes. A large part of this area though still vacant had already been restricted to residence use by private covenants before the ordinance was passed. "The ordinance," the court said, "is of the now familiar comprehensive type, but in the main regulates only the character of buildings which lawfully may be erected and does not prescribe height and area limitations."

the ordinance whether sixty per cent. of the houses nearest to the street, or sixty per cent. of those farthest from the street, or some other method of calculation, is to govern. But in the present case this contention may be put aside, since (a) the permit was granted and the building line fixed under the proviso which reserved to the council in appropriate cases authority to fix the building line without reference to this limitation; and (b) as to the existing houses in the block in question, the actual differences in respect of the building lines upon which more than sixty per cent. of them stood are so slight as to be entirely negligible upon the question of certainty.

The evidence shows that the variation in the location of eighty per cent. of the existing houses was only one-tenth of a foot, and, ignoring this inconsequential difference, the established building line was slightly over forty-two feet back from the street. The line designated for petitioner's building was substantially more favorable to him than this, being more than seven feet nearer the street. Whether the provision of the ordinance, fixing the line with relation to the location of sixty per cent. of the existing houses, in its general, or in some other specific, application is so vague as to amount to a denial of due process, is a question which does not concern petitioner, since, as applied to the facts in the present case, it is definite enough, and since, in any event, he has been excepted from the operation of the provision, and it does not appear that the alleged unconstitutional feature of which he complains has injured him or operated to deprive him of any right under the federal Constitution. Oliver Iron Co. v. Lord, 262 U. S. 172, 180-181; Chicago Board of Trade v. Olsen, 262 U. S. 1, 42; Dahnke-Walker Co. v. Bondurant, 257 U. S. 282, 289; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544-545.

The proviso, under which the council acted, also is attacked as violating the equal protection clause, on the ground that such proviso enables the council unfairly to discriminate between lot owners by fixing unequal distances from the street for the erection of buildings of the same character under like circumstances. We cannot, of course, construe the ordinance as meaning that the power may be thus exerted; nor may we assume in advance that it will be exercised by the council capriciously, arbitrarily, or with inequality. It will be time enough to complain when, if ever, the power shall be thus abused.

The proviso evidently proceeds upon the consideration that an inflexible application of the ordinance may under some circumstances result in unnecessary hardship. In laying down a general rule, such as the one with which we are here concerned, the practical impossibility of anticipating in advance and providing in specific terms for every exceptional case which may arise, is apparent. And yet the inclusion of such cases may well result in great and needless hardship, entirely disproportionate to the good which will result from a literal enforcement of the general rule. Hence the wisdom and necessity here of reserving the authority to determine whether, in specific cases of need, exceptions may be made without subverting the general purposes of the ordinance. We think it entirely plain that the reservation of authority in the present ordinance to deal in a special manner with such exceptional cases is unassailable upon constitutional grounds. Wilson v. Eureka City, 173 U. S. 32, 36-37; In re Flaherty, 105 Cal. 558, 562; Ex parte Fiske, 72 Cal. 125, 127.

Yick Wo v. Hopkins, 118 U. S. 356, upon which petitioner relies, is not to the contrary. The ordinance there involved vested uncontrolled discretion in the board of supervisors, and this discretion was actually exercised for the express purpose of depriving the petitioner in that case of a privilege that was extended to others. See Crowley v. Christensen, 137 U. S. 86, 94.

The remaining contention is that the ordinance, by compelling petitioner to set his building back from the street line of his lot, deprives him of his property without due process of law. Upon that question the decisions are divided as they are in respect of the validity of zoning regulations generally. But after full consideration of the conflicting decisions, we recently have held, in Euclid v. Ambler Co., 272 U. S. 365, that comprehensive zoning laws and ordinances, prescribing, among other things, the height of buildings to be erected (Welch v. Swasey, 214 U. S. 91) and the extent of the area to be left open for light and air, and in aid of fire protection, etc., are, in their general scope, valid under the federal Constitution. It is hard to see any controlling difference between regulations which require the lot owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. Euclid v. Ambler Co., supra, p. 386. State Legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable. Zahn v. Board of Public Works, 274 U. S. 325.

The property here involved forms part of a residential district within which, it is fair to assume, permission to erect business buildings is the exception and not the rule. The members of the city council, as a basis for the ordinance, set forth in their answer that front yards afford room for lawns and trees, keep the dwellings farther from the dust, noise, and fumes of the street, add to the attractiveness and comfort of a residential district, create a better home environment, and, by securing a greater distance between houses on opposite sides of the street, reduce the fire hazard; that the projection of a building beyond the front line of the adjacent dwellings cuts off light and air from them, and, by interfering with the view of street corners, constitutes a danger in the operation of automobiles. We cannot deny the existence of these grounds—indeed, they seem obvious. Other grounds, of like tendency, have been suggested. The highest court of the state, with greater familiarity with the local conditions and facts upon which the ordinance was based than we possess, has sustained its constitutionality; and that decision is entitled to the greatest respect and, in a case of this kind, should be interfered with only if in our judgment it is plainly wrong, Welch v. Swasey, supra, p. 106, a conclusion which, upon the record before us, it is impossible for us to reach.

The courts, it is true as already suggested, are in disagreement as to the validity of set-back requirements. An examination discloses that one group of decisions holds that such requirements have no rational relation to the public safety, health, morals, or general welfare, and cannot be sustained as a legitimate exercise of the police power. The view of the other group is exactly to the contrary. In the Euclid Case, upon a review of the decisions, we rejected the basic reasons upon which the decisions in the first group depend and accepted those upon which rests the opposite view of the other group. Nothing we think is to be gained by a similar review in respect of the specific phase of the general question which is presented here. As to that, it is enough to say that, in consonance with the principles announced in the Euclid Case, and upon what, in the light of present day conditions, seems to be the better reason, we sustain the view put forward by the latter group of decisions, of which the following are representative: Windsor v. Whitney, 95 Conn. 357; Matter of Wulfsohn v. Burden, 241 N. Y. 288, 303; Lincoln Trust Co. v. Williams Bldg. Corp., 229 N. Y. 313.

Eubank v. Richmond, 226 U. S. 137, which is petitioner's main reliance upon this point, presented an altogether different question. The ordinance there considered *required* the committee on streets to fix a building line upon the *request* of the owners of two-thirds of the property abutting on any street. The ordinance was held bad by this court (p. 143) because it left no discretion in the committee.

"The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determine not only the extent of use but the kind of use which another set of owners may make of their property."

And the court expressly declined (p. 144) to consider the power of a city to establish a building line or regulate the structure or height of buildings.

Since upon consideration we are unable to say that the ordinance under review is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," we are bound to sustain it as constitutional. Euclid v. Ambler Co., supra, p. 395.

Judgment affirmed.[48]

NECTOW v. CAMBRIDGE.

1928. Supreme Court of the United States. 277 U. S. 183.

Mr. Justice Sutherland delivered the opinion of the Court.

A zoning ordinance of the city of Cambridge divides the city into three kinds of districts, residential, business, and unrestricted. Each of these districts is subclassified in respect to the kind of buildings which may be erected. The ordinance is an elaborate one, and of the same general character as that considered by this court in Euclid v. Ambler Co., 272 U. S. 365. In its general scope it is conceded to be constitutional within that decision. The land of plaintiff in error was put in district R-3, in which are permitted only dwellings, hotels, clubs, churches, schools, philanthropic institutions, green-houses and gardening, with customary incidental accessories. The attack upon the ordinance is that, as specifically applied to plaintiff in error, it deprived him of his property without due process of law in contravention of the Fourteenth Amendment.

The suit was for a mandatory injunction directing the city and its inspector of buildings to pass upon an application of the plaintiff in error for a permit to erect any lawful buildings upon a tract of land without regard to the provisions of the ordinance including such tract within a residential district. The case was referred to a master to make and report findings of fact. After a view of the premises and the surrounding territory, and a hearing, the master made and reported his findings. The case came on to be heard by a justice of the court, who, after confirming the master's report, reported the case for the determination of the full court. Upon consideration, that court sustained the ordinance as applied to plaintiff in error, and dismissed the bill. 260 Mass. 441.

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[48] For the earlier holdings against establishment of set-back lines under the police power and conflict even as to whether they might be established by eminent domain, and the more favorable trend of later decisions, see notes in 12 A. L. R. 679, 681; 28 A. L. R. 315; 44 A. L. R. 1377; 53 A. L. R. 1222 (annotating Appeal of White (1926) 287 Pa. 259, 134 Atl. 409, which is contra to Gorieb v. Fox).

A condensed statement of facts, taken from the master's report, is all that is necessary. When the zoning ordinance was enacted, plaintiff in error was and still is the owner of a tract of land containing 140,000 square feet, of which the locus here in question is a part. The locus contains about 29,000 square feet, with a frontage on Brookline street, lying west, of 304.75 feet, on Henry street, lying north, of 100 feet, on the other land of the plaintiff in error, lying east, of 264 feet, and on land of the Ford Motor Company, lying southerly, of 75 feet. The territory lying east and south is unrestricted. The lands beyond Henry street to the north and beyond Brookline street to the west are within a restricted residential district. The effect of the zoning is to separate from the west end of plaintiff in error's tract a strip 100 feet in width. The Ford Motor Company has a large auto assembling factory south of the locus; and a soap factory and the tracks of the Boston & Albany Railroad lie near. Opposite the locus, on Brookline street, and included in the same district, there are some residences; and opposite the locus, on Henry street, and in the same district, are other residences. The locus is now vacant, although it was once occupied by a mansion house. Before the passage of the ordinance in question, plaintiff in error had outstanding a contract for the sale of the greater part of his entire tract of land for the sum of $63,000. Because of the zoning restrictions, the purchaser refused to comply with the contract. Under the ordinance, business and industry of all sorts are excluded from the locus, while the remainder of the tract is unrestricted. It further appears that provision has been made for widening Brookline street, the effect of which, if carried out, will be to reduce the depth of the locus to 65 feet. After a statement at length of further facts, the master finds "that no practical use can be made of the land in question for residential purposes, because among other reasons herein related, there would not be adequate return on the amount of any investment for the development of the property." The last finding of the master is:

"I am satisfied that the districting of the plaintiff's land in a residence district would not promote the health, safety, convenience and general welfare of the inhabitants of that part of the defendant City, taking into account the natural development thereof and the character of the district and the resulting benefit to accrue to the whole City and I so find."

It is made pretty clear that because of the industrial and railroad purposes to which the immediately adjoining lands to the south and east have been devoted and for which they are zoned, the locus is of comparatively little value for the limited uses permitted by the ordinance.

We quite agree with the opinion expressed below that a court should not set aside the determination of public officers in such a matter unless it is clear that their action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." Euclid v. Ambler Co., supra, p. 395.

An inspection of a plat of the city upon which the zoning districts are outlined, taken in connection with the master's findings, shows with reasonable certainty that the inclusion of the locus in question is not indispensable to the general plan. The boundary line of the residential district before reaching the locus runs for some distance along the streets, and to exclude the locus from the residential district requires only that such line shall be continued 100 feet further along Henry street and thence south along Brookline street. There does not appear to be any reason why this should not be done. Nevertheless, if that were all, we should not be warranted in substituting our judgment for that of the zoning authorities primarily charged with the duty and responsibility of determining the question. Zahn v. Board of Public Works, 274 U. S. 325, 328, and cases cited. But that is not all. The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. Euclid v. Ambler Co., supra, p. 395. Here, the express finding of the master, already quoted, confirmed by the court below, is that the health, safety, convenience, and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question. This finding of the master, after a hearing and an inspection of the entire area affected, supported, as we think it is, by other findings of fact, is determinative of the case. That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained.

Judgment reversed.[49]

ALLGEYER v. LOUISIANA.

1897. Supreme Court of the United States. 165 U. S. 578.

[The State of Louisiana brought an action in a Louisiana court to recover from Allgeyer & Co., three statutory penalties of $1000 each for alleged violations of a Louisiana statute which purported so to penalize any person, firm or corporation, who "in any manner whatsoever does any act in this state to effect, for himself or for another, insurance on property then in this state in any marine insurance company which has not complied in all respects with the laws of this state." The agreed facts showed that Allgeyer & Co., cotton exporters doing business in New Orleans, made a contract of open marine insurance with the Atlantic Mutual Insurance Company, a New York company, which had no agent in Louisiana and which had not complied with the requirements of Louisiana for the doing of business in that state. In accordance with the terms of this open policy Allgeyer & Co. upon later making a shipment of cotton gave notice to the insurance company by letter mailed in Louisiana, the notice being necessary to cause the open policy to attach to any particular shipment. By the terms of the policy, premiums and losses were payable in New York. Premiums were remitted by the defendants from New Orleans. The Supreme Court of Louisiana, reversing the trial court, gave judgment for one penalty of $1000 and this writ of error was taken.]

Mr. Justice Peckham delivered the opinion of the court.

There is no doubt of the power of the state to prohibit foreign insurance companies from doing business within its limits. The state can impose such conditions as it pleases upon the doing of any business by those companies within its borders, and unless the conditions be complied with the prohibition may be absolute. The cases upon this subject are cited in the opinion of the court in Hooper v. California, 155 U. S. 648.

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[49] In Washington ex rel. Seattle Title Trust Co. v. Roberge (1928) 278 U. S. 116, 73 L. ed. 210, an administrative feature of the Seattle comprehensive zoning ordinance was held not consistent with due process of law.

May zoning ordinances authorize erection of buildings of a type excluded by prior restrictive covenants? See Ludgate v. Somerville (1927) 121 Ore. 643, 256 Pac. 1043, 54 A. L. R. 837 (annotation). Is legislation valid which fixes a minimum height for new buildings? See Brown v. Board of Appeals, Springfield (1927) 327 Ill. 644, 159 N. E. 225, 56 A. L. R. 242 (annotation).

A conditional prohibition in regard to foreign insurance companies doing business within the State of Louisiana is to be found in article 236 of the constitution of that state, which reads as follows: "No foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the state, upon whom process may be served."

It is not claimed in this suit that the Atlantic Mutual Insurance Company has violated this provision of the constitution by doing business within the state. * * *

In the course of the opinion delivered in this case by the Supreme Court of Louisiana that court said:

"The open policy in this case is conceded to be a New York contract; hence the special insurance effected on the cotton complained of here was a New York contract. * * * We are not dealing with the contract. If it be legal in New York, it is valid elsewhere. We are concerned only with the fact of its having been entered into by a citizen of Louisiana while within her limits affecting property within her territorial limits. It is the act of the party, and not the contract, which we are to consider. * * * The defendants while in the state undoubtedly insured their property located in the state in a foreign insurance company under an open policy. The instant the letter or communication was mailed or telegraphed the property was insured. The act of insurance was done within the state and the offence denounced by the statute was complete." * * *

We have, then, a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the State of Louisiana, being made and to be performed within the State of New York, where the premiums were to be paid, and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the State of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the state. It was a mere notification that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification was sent.

It is natural that the state court should have remarked that there is in this "statute an apparent interference with the liberty of defendants in restricting their rights to place insurance on property of their own whenever and in what company they desired." Such interference is not only apparent, but it is real, and we do not think that it is justified for the purpose of upholding what the state says is its policy with regard to foreign insurance companies which had not complied with the laws of the state for doing business within its limits. In this case the company did no business within the state, and the contracts were not therein made.

The supreme court of Louisiana says that the act of writing within that state the letter of notification was an act therein done to effect an insurance on property then in the state, in a marine insurance company which had not complied with its laws, and such act was therefore prohibited by the statute. As so construed, we think the statute is a violation of the Fourteenth Amendment of the federal Constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

It was said by Mr. Justice Bradley, in Butchers' Union Company v. Crescent City Company, 111 U. S. 746, 762, in the course of his concurring opinion in that case, that "the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen." Again, on page 764 the learned justice said: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." And again, on page 765: "But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already intimated, is a material part of the liberty of the citizen."[50] It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word "liberty," as contained in the Fourteenth Amendment. * * *

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[50] Note that these expressions of Mr. Justice Bradley are from his separate concurring opinion, delivered in 1884 in the cited case, and are repetitions of his statements in his dissenting opinion in the Slaughter-House Cases, supra, at p. 640. The instant case is the first in which the Supreme Court relied upon the "liberty of contract" concept as a ground for holding a statute invalid.

The foregoing extracts have been made for the purpose of showing what general definitions have been given in regard to the meaning of the word "liberty" as used in the Amendment, but we do not intend to hold that in no such case can the state exercise its police power. When and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises.

Has not a citizen of a state, under the provisions of the federal Constitution above mentioned, a right to contract outside of the state for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the state by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of the Hooper Case (supra), and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the state, and as such was a valid and proper contract. The act done within the limits of the state under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the federal Constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the state to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the federal Constitution.

In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto; and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction; nor can the state legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the state. The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it. Milliken v. Pratt, 125 Mass. 374; Tilden v. Blair, 21 Wall. 241. The contract in this case was thus made. It was a valid contract, made outside of the state, to be performed outside of the state, although the subject was property temporarily within the state. As the contract was valid in the place where made and where it was to be performed, the party to the contract, upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act and to give that notification within the limits of the state, any prohibition of the state statute to the contrary notwithstanding. The giving of the notice is a mere collateral matter; it is not the contract itself, but is an act performed pursuant to a valid contract, which the state had no right or jurisdiction to prevent its citizens from making outside the limits of the state. * * *

Judgment reversed.

✓ HOLDEN v. HARDY.

1898. Supreme Court of the United States. 169 U. S. 366.

[Holden was convicted before a justice of the peace in Utah on charges of having employed workmen more than eight hours a day, one in an underground mine and another in an ore reduction plant, in violation of a statute which made eight hours the maximum per day for such employment "except in cases of emergency where life or property is in imminent danger." No emergency was shown. From a denial by the State Supreme Court of a writ of habeas corpus this writ of error was taken.]

MR. JUSTICE BROWN delivered the opinion of the court. * * * An examination * * * of cases under the Fourteenth Amendment will demonstrate that, in passing upon the validity of state legislation under that Amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science * * *. [Various law reforms are here mentioned.]

This case does not call for an expression of opinion as to the wisdom of these changes, or their validity under the Fourteenth Amendment, although the substitution of prosecution by information in lieu of indictment was recognized as valid in Hurtado v.

California, 110 U. S. 516. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that, while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible, and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens, as they may deem best for the public welfare, without bringing them into conflict with the supreme law of the land.

Of course, it is impossible to forecast the character or extent of these changes; but in view of the fact that, from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and particularly to the new relations between employers and employés, as they arise.

* * *

Recognizing the difficulty in defining with exactness the phrase "due process of law," it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation, and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense.

As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. Indeed, we may go a step further, and say that as property can only be legally acquired as between living persons by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid. * * * [A quotation from Allgeyer v. Louisiana, ante, p. 732 is omitted.]

This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous or so far detrimental to the health of employés as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases Davidson v. New Orleans, 96 U. S. 97, and Yick Wo v. Hopkins, 118 U. S. 356, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion "is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests." Lawton v. Steele, 152 U. S. 133, 136. * * *

While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina, and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way and by such primitive methods that no special laws were considered necessary, prior to the adoption of the Constitution, for the protection of the operatives; but, in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them, without special protection against the dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the states designed to meet these exigencies, and to secure the safety of persons peculiarly exposed to these dangers. Within this general category are ordinances providing for fire escapes for hotels, theaters, factories, and other large buildings; a municipal inspection of boilers; and appliances designed to secure passengers upon railways and steamboats against the dangers necessarily incident to these methods of transportation. In states where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact; for the cleanliness and ventilation of working rooms; for the guarding of well holes, stairways, elevator shafts; and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shoring up of dangerous walls; for ventilation shafts, bore holes, escapement shafts, means of signaling the surface; for the supply of fresh air, and the elimination, as far as possible, of dangerous gases; for safe means of hoisting and lowering cages; for a limitation upon the number of persons permitted to enter a cage; that cages shall be covered; and that there shall be fences and gates around the top of shafts, besides other similar precautions. * * *

But, if it be within the power of a legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals. It is as much for the interest of the state that the public health should be preserved as that life should be made secure. With this end in view, quarantine laws have been enacted in most, if not all, of the states; insane asylums, public hospitals, and institutions for the care and education of the blind established;

and special measures taken for the exclusion of infected cattle, rags, and decayed fruit. In other states laws have been enacted limiting the hours during which women and children shall be employed in factories; and while their constitutionality, at least as applied to women, has been doubted in some of the states, they have been generally upheld. * * *

Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the state. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employés; and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal courts.

While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases generated by the processes of refining or smelting.

* * *

The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently, under the statute, is the only one liable, his defense is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employés, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. "The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer."[51]

We have no disposition to criticise the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employés, and there are reasonable grounds for believing that such determination is supported by the facts. * * *

Affirmed.[52]

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

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[51] To what extent may government go in attempting to make the individual a fit social or economic unit, or to compel him to forego risks of becoming unfit? See Samuels v. McCurdy, ante, p. 662. In Ah Lim v. Territory of Washington (1890) 1 Wash. 156, 163-164, 24 Pac. 588, 9 L. R. A. 395, sustaining a statute which made opium smoking a criminal offense, Dunbar, J., said: "Doubtless the true theory on which compulsory education is sustained is, that the state has an interest in the intellectual condition of each of its citizens, recognizing the fact that society is but an aggregation of individuals, and that the moral or intellectual plane of society is elevated or degraded in proportion to the plane occupied by its individual members, and that the education is not compelled for the benefit of the child during its minority, or for its exclusive benefit after its majority.

"The state has an undisputed right to, and does provide gymnasium attachments to its schools, and prescribed calisthenic exercises for the muscular development of school children. The object to be obtained is not for the exclusive benefit of the child. The state has an interest in the health of its citizens, and has a right to see to it that its citizens are self-supporting."

Compare compulsory treatment of inebriates, sustained in Leavitt v. Morris (1908) 105 Minn. 170, 117 N. W. 393, 17 L. R. A. (N. S.) 984, 15 Ann. Cas. 961, with which compare People ex rel. Barone v. Fox (1911) 144 App. Div. 611, 129 N. Y. Supp. 646, holding that prostitutes when found, upon arrest for vagrancy, to have communicable venereal disease may be confined for treatment beyond the term of confinement for undiseased vagrants. Ordinances declaring association with prostitutes, thieves and other evil persons punishable offenses were held invalid in Watertown v. Christnacht (1917) 39 S. Dak. 290, 164 N. W. 62, L. R. A. 1917F, 903 (annotations) and in Lancaster v. Reed (1919, Mo. App.) 207 S. W. 868. While a wanderer who is able to work and is without other means of support is punishable for refusal to work, a state statute is invalid even in war-time which attempts to require every able-bodied person to pursue some useful occupation although financially able to remain idle. Ex parte Hudgins (1920) 86 W. Va. 526, 103 S. E. 327, 9 A. L. R. 1361. Contra: State v. McClure (1919) 31 Del. 265, 105 Atl. 712.

[52] In Aikens v. Wisconsin (1904) 195 U. S. 194, 49 L. ed. 154, the court assumed that the Fourteenth Amendment established a constitutionally protected "right to contract" (immunity from state interference with associating by agreement for some purposes) but held valid a state statute which imposed punishment upon "any two or more persons who shall combine * * * for the purpose of * * * maliciously injuring another in his reputation, trade, business or profession by any means whatever." So in Smiley v. Kansas (1905) 196 U. S. 447, 456, 49 L. ed. 546, in sustaining a statute intended to suppress combinations in restraint of competition, the court said: "Undoubtedly there is

LOCHNER v. PEOPLE OF NEW YORK.

1905. Supreme Court of the United States. 198 U. S. 45.

[On writ of error to review a judgment of the New York Court of Appeals which had affirmed a judgment of a lower court convicting Lochner for requiring and permitting employees in his bakery and confectionery to work in excess of a statutory limit. The statute applied only to bakeries and confectioneries and limited employment therein to not more than sixty hours per week or ten hours in one day.]

Mr. Justice Peckham delivered the opinion of the court. * * *

The statute necessarily interferes with the right of contract between the employer and employés, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the federal Constitution. Allgeyer v. Louisiana, 165 U. S. 578. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. Mugler v. Kansas, 123 U. S. 623; In re Kemmler, 136 U. S. 436; Crowley v. Christensen, 137 U. S. 86; In re Converse, 137 U. S. 624.

The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the federal Constitution offers no protection. If the contract be one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no

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a certain freedom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom parties may seek to further their business interests, and it may not be always easy to draw the line between those contracts which are beyond the reach of the police power and those which are subject to prohibition or restraint."

protection from the federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the state, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employé), it becomes of great importance to determine which shall prevail,—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state.

This court has recognized the existence and upheld the exercise of the police powers of the states in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed. Among the later cases where the state law has been upheld by this court is that of Holden v. Hardy, 169 U. S. 366. * * *

It will be observed that, even with regard to that class of labor, the Utah statute [in that case] provided for cases of emergency wherein the provisions of the statute would not apply. The statute now before this court has no emergency ~~clause in~~ it, and, ~~if~~ the statute is valid, there are no circumstances and no emergencies under which the slightest violation of the provisions of the act would be innocent. There is nothing in Holden v. Hardy which covers the case now before us. Nor does Atkin v. Kansas, 191 U. S. 207, touch the case at bar. The Atkin Case was decided upon the right of the state to control its municipal corporations, and to prescribe the conditions upon which it will permit work of a public character to be done for a municipality. Knoxville Iron Co. v. Harbison, 183 U. S. 13, is equally far from an authority for this legislation. The employés in that case were held to be at a disadvantage with the employer in matters of wages, they being miners and coal workers, and the act simply provided for the cashing of coal orders when presented by the miner to the employer. * * *

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail,—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor. * * *

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris,* as employer or employé, to make contracts for the labor of the latter under the protection of the provisions of the federal Constitution, there would seem to be no length to which legislation of this nature might not go. The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature, as stated in Holden v. Hardy, supra, and Jacobson v. Massachusetts, 197 U. S. 11.

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employé. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family.

In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employés. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real-estate clerk, or the broker's clerk, in such offices is therefore unhealthy, and the legislature, in its paternal wisdom, must, therefore, have the right to legislate on the subject of, and to limit, the hours for such labor; and, if it exercises that power, and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employé condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts.

It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employés, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired. We mention these extreme cases because the contention is extreme.

We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employés named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employés, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employés, if the hours of labor are not curtailed. * * *

This interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase. * * * It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. * * * It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employés (all being men, *sui juris*), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employés. Under such circumstances the freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the federal Constitution. * * *

Reversed.

MR. JUSTICE HARLAN, with whom MR. JUSTICE WHITE and MR. JUSTICE DAY concurred, dissenting: * * * I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the state and the end sought to be accomplished by its legislation. * * * Still less can I say that the statute is, beyond question, a plain palpable invasion of rights secured by the fundamental law. * * *

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. Suppose the statute prohibited labor in bakery and confectionery establishments in excess of eighteen hours each day. No one, I take it, could dispute the power of the state to enact such a statute. But the statute before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the state to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. There are very few, if any, questions in political economy about which entire certainty may be predicated. * * *

I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the state and to provide for those dependent upon them.

If such reasons exist that ought to be the end of this case, for the state is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States. * * *

Mr. Justice Holmes dissenting. I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. Jacobson v. Massachusetts, 197 U. S. 11. United

States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. Northern Securities Co. v. United States, 193 U. S. 197. Two years ago we upheld the prohibition of sales of stock on margins, or for future delivery, in the Constitution of California. Otis v. Parker, 187 U. S. 606. The decision sustaining an eight-hour law for miners is still recent. Holden v. Hardy, 169 U. S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word "liberty," in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

MULLER v. STATE OF OREGON.

1908. Supreme Court of the United States. 208 U. S. 412.

[The case involved the validity of the following Oregon statute: "No female shall be employed in any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day."]

Mr. Justice Brewer delivered the opinion of the court. * * *

The single question is the constitutionality of the statute under which the defendant was convicted, so far as it affects the work of a female in a laundry. * * *

It is the law of Oregon that women, whether married or single, have equal contractual and personal rights with men. * * * Their rights in these respects can no more be infringed than the equal rights of their brothers. We held in Lochner v. New York, 198 U. S. 45, that a law providing that no laborer shall be required or permitted to work in a bakery more than sixty hours in a week or ten hours in a day was not as to men a legitimate exercise of the police power of the state, but an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and as such was in conflict with, and void under, the federal constitution. That decision is invoked by plaintiff in error as decisive of the question before us. But this assumes that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor. * * *

It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation, as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis for the defendant in error is a very copious collection of all these matters * * * an epitome of which is found in the margin.[53]

While there have been but few decisions bearing directly upon the question, the following sustain the constitutionality of such legislation: Commonwealth v. Hamilton Mfg. Co., 120 Mass. 383; Wenham v. State, 65 Neb. 394, 400, 406; State v. Buchanan, 29 Wash. 602; Commonwealth v. Beatty, 15 Pa. Super. Ct. 5, 17. Against them is the case of Ritchie v. People, 155 Ill. 98.

The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge. * * *

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[53] The marginal note lists numerous statutes of many states and foreign countries, and says that also included in the brief were extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene and inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women.

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As [*sic*] minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality.

Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.

We have not referred in this discussion to the denial of the elective franchise in the State of Oregon, for while it may disclose a lack of political equality in all things with her brother, that is not of itself decisive. The reason runs deeper, and rests in the inherent difference between the two sexes, and in the different functions in life which they perform.

For these reasons, and without questioning in any respect the decision in Lochner v. New York, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the federal Constitution, so far as it respects the work of a female in a laundry, and the judgment of the Supreme Court of Oregon is affirmed.[54]

BUNTING v. STATE OF OREGON.

1917. Supreme Court of the United States. 243 U. S. 426.

Mr. Justice McKenna delivered the opinion of the court.[55]

Indictment charging a violation of a statute of the State of Oregon, § 2 of which provides as follows:

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[54] Accord: Hawley v. Walker (1914) 232 U. S. 718, 58 L. ed. 813, (ten hour day for women in millinery establishments); Riley v. Massachusetts (1914) 232 U. S. 671, 58 L. ed. 788, (ten hour day for women in any manufacturing establishment and without deviation from schedule posted by proprietor); Miller v. Wilson (1915) 236 U. S. 373, 59 L. ed. 628, (eight hour day for women employed in hotels, herein a chambermaid; the court said, "This is not to imply that a limitation of the hours of labor of women might not be pushed to a wholly indefensible extreme"); Bosley v. McLaughlin (1915) 236 U. S. 385, 59 L. ed. 632 (for women employed in hospitals an eight hour day and not more than forty-eight hours in any one week); Radice v. New York (1924) 264 U. S. 292, 68 L. ed. 690, (forbidding employment of women as cooks and waitresses in restaurants between 10 P. M. and 6 A. M.).

[55] The brief of Mr. Felix Frankfurter, as reported in the official reporter, contained the following:

"In Lochner v. New York, 198 U. S. 45, the state authority in the specific instance was denied because no reasonable relation was discernible to the major-

"No person shall be employed in any mill, factory or manufacturing establishment in this state more than ten hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger; *provided, however,* employees may work overtime not to exceed three hours in any one day, conditioned that payment be made for said overtime at the rate of time and one-half of the regular wage."

A violation of the act is made a misdemeanor, and in pursuance of this provision the indictment was found. It charges a violation of the act by plaintiff in error, Bunting, by employing and causing to work in a flour mill belonging to the Lakeview Flouring Mills, a corporation, one Hammersly for thirteen hours in one day, Hammersly not being within the excepted conditions, and not being paid the rate prescribed for overtime.

A demurrer was filed to the indictment, alleging against its sufficiency that the law upon which it was based is invalid because it violates the Fourteenth Amendment of the Constitution of the United States and the constitution of Oregon.

The demurrer was overruled; and the defendant, after arraignment, plea of not guilty and trial, was found guilty. A motion in

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ity between a ten hour law for bakers and the public welfare. This judgment was based upon a view of the nature of the baker's employment beyond ten hours as known 'to the common understanding' *Id.* 59. See Hours of Labor and Realism in Constitutional Law, 29 Harv. L. Rev. 353. It is now clear that 'common understanding' is a treacherous criterion both as to the assumptions on which such understanding is based, and as to the evil consequences, if they are allowed to govern. Pound's Liberty of Contract, 18 Yale L. J. 454, 480, note 123; 2 Ely's Property and Contract, 662, 674-5. The subject is one for scientific scrutiny and critique, for authoritative interpretation of accredited facts. To this end science has been devoted all over the world. Particularly in the last decade science has been giving us the basis for judgment by experience to which, when furnished, judgment by speculation must yield. This is precisely what Holden v. Hardy, supra, looked forward to.

"The insight expressed in that case has now been amply justified by experience. What in 1898 presented a specific, and apparently, exceptional instance—the poisoning of the human system through long hours of labor in mines, and the implications of this evil to the general welfare—is now disclosed to be of far wider and deeper application. It is now demonstrable that the considerations that were patent as to miners in 1898 are to-day operative, to a greater or less degree, throughout the industrial system.

"It is to this body of experience that the court's attention is invited. It is a mass of data that, partly, was not presented in cases like Lochner v. New York, supra, but mostly could not have been before the court, because it was not heretofore in existence. Inasmuch as the application of the contending principles must vary with the facts to which they are sought to be applied, of course new facts are the indispensable basis to the determination of the validity of specific new legislation. People v. Schweinler Press, 214 N. Y. 395, 412."

The official reporter adds:

"In support of the argument, counsel's brief presented an extensive systematic review of facts and statistics dealing with the effects of overtime upon the physical and moral health of the worker and so upon the vitality, efficiency and prosperity of the nation, with additional references to experiences and results abroad since the outbreak of the European War. The good effects following regulation and the extent of regulation as shown in American and foreign legislation were also indicated."

arrest of judgment was denied and he was fined $50. The judgment was affirmed by the Supreme Court of the state. The Chief Justice of the court then allowed this writ of error.

The consonance of the Oregon law with the Fourteenth Amendment is the question in the case, and this depends upon whether it is a proper exercise of the police power of the state, as the Supreme Court of the state decided that it is.

That the police power extends to health regulations is not denied, but it is denied that the law has such purpose or justification. It is contended that it is a wage law, not a health regulation, and takes the property of plaintiff in error without due process. The contention presents two questions: (1) Is the law a wage law, or an hours of service law? And (2) if the latter, has it equality of operation?

Section 1 of the law expresses the policy that impelled its enactment to be the interest of the state in the physical well-being of its citizens and that it is injurious to their health for them to work "in any mill, factory or manufacturing establishment" more than ten hours in any one day; and § 2, as we have seen, forbids their employment in those places for a longer time. If, therefore, we take the law at its word there can be no doubt of its purpose, and the Supreme Court of the state has added the confirmation of its decision, by declaring that "the aim of the statute is to fix the maximum hours of service in certain industries. The act makes no attempt to fix the standard of wages. No maximum or minimum wage is named. That is left wholly to the contracting parties."

It is, however, urged that we are not bound by the declaration of the law or the decision of the court. In other words, and to use counsel's language, "the legislative declaration of necessity, even if the act followed such declaration, is not binding upon this court. Coppage v. Kansas, 236 U. S. 1." Of course, mere declaration cannot give character to a law nor turn illegal into legal operation, and when such attempt is palpable this court necessarily has the power of review.

But does either the declaration or the decision reach such extreme? Plaintiff in error, in contending for this and to establish it, makes paramount the provision for overtime; in other words, makes a limitation of the act the extent of the act—indeed, asserts that it gives, besides, character to the act, illegal character.

To assent to this is to ascribe to the legislation such improvidence of expression as to intend one thing and effect another, or artfulness of expression to disguise illegal purpose. We are reluctant to do either and we think all the provisions of the law can be accommodated without doing either.

First, as to plaintiff in error's attack upon the law. He says: "The law is not a ten-hour law; it is a thirteen-hour law designed solely for the purpose of compelling the employer of labor in mills, factories and manufacturing establishments to pay more for labor than the actual market value thereof." And further: "It is a ten-hour law for the purpose of taking the employer's property from him and giving it to the employee; it is a thirteen-hour law for the purpose of protecting the health of the employee." To this plaintiff in error adds that he was convicted, not for working an employee during a busy season for more than ten hours, but for not paying him more than the market value of his services.

The elements in this contention it is difficult to resolve or estimate. The charge of pretense against the legislation we, as we have already said, cannot assent to. The assumption that plaintiff in error was convicted for not paying more in a busy season than the market value of the services rendered him or that under the law he will have to do so, he gives us no evidence to support. If there was or should be an increase of demand for his products, there might have been or may be an increase of profits. However, these are circumstances that cannot be measured, and we prefer to consider with more exactness the overtime provision.

There is a certain verbal plausibility in the contention that it was intended to permit thirteen hours' work if there be fifteen and one-half hours' pay, but the plausibility disappears upon reflection. The provision for overtime is permissive, in the same sense that any penalty may be said to be permissive. Its purpose is to deter by its burden, and its adequacy for this was a matter of legislative judgment under the particular circumstances. It may not achieve its end, but its insufficiency cannot change its character from penalty to permission. Besides, it is to be borne in mind that the legislature was dealing with a matter in which many elements were to be considered. It might not have been possible, it might not have been wise, to make a rigid prohibition. We can easily realize that the legislature deemed it sufficient for its policy to give to the law an adaptation to occasions different from special cases of emergency for which it provided, occasions not of such imperative necessity, and yet which should have some accommodation—abuses prevented by the requirement of higher wages. Or even a broader contention might be made that the legislature considered it a proper policy to meet the conditions long existent by a tentative restraint of conduct rather than by an absolute restraint, and achieve its purpose through the interest of those affected rather than by the positive fiat of the law.

We cannot know all of the conditions that impelled the law or its particular form. The Supreme Court, nearer to them, describes the law as follows: "It is clear that the intent of the law is to make 10 hours a regular day's labor in the occupations to which reference is made. Apparently the provisions for permitting labor for the overtime on express conditions were made in order to facilitate the enforcement of the law, and in the nature of a mild penalty for employing one not more than three hours overtime. It might be regarded as more difficult to detect violations of the law by an employment for a shorter time than for a longer time. This penalty also goes to the employee in case the employer avails himself of the overtime clause."

But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise. Rast v. Van Deman & Lewis Co., 240 U. S. 342, 365. It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government; and that it is not as complete as it might be, not as rigid in its prohibitions as it might be, gives, perhaps, evasion too much play, is lighter in its penalties than it might be, is no impeachment of its legality. This may be a blemish, giving opportunity for criticism and difference in characterization, but the constitutional validity of legislation cannot be determined by the degree of exactness of its provisions or remedies. New policies are usually tentative in their beginnings, advance in firmness as they advance in acceptance. They do not at a particular moment of time spring full-perfect in extent or means from the legislative brain. Time may be necessary to fashion them to precedent customs and conditions and as they justify themselves or otherwise they pass from militancy to triumph or from question to repeal.

But passing general considerations and coming back to our immediate concern, which is the validity of the particular exertion of power in the Oregon law, our judgment of it is that it does not transcend constitutional limits.

This case is submitted by plaintiff in error upon the contention that the law is a wage law, not an hours-of-service law, and he rests his case on that contention. To that contention we address our decision and do not discuss or consider the broader contentions of counsel for the state that would justify the law even as a regulation of wages.

There is a contention made that the law, even regarded as regulating hours of service, is not either necessary or useful "for preservation of the health of employees in mills, factories, and manufacturing establishments." The record contains no facts to support the contention, and against it is the judgment of the legislature and the Supreme Court, which said: "In view of the well-known fact that the custom in our industries does not sanction a longer service than ten hours per day, it cannot be held, as a matter of law, that the legislative requirement is unreasonable or arbitrary as to hours of labor. Statistics show that the average daily working time among workingmen in different countries is, in Australia, 8 hours;

in Great Britain, 9; in the United States, 9¾; in Denmark, 9¾; in Norway, 10; Sweden, France, and Switzerland, 10½; Germany, 10¼; Belgium, Italy, and Austria, 11; and in Russia, 12 hours."

The next contention of plaintiff in error is that the law discriminates against mills, factories and manufacturing establishments in that it requires that a manufacturer, without reason other than the fiat of the legislature, shall pay for a commodity, meaning labor, one and one-half times the market value thereof while other people purchasing labor in like manner in the open market are not subjected to the same burden. But the basis of the contention is that which we have already disposed of, that is, that the law regulates wages, not hours of service. Regarding it as the latter, there is a basis for the classification.

Further discussion we deem unnecessary.

Judgment affirmed.

The Chief Justice, Mr. Justice Van Devanter and Mr. Justice McReynolds, dissent.

Mr. Justice Brandeis took no part in the consideration and decision of the case.

NEW YORK CENTRAL R. CO. v. WHITE.

1917. Supreme Court of the United States. 243 U. S. 188.

Mr. Justice Pitney, delivering the opinion of the court, sustaining the New York Workmen's Compensation Act of 1914,[56] said in part:

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[56] The first American Workmen's Compensation Law applicable to a wide range of employments was enacted in New York in 1910. In Ives v. South Buffalo R. Co. (1911) 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156, this act was held to be in conflict with the due process of law clauses of the state and federal constitutions, by unanimous decision of the New York Court of Appeals (Cullen, C. J., Gray, Haight, Willard Bartlett, Chase, Collin and Werner, JJ.). The opinion of the court contained the following: "The statute, judged by our common-law standards, is plainly revolutionary. Its central and controlling feature is that every employer who is engaged in any of the classified industries shall be liable for any injury to a workman arising out of and in the course of the employment by 'a necessary risk or danger of the employment or one inherent in the nature thereof; * * * provided that the employer shall not be liable in respect of any injury to the workman which is caused in whole or in part by the serious and willful misconduct of the workman.' This rule of liability, stated in another form, is that the employer is responsible to the employee for every accident in the course of the employment, whether the employer is at fault or not, and whether the employee is at fault or not, except when the fault of the employee is so grave as to constitute serious and willful misconduct on his part. The radical character of this legislation is at once revealed by contrasting it with the rule of the common law, under which the employer is liable for injuries to his employee only when the employer is guilty of some act or acts of negligence which caused the occurrence out of which the injuries arise, and then only when the employee is shown to be free from any negligence which contributes to the occurrence." 201 N. Y. at p. 285. The decision aroused much criticism both pro-

The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity. The adverse considerations urged or suggested in this case and in kindred cases submitted at the same time are: (a) that the employer's property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other person for whom he is responsible, and in spite of the fact that the injury may be solely attributable to the fault of the employee; (b) that the employee's rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act; and (c) that both employer and employee are deprived of their liberty to acquire property by being prevented from making such agreement as they choose respecting the terms of the employment.

* * *

The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is of course recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest.

* * *

The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman's negligence is one of the natural and ordinary risks of the occupation, assumed by the employee and presumably taken into account in the fixing of his wages. The earliest reported cases are Murray v. South Carolina R. R. Co. (1841) 1 McMull. (S. C.) 385, 398; Farwell v. Boston & Worcester R. R. Corp. (1842) 4 Metc. 49, 57. [Other citations are omitted.] It needs no argument to show that such a rule is subject to modification or abrogation by a state upon proper occasion.

The same may be said with respect to the general doctrine of assumption of risk. * * *

So, also, with respect to contributory negligence. Aside from injuries intentionally self-inflicted, for which the statute under consideration affords no compensation, it is plain that the rules of law upon the subject, in their bearing upon the employer's responsibil-

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fessional and lay, and at the time and for several years was one of the cases most often cited in attacks upon the doctrine of judicial review of legislation. In 1913 an amendment of the state constitution was adopted, specifically authorizing such an act. Under this authority the New York legislature enacted the act of 1914 involved in the case above. In Jensen v. Southern Pacific Co. (1915) 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276, the New York Court of Appeals distinguished it from the prior statute and held that it did not violate the Fourteenth Amendment.

ity, are subject to legislative change; for contributory negligence, again, involves a default in some duty resting on the employee, and his duties are subject to modification.

It may be added, by way of reminder, that the entire matter of liability for death caused by wrongful act, both within and without the relation of employer and employee, is a modern statutory innovation, in which the states differ as to who may sue, for whose benefit, and the measure of damages.

But it is not necessary to extend the discussion. This court repeatedly has upheld the authority of the states to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee. [Citations are omitted.]

It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of "due process of law," suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. * * * No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. And just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale. The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety. * * *

Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which in all ordinary cases of accidental injury he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case but in all cases assuming any loss beyond the prescribed scale.

Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the carrier, of the innkeeper, of him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. St. Louis & San Francisco Ry. Co. v. Mathews, 165 U. S. 1, 22; Chicago, Rock Island and Pacific Ry. Co. v. Zernecke, 183 U. S. 582, 586. * * *

We recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the state. In our opinion it is fairly supportable upon that ground. And for this reason: The subject-matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. "The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer." Holden v. Hardy, 169 U. S. 366, 397. * * *

We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the Fourteenth Amendment, and are brought to consider, next, the manner in which the employer is required to secure payment of the compensation. By § 50, this may be done in one of three ways: (a) state insurance, (b) insurance with an authorized insurance corporation or association, or (c) by a deposit of securities. The record shows that the predecessor of plaintiff in error chose the third method, and, with the sanction of the commission, deposited securities to the amount of $300,000, under § 50, and $30,000 in cash as a deposit to secure prompt and convenient payment, under § 25, with an agreement to make a further deposit if required. * * *

It is obvious that this case presents no question as to whether the state might, consistently with the Fourteenth Amendment, compel employers to effect insurance according to either of the plans mentioned in the first and second clauses. There is no such compulsion, since self-insurance under the third clause presumably is open to all employers on reasonable terms that it is within the power of the state to impose. Regarded as optional arrangements, for acceptance or rejection by employers unwilling to comply with that clause, the plans of insurance are unexceptionable from the constitutional standpoint. Manifestly, the employee is not injuriously affected in a constitutional sense by the provisions giving to the employer an option to secure payment of the compensation in either of the modes prescribed, for there is no presumption that either will prove inadequate to safeguard the employee's interests.

MOUNTAIN TIMBER CO. v. STATE OF WASHINGTON.

1917. Supreme Court of the United States. 243 U. S. 219.

This was an action brought by the state against plaintiff in error, a corporation engaged in the business of logging timber and operating a logging railroad and a sawmill having power-driven machinery, all in the State of Washington, to recover under c. 74 of the Laws of 1911, known as the Workmen's Compensation Act, certain premiums based upon a percentage of the estimated pay-roll of the workmen employed by plaintiff in error during the three months beginning October 1, 1911. Plaintiff in error by demurrer raised objections to the act, based upon the Constitution of the United States. The Supreme Court of Washington overruled them, and affirmed a judgment in favor of the state, 75 Washington, 581, following its previous decision in State, ex rel. Davis-Smith Co. v. Clausen, 65 Washington, 156; and the case comes here under § 237, Judicial Code.

The act establishes a state fund for the compensation of workmen injured in hazardous employment, abolishes, except in a few specified cases, the action at law by employee against employer to recover damages on the ground of negligence, and deprives the courts of jurisdiction over such controversies. It is obligatory upon both employers and employees in the hazardous employments, and the state fund is maintained by compulsory contributions from employers in such industries, and is made the sole source of compensation for injured employees and for the dependents of those whose injuries result in death. * * *

Section 4 contains a schedule of contribution, reciting that industry should bear the greater portion of the burden of the cost of its accidents, and requiring each employer prior to January 15th of each year to pay into the state treasury, in accordance with the schedule, a sum equal to a percentage of his total pay-roll for the year. * * * The schedule divides the various occupations into groups, and imposes various percentages upon the different groups, the lowest being 1½%, in the case of the textile industries, creameries, printing establishments, etc., and the highest being 10%, in the case of powder works. The same section establishes 47 different classes of industry. * * *

Section 5 contains a schedule of the compensation to be awarded out of the accident fund to each injured workman, or to his family or dependents in case of his death, and declares that except as in the act otherwise provided such payment shall be in lieu of any and all rights of action against any person whomsoever. * * * By § 21 the Industrial Insurance Department is created, consisting of three commissioners. By § 20 a judicial review is given in the nature of an appeal to the Superior Court from any decision of the Department upon questions of fact or of the proper application of the act, but not upon matters resting in the discretion of the Department. Other sections provide for matters of detail, and § 11 renders void any agreement by employer or workman to waive the benefit of the act.[57]

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[57] Counsel for the plaintiff in error argued:

"The act is sought to be supported upon the grounds that the present system thrusts the burden upon those who are economically weakest, makes recoveries difficult, exposes employers to excessive verdicts, wastes the insurance which it provides for employees, produces antagonism between employer and employee, and subjects society to economic loss. The theory of the law, as of its German prototype, is a theory of economic improvement at the expense of the employer. It does not create or conserve rights of members of society as individuals. No alteration is intended in the contractual relations between employer and employee in the way of regulating the physical performance of the duties which the relations involve, by prescribing rules of conduct and fixing liability for non-observance. The object is rather to use the relationship created by the contracts of the parties to aid as a basis for raising between them a new and independent contract of insurance to serve this economic policy.

"The law of tort, including employers' liability statutes, pertains to the redress of private wrongs. The damages recoverable are intended to be commensurate with and to reimburse the employee for the injury suffered. But the obligations of workmen's compensation accrue from contingencies not within the control of the parties and thus have no relation to their conduct; the compensation is not intended to be commensurate with the injury but is based upon some percentage of the employee's wages. * * *

"The Fourteenth Amendment was adopted to preclude such philanthropic interference with the liberty of a self-reliant race. If the centralized advantages of communism or socialism are deemed preferable, the Constitution provides a method of amendment resulting in certainty of right. The idea, so often suggested, that somehow constitutional restraints stand as a barrier to modern progress is based on a one-sided view. The choice is not a choice of the supposed advantages of socialism and the defects of individualism but of the advantages and defects considered together of these two great conceptions. But that choice may not be made or sanctioned by this court for the nation. The question here is, has the Constitution limited the state legislatures so as to preclude this legislation and the socialistic conception of governmental function upon which it is based? * * *

"Compensation laws are based on a socialistic economic theory. That theory has no relation to hazard. The farm-hand or domestic servant who breaks his arm at work is from the economic view-point as much entitled to compensation and state support as the industrial worker. And such was the German and English experience, where the compensation scheme was of necessity finally extended to all employments irrespective of hazard. The essay on hazard which constitutes the introduction of the Washington law is for the purpose of meeting constitutional objection to a socialistic scheme; but hazard as a ground of the law is embarrassing in the execution of the economic policy. For we find

Mr. Justice Pitney, after reciting the provisions of the statute, delivered the opinion of the court.

From this recital it will be clear that the fundamental purpose of the act is to abolish private rights of action for damages to employees in the hazardous industries (and in any other industry at the option of employer and employees), and to substitute a system of compensation to injured workmen and their dependents out of a public fund established and maintained by contributions required to be made by the employers in proportion to the hazard of each class of occupation.

While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed (Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576), yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the *quid pro quo* for the burdens imposed upon him, so that if the act is not valid as against employees it is not valid as against employers.

However, so far as the interests of employees and their dependents are concerned, this act is not distinguishable in any point raising a constitutional difficulty from the New York Workmen's Compensation Act, sustained in New York Central R. R. Co. v. White, decided this day, [243 U. S. 188.] * * *

So far as employers are concerned, however, there is a marked difference between the two laws, because of the enforced contributions to the state fund that are characteristic of the Washington Act, and it is upon this feature that the principal stress of the argument for plaintiff in error is laid. * * *

If the legislation could be regarded merely as substituting one form of employer's liability for another, the points raised against it would be answered sufficiently by our opinion in New York Central R. R. Co. v. White, supra. * * *

But the Washington law goes further, in that the enforced contributions of the employer are to be made whether injuries have befallen his own employees or not, so that however prudently one may manage his business, even to the point of immunity to his employees from accidental injury or death, he nevertheless is required to make periodical contributions to a fund for making compensation to the injured employees of his perhaps negligent competitors. * * *

Whether this legislation be regarded as a mere exercise of the power of regulation, or as a combination of regulation and taxation, the crucial inquiry under the Fourteenth Amendment is whether it

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hazard put forward in justification of the law, but stretched beyond judicial recognition. Hazard is put forward to meet constitutional objection; while the conflicting economic theory, which must disregard hazard, is put forward to justify the law under the police power. * * * "

clearly appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power. All reasonable presumptions are in favor of its validity, and the burden of proof and argument is upon those who seek to overthrow it. * * *

It seems to us that the considerations to which we have adverted in New York Central R. R. Co. v. White, supra, as showing that the Workmen's Compensation Law of New York is not to be deemed arbitrary and unreasonable from the standpoint of natural justice, are sufficient to support the State of Washington in concluding that the matter of compensation for accidental injuries with resulting loss of life or earning capacity of men employed in hazardous occupations is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through state agencies. Certainly the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce disabling or mortal injuries to the human beings employed is not a matter of wholly private concern. It hardly would be questioned that the state might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed. Does direct compensation stand on a less secure ground? A familiar exercise of state power is the grant of pensions to disabled soldiers and to the widows and dependents of those killed in war. Such legislation usually is justified as fulfilling a moral obligation, or as tending to encourage the performance of the public duty of defense. But is the state powerless to compensate, with pensions or otherwise, those who are disabled, or the dependents of those whose lives are lost, in the industrial occupations that are so necessary to develop the resources and add to the wealth and prosperity of the state? A machine as well as a bullet may produce a wound, and the disabling effect may be the same. * * * It is said that the compensation or pension under this law is not confined to those who are left without means of support. This is true. But is the state powerless to succor the wounded except they be reduced to the last extremity? Is it debarred from compensating an injured man until his own resources are first exhausted? This would be to discriminate against the thrifty and in favor of the improvident. The power and discretion of the state are not thus circumscribed by the Fourteenth Amendment.

Secondly, is the tax or imposition so clearly excessive as to be a deprivation of liberty or property without due process of law? If not warranted by any just occasion, the least imposition is oppressive. But that point is covered by what has been said. Taking the law, therefore, to be justified by the public nature of the object, whether as a tax or as a regulation, the question whether the charges are excessive remains. Upon this point no particular contention is made that the compensation allowed is unduly large; and it is evident that, unless it be so, the corresponding burden upon the industry cannot be regarded as excessive if the state is at liberty to impose the entire burden upon the industry. * * *

Upon the third question—the distribution of the burden—there is no criticism upon the act in its details. As we have seen, its fourth section prescribes the schedule of contribution, dividing the various occupations into groups, and imposing various percentages evidently intended to be proportioned to the hazard of the occupations in the respective groups. Certainly the application of a proper percentage to the pay-roll of the industry cannot be deemed an arbitrary adjustment, in view of the legislative declaration that it is "deemed the most accurate method of equitable distribution of burden in proportion to relative hazard." It is a matter of common knowledge that in the practice of insurers the pay-roll frequently is adopted as the basis for computing the premium. The percentages seem to be high; but when these are taken in connection with the provisions requiring accounts to be kept with each industry in accordance with the classification, and declaring that no class shall be liable for the depletion of the accident fund from accidents happening in any other class, and that any class having sufficient funds to its credit at the end of the first three months or any month thereafter is not to be called upon, it is plain that, after the initial payment, which may be regarded as a temporary reserve, the assessments will be limited to the amounts necessary to meet actual losses. As further rebutting the suggestion that the imposition is exorbitant or arbitrary, we should accept the declaration of intent that the fund shall ultimately become neither more nor less than self-supporting, and that the rates are subject to future adjustment by the legislature and the classifications to rearrangement according to experience, as plain evidence of an intelligent effort to limit the burden to the requirements of each industry. * * *

There remains, therefore, only the contention that it is inconsistent with the due process and equal protection clauses of the Fourteenth Amendment to impose the entire cost of accident loss upon the industries in which the losses arise. But if, as the legislature of Washington has declared in the first section of the act, injuries in such employments have become frequent and inevitable, and if, as we have held in New York Central R. R. Co. v. White, the state is at liberty, notwithstanding the Fourteenth Amendment, to disregard questions of fault in arranging a system of compensation for such injuries, we are unable to discern any ground in natural justice or fundamental right that prevents the state from imposing the entire burden upon the industries that occasion the losses. The act in effect puts these hazardous occupations in the category of dangerous agencies, and requires that the losses shall be reckoned as a part of the cost of the industry, just like the payroll, the repair account, or any other item of cost. The plan of assessment insurance is closely followed, and none more just has been suggested as a means of distributing the risk and burden of losses that inevitably must occur, in spite of any care that may be taken to prevent them. * * *

The act cannot be deemed oppressive to any class of occupation, provided the scale of compensation is reasonable, unless the loss of human life and limb is found in experience to be so great that, if charged to the industry, it leaves no sufficient margin for reasonable profits. But certainly, if any industry involves so great a human wastage as to leave no fair profit beyond it, the state is at liberty, in the interest of the safety and welfare of its people, to prohibit such an industry altogether.

To the criticism that carefully managed plants are in effect required to contribute to make good the losses arising through the negligence of their competitors, it is sufficient to say that the act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of the responsibility of the employer or the industry. Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when, or in what particular plant or industry, they will occur, we deem that the state acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the particular plant in which the accident might happen to occur. In short, it cannot be deemed arbitrary or unreasonable for the state, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation.

The idea of special excise taxes for regulation and revenue proportioned to the special injury attributable to the activities taxed is not novel. In Noble State Bank v. Haskell, 219 U. S. 104, this court sustained an Oklahoma statute which levied upon every bank existing under the laws of the state an assessment of a percentage of the bank's average deposits, for the purpose of creating a guaranty fund to make good the losses of depositors in insolvent banks. There, as here, the collection and distribution of the fund were made a matter of public administration, and the fund was created not by general taxation but by a special imposition in the nature of an occupation tax upon all banks existing under the laws of the state. In Hendrick v. Maryland, 235 U. S. 610, 622, and Kane v. New Jersey, 242 U. S. 160, 169, we sustained laws, of a kind now familiar, imposing license fees upon motor vehicles, graduated according to horse power, so as to secure compensation for the use of improved roadways from a class of users for whose needs they are essential and whose operations over them are peculiarly injurious. And see Charlotte, Columbia & Augusta R. R. Co. v. Gibbes, 142 U. S. 386, 394-5, and cases cited. Many of the states have laws protecting the sheep industry by imposing a tax upon dogs in order to create a fund for the remuneration of sheep-owners for losses suffered by the killing of their sheep by dogs. And the tax is imposed upon all dog-owners, without regard to the question whether their particular dogs are responsible for the loss of sheep. Statutes of this character have been sustained by the state courts against attacks based on constitutional grounds. Morey v. Brown, 42 N. H. 373, 375; Tenney, Chairman, v. Lenz, 16 Wisconsin, 566; Mitchell v. Williams, 27 Indiana, 62; Van Horn v. People, 46 Michigan, 183, 185, 186; Longyear v. Buck, 83 Michigan, 236, 240; Cole v. Hall, Collector, 103 Illinois, 30; Holst v. Roe, 39 Ohio St. 340, 344; McGlone, Sheriff, v. Womack, 129 Kentucky, 274, 283 *et seq.* * * *

Judgment affirmed.[59]

THE CHIEF JUSTICE [WHITE,] MR. JUSTICE MCKENNA, MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS dissent.

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[59] The Supreme Court of the United States has sustained all forms of state compensation laws that have come before it. Cases subsequent to those in this case-book are: Middletown v. Texas Power & Light Co. (1919) 249 U. S. 152, 63 L. ed. 527; Thornton v. Duffy (1920) 254 U. S. 361, 65 L. ed. 304; Lower Vein Coal Co. v. Industrial Board of Indiana (1921) 255 U. S. 144, 65 L. ed. 555; Madera Sugar Pine Co. v. Industrial Accident Comm. of California (1923) 262 U. S. 499, 67 L. ed. 1091; Sheehan Co. v. Shuler (1924) 265 U. S. 371, 68 L. ed. 1061, 35 A. L. R. 1056; New York State Rys. v. Shuler (1924) 265 U. S. 379, 68 L. ed. 1064. On the elective aspect of American compensation laws, see especially Hawkins v. Bleakly (1917) 243 U. S. 210, 61 L. ed. 678, Ann. Cas. 1917D, 637; Booth Fisheries Co. v. Industrial Comm. of Wisconsin (1926) 271 U. S. 208, 70 L. ed. 908. On the attenuation of the concept "hazardous" see Ward & Gow v. Krinsky (1922) 259 U. S. 503, 66 L. ed. 1033, 28 A. L. R. 1207. A statute construed as warranting an award for the death of an employee, killed a few minutes before the time to report for work, on a public road at a railway crossing some distance from his employer's premises, by a collision between a train and an automobile in which he was riding to his employer's plant, the location of which made it necessary for him to cross the track in question, does not violate the Fourteenth Amendment. Cudahy Packing Co. of Nebraska v. Parramore (1923) 263 U. S. 418, 68 L. ed. 366, 30 A. L. R. 532.

For a comprehensive but brief discussion of Workmen's Compensation Laws, see (1924) Downey, Workmen's Compensation (with extensive bibliography).

ARIZONA EMPLOYERS' LIABILITY CASES.

1919. Supreme Court of the United States. 250 U. S. 400.

[Justices Holmes, Day, Pitney, Brandeis and Clarke concurred in an opinion by Pitney, J., sustaining the statute stated in the opinion below. Holmes, J., gave a "statement of additional reasons" with which also Brandeis and Clarke, JJ., concurred.]

MR. JUSTICE MCKENNA dissenting.

I find myself unable to concur, yet reluctant to dissent. The case is of the kind that, once pronounced, will be a rule in like or cognate cases forever,—indeed, may even be extended. It is said to rest on the cases sustaining the workmen's compensation law of New York, 243 U. S. 188, and its associated cases in the same volume upholding like laws of other States. The present case certainly comes after those cases and has that symptom of being their sequence. They cannot be said to have been easy of judgment against the contentions and conservatism which opposed them, and there was, at least to me, no prophecy of their extent, and therefore to me the present case is a step beyond them. I hope it is something more than timidity, dread of the new, that makes me fear that it is a step from the deck to the sea—the metaphor suggests a peril in the consequences. * * *

MR. JUSTICE MCREYNOLDS dissenting.

While I earnestly join in the dissent written by Mr. Justice McKenna, it seems not inappropriate to state my own views somewhat more fully. The important and underlying question is common to the five cases. Number 232 is typical and to detail certain facts and circumstances disclosed by the record therein may aid the discussion.

Basing his claim upon the Arizona Employers' Liability Law, Dan Veazey sued plaintiff in error in the United States District Court to recover damages for personal injuries received by him February 10, 1916, while engaged as millwright and carpenter in constructing a "flotation system" at the company's mill or reduction works in Gila County, Arizona "wherein steam, electricity and other mechanical power was then and there used to operate machinery." He alleged that while exercising due care he "suffered severe personal and bodily injuries by an accident arising out of and in course of such labor, service and employment, and due to a condition or conditions of such occupation or employment," which injuries were not caused by his negligence, but were sustained in the manner following: "Plaintiff in the due course of his said labor, service, and employment was standing upon a certain timber or joist incorporated in said 'flotation system,' engaged in bolting and fastening together the timbers thereof. That the said timber or joist upon which plaintiff was then and there standing was then and there elevated above the ground or floor of said mill or reduction works a distance of approximately 10 feet. That while so engaged as aforesaid, plaintiff slipped from said timber or joist and fell to the ground * * * with great force and violence, * * *" was permanently injured, and will forever remain sick, sore, lame, and crippled.

No charge of negligence or failure to perform any duty was made against the company. It unsuccessfully set up and relied upon invalidity of the Employers' Liability Law because in conflict with the Fourteenth Amendment; judgment went against it; and the cause is here by writ of error to the trial court. (Jud. Code, § 237).

Article XVIII of the Arizona Constitution provides:

"Section 4. The common-law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master, is forever abrogated.

"Section 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

"Section 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

"Section 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Legislature shall enact an Employers' Liability Law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"Section 8. The Legislature shall [also] enact a Workmen's Compulsory Compensation law [stating general outlines of a compensation law.]

Obeying the constitutional mandate, the legislature enacted the "Employers' Liability Law," approved May 24, 1912, (c. 89, Laws of Ariz., 1912, p. 491; Rev. Stats. Ariz., 1913, pars. 3153-3162) which provides:

That to protect the safety of workmen at manual or mechanical labor in many occupations declared hazardous and enumerated in § 4—among them all work in or about mines and in mills, shops, plants and factories where steam or electricity is used to operate machinery—every employer, whether individual, association or corporation "shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

"Sec. 6. When in the course of work in any of the employments or occupations enumerated in Sec. 4 of this Act, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to [the] employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative, for the benefit of the estate of the deceased." Section 7 requires that questions of contributory negligence and assumption of risk shall be left to the jury.

Likewise, the legislature enacted a Compulsory Compensation Law, approved June 8, 1912, applicable to workmen in the same occupations as those declared hazardous by the Employers' Liability Law (C. 14, Laws of Ariz. Spec. Sess. 1912, p. 23). [This statute contained a schedule of compensations graduated according to average earnings of the employee and the seriousness of the injury, with a maximum of $4000.]

In Consolidated Arizona Smelting Co. v. Ujack (1914) 15 Arizona 382, 384, the Supreme Court declared:

"Under the laws of Arizona, an employee who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law liability relieved of the fellow servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. Const. secs. 4, 5, art. 18. (2) Employers' Liability Law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Const. sec. 7, art. 18. (3) The Compulsory Compensation Law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Const. sec. 8, art. 18."

In Inspiration Consolidated Copper Co. v. Mendez (July 2, 1917) 19 Arizona 151, 157, the Supreme Court specifically held that the Employers' Liability Law does not conflict with the Fourteenth Amendment, and among other things said:

"That the liability statute must be construed as one creating a liability for accidents resulting in injuries to the workmen engaged in hazardous occupations due to the risks and hazards inherent in such occupations, without regard to the negligence of the employer, as such negligence is understood in the common law of liability; in other words, such statute creates a liability for accident arising from the risks and hazards inherent in the occupation without regard to the negligence or fault of the employer." * * *

In Arizona Copper Co. v. Burciaga (1918) [20 Ariz. 85, 90, 93, 94,] the Supreme Court said:

"* * * Of course, mental and physical suffering experienced by the employee injured, proximately resulting from the accident, the reasonable value of working time lost by the employee, necessary expenditures for the treatment of injuries and compensation for the employee's diminished earning power directly resulting from the injury, and perhaps other results causing direct loss, are matters of actual loss and as such recoverable."

From the foregoing it appears that we have for consideration a statute [the Liability Law] which undertakes, in the absence of fault, to impose upon all employers (individual and corporate) engaged in enterprises essential to the public welfare, not subject to prohibition by the state and often not attended by any extraordinary hazard, an unlimited liability to employees for damages resulting from accidental injuries—including physical and mental pain—which may be recovered by the injured party or his administrator for benefit of widow, children, parents, next of dependent kin or the estate. The individual who hires only one man and works by his side is put on the same footing as a corporation which employs thousands; no attention is given to probable ability to pay the award; length of service is unimportant—a minute seems enough; wages contracted for bear no necessary relationship to what may be recovered; and a single accident which he was powerless to prevent or provide against may pauperize the employer. And by reason of existing constitutional and statutory provisions an injured workman may claim under this act or under the Compensation Law or according to the common law materially modified in his favor by exclusion of the fellow-servant rule and otherwise. On the other hand, while the employer is declared subject to new, uncertain and greatly enlarged liability, notwithstanding the utmost care, nothing has been granted him in return.

In such circumstances, would enforcement of the challenged statute deprive employers of rights protected by the Fourteenth Amendment? Plainly, I think, nothing short of an affirmative answer is compatible with well-defined constitutional guaranties.

Of course, the Fourteenth Amendment was never intended to render immutable any particular rule of law, nor did it by fixation immortalize prevailing doctrines concerning legal rights and liabilities. Orderly and rational progress was not forestalled. Holden v. Hardy, 169 U. S. 366, 387. But it did strip the states of all power to deprive any person of life, liberty or property by arbitrary or oppressive action—such action is never due process of law.

In the last analysis it is for us to determine what is arbitrary or oppressive upon consideration of the natural and inherent principles of practical justice which lie at the base of our traditional jurisprudence and inspirit our Constitution. A legislative declaration of reasonableness is not conclusive; no more so is popular approval —otherwise constitutional inhibitions would be futile. And plainly, I think, the individual's fundamental rights are not proper subjects for experimentation; they ought not to be sacrificed to questionable theorization.

Until now I had supposed that a man's liberty and property— with their essential incidents—were under the protection of our charter and not subordinate to whims or caprices or fanciful ideas of those who happen for the day to constitute the legislative majority. The contrary doctrine is revolutionary and leads straight towards destruction of our well-tried and successful system of government. Perhaps another system may be better—I do not happen to think so—but it is the duty of the courts to uphold the old one unless and until superseded through orderly methods. * * *

The right to employ and the right to labor are correlative— neither can be destroyed nor unduly hindered without impairing the other. The restrictions imposed by the act of Congress, struck down in the Adair Case, by the Kansas statute, declared invalid in the Coppage Case, and by the Arizona statute, held inoperative in the Truax Case, viewed as practical matters seem rather trivial in comparison with the burden laid on employers by the statute before us. And the grounds suggested to support it really amount in substance to asserting that the legislature has power to protect society against the consequences of accidental injuries, and therefore it may impose the loss resulting therefrom upon those wholly without fault who have afforded others welcomed opportunities to earn an honest living under unobjectionable conditions. As a measure to stifle enterprise, produce discontent, strife, idleness, and pauperism, the outlook for the enactment seems much too good.

In New York Central R. R. Co. v. White, 243 U. S. 188, and Mountain Timber Co. v. Washington, 243 U. S. 219, as I had supposed for reasons definitely pointed out, we held the challenged statutes not in conflict with the Fourteenth Amendment although they imposed liability without fault and introduced a plan for compensating workmen, unknown to the common law. The elements of those statutes regarded as adequate to save their validity we specified; if such characteristics had not been found, the result, necessarily, would have been otherwise, unless we were merely indulging in harmful chatter.

Here, without fault, the statute in question imposes liability in some aspects more onerous than either the New York or Washington law prescribed; and the grounds upon which we sustained those statutes are wholly lacking. The employer is not exempted from any liability formerly imposed; he is given no quid pro quo for his new burdens; the common-law rules have been set aside without a reasonably just substitute; the employee is relieved from consequences of ordinary risks of the occupation and these are imposed upon the employer without defined limit to possible recovery which may ultimately go to nondependents, distant relatives, or, by escheat, to the state; "the act bears no fair indication of a just settlement of a difficult problem affecting one of the most important of social relations"—on the contrary, it will probably intensify the difficulties.

The liability is not restricted to the pecuniary loss of a disabled employee or those entitled to look to him for support, but includes compensation for physical and mental pain and suffering; a recovery resulting in bankruptcy to an employer may benefit only a distant relative, financially independent; the prescribed responsibility is not "to contribute reasonable amounts according to a reasonable and definite scale by way of compensation for the loss of earning power arising from accidental injuries," but is unlimited, unavoidable by any care, incapable of fairly definite estimation in advance, and enforceable by litigation probably acrimonious, long drawn out, and expensive. While the statute is inattentive to the employee's fault, it permits recovery in excess of the employee's pecuniary misfortune, and provides for compensation, not general, but sporadic, uncertain, conjectural, delayed, indefinite as to amount, and not distributed over such long period as to afford actual protection against loss or lessened earning capacity with insurance to society against pauperism, etc.

I am unable to see any rational basis for saying that the act is a proper exercise of the state's police power. It is unreasonable and oppressive upon both employer and employee; to permit its enforcement will impair fundamental rights solemnly guaranteed by our Constitution, and heretofore, as I think, respected and enforced.

The CHIEF JUSTICE [WHITE] and MR. JUSTICE MCKENNA and MR. JUSTICE VAN DEVANTER concur in this opinion.

ADKINS ET AL., CONSTITUTING THE MINIMUM WAGE BOARD OF THE DISTRICT OF COLUMBIA v. CHILDREN'S HOSPITAL.

SAME v. LYONS.

1923. Supreme Court of the United States. 261 U. S. 525.

MR. JUSTICE SUTHERLAND delivered the opinion of the court.

The question presented for determination by these appeals is the constitutionality of the Act of September 19, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia. 40 Stat. 960, c. 174.

The act provides for a board of three members to be constituted, as far as practicable, so as to be equally representative of employers, employees and the public. The board is authorized to have public hearings, at which persons interested in the matter being investigated may appear and testify, to administer oaths, issue subpœnas requiring the attendance of witnesses and production of books, etc., and to make rules and regulations for carrying the act into effect.

By § 8 the board is authorized—

"(1) To investigate and ascertain the wages of women and minors in the different occupations in which they are employed in the District of Columbia; (2) to examine, through any member or authorized representative, any book, pay roll or other record of any employer of women or minors that in any way appertains to or has a bearing upon the question of wages of any such women or minors; and (3) to require from such employer full and true statements of the wages paid to all women and minors in his employment."

And by § 9,

"To ascertain and declare, in the manner hereinafter provided, the following things: (a) Standards of minimum wages for women in any occupation within the District of Columbia, and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals; and (b) standards of minimum wages for minors in any occupation within the District of Columbia, and what wages are unreasonably low for any such minor workers."

The act then provides (§ 10) that if the board, after investigation, is of opinion that any substantial number of women workers in any occupation are receiving wages inadequate to supply them with the necessary cost of living, maintain them in health and protect their morals, a conference may be called to consider and inquire into and report on the subject investigated, the conference to be equally representative of employers and employees in such occupation and of the public, and to include one or more members of the board.

The conference is required to make and transmit to the board a report including, among other things,
"Recommendations as to standards of minimum wages for women workers in the occupation under inquiry and as to what wages are inadequate to supply the necessary cost of living to women workers in such occupation and to maintain them in health and to protect their morals." § 11.

The board is authorized (§ 12) to consider and review these recommendations and to approve or disapprove any or all of them. If it approve any recommendations it must give public notice of its intention and hold a public hearing at which the persons interested will be heard. After such hearing, the board is authorized to make such order as to it may appear necessary to carry into effect the recommendations, and to require all employers in the occupation affected to comply therewith. It is made unlawful for any such employer to violate in this regard any provision of the order or to employ any woman worker at lower wages than are thereby permitted.

There is a provision (§ 13) under which the board may issue a special license to a woman whose earning capacity "has been impaired by age or otherwise," authorizing her employment at less than the minimum wages fixed under the act.

All questions of fact (§ 17) are to be determined by the board, from whose decision there is no appeal; but an appeal is allowed on questions of law.

Any violation of the act (§ 18) by an employer or his agent or by corporate agents is declared to be a misdemeanor, punishable by fine and imprisonment.

Finally, after some further provisions not necessary to be stated, it is declared (§ 23) that the purposes of the act are "to protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living; and the act in each of its provisions and in its entirety shall be interpreted to effectuate these purposes."

The appellee in the first case is a corporation maintaining a hospital for children in the District. It employs a large number of women in various capacities, with whom it had agreed upon rates of wages and compensation satisfactory to such employees, but which in some instances were less than the minimum wage fixed by an ✓ order of the board made in pursuance of the act. The women with whom appellee had so contracted were all of full age and under no legal disability. The instant suit was brought by the appellee in the Supreme Court of the District to restrain the board from enforcing or attempting to enforce its order on the ground that the same was in contravention of the Constitution, and particularly the due process clause of the Fifth Amendment.

In the second case the appellee, a woman twenty-one years of age, was employed by the Congress Hall Hotel Company as an elevator operator, at a salary of $35 per month and two meals a day. She alleges that the work was light and healthful, the hours short, with surroundings clean and moral, and that she was anxious to continue it for the compensation she was receiving, and that she did not earn more. Her services were satisfactory to the Hotel Company, and it would have been glad to retain her, but was obliged to dispense with her services by reason of the order of the board and on account of the penalties prescribed by the act. The wages received by this appellee were the best she was able to obtain for any work she was capable of performing, and the enforcement of the order, she alleges, deprived her of such employment and wages. She further averred that she could not secure any other position at which she could make a living, with as good physical and moral surroundings, and earn as good wages, and that she was desirous of continuing and would continue the employment, but for the order of the board. An injunction was prayed as in the other case.

The Supreme Court of the District denied the injunction and dismissed the bill in each case. Upon appeal the Court of Appeals by a majority first affirmed, and subsequently, on a rehearing, reversed, the trial court. * * * It is from these final decrees that the cases come here. * * *

We come then, at once, to the substantive question involved.

The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy. [The remainder of this paragraph is printed ante, p. 45.]

The statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment. That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause is settled by the decisions of this court and is no longer open to question. [Citations and quotations omitted.]

There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered. It will be helpful to this end to review some of the decisions where the interference has been upheld and consider the grounds upon which they rest:

(1) *Those dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest.* There are many cases, but it is sufficient to cite Munn v. Illinois, 94 U. S. 113. The power here rests upon the ground that, where property is devoted to a public use, the owner thereby in effect grants to the public an interest in the use which may be controlled by the public for the common good to the extent of the interest thus created. It is upon this theory that these statutes have been upheld, and, it may be noted in passing, so upheld, even in respect of their incidental and injurious or destructive effect upon pre-existing contracts. See Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467. In the case at bar the statute does not depend upon the existence of a public interest in any business to be affected, and this class of cases may be laid aside as inapplicable.

(2) *Statutes relating to contracts for the performance of public work.* Atkin v. Kansas, 191 U. S. 207; Heim v. McCall, 239 U. S. 175; Ellis v. United States, 206 U. S. 246. These cases sustain such statutes as depending, not upon the right to condition private contracts, but upon the right of the government to prescribe the conditions upon which it will permit work of a public character to be done for it, or, in the case of a state, for its municipalities. We may therefore, in like manner, dismiss these decisions from consideration as inapplicable.

(3) *Statutes prescribing the character, methods, and time for payment of wages.* Under this head may be included McLean v. Arkansas, 211 U. S. 539, sustaining a state statute requiring coal to be measured for payment of miners' wages before screening; Knoxville Iron Co. v. Harbison, 183 U. S. 13, sustaining a Tennessee statute requiring the redemption in cash of store orders issued in payment of wages; Erie R. R. Co. v. Williams, 233 U. S. 685, upholding a statute regulating the time within which wages shall be paid to employees in certain specified industries; and other cases sustaining statutes of like import and effect. In none of the statutes thus sustained was the liberty of employer or employee to fix the amount of wages the one was willing to pay and the other willing to receive interfered with. Their tendency and purpose was to prevent unfair, and perhaps fraudulent, methods in the payment of wages, and in no sense can they be said to be, or to furnish a precedent for, wage-fixing statutes.

(4) *Statutes fixing hours of labor.* It is upon this class that the greatest emphasis is laid in argument, and therefore, and because such cases approach most nearly the line of principle applicable to the statute here involved, we shall consider them more at length. In some instances the statute limited the hours of labor for men in certain occupations, and in others it was confined in its application to women. No statute has thus far been brought to the attention of

this court which by its terms, applied to all occupations. In Holden v. Hardy, 169 U. S. 366, the court considered an act of the Utah Legislature, restricting the hours of labor in mines and smelters. This statute was sustained as a legitimate exercise of the police power, on the ground that the legislature had determined that these particular employments, when too long pursued, were injurious to the health of the employees, and that, as there were reasonable grounds for supporting this determination on the part of the legislature, its decision in that respect was beyond the reviewing power of the federal courts.

That this constituted the basis of the decision is emphasized by the subsequent decision in Lochner v. New York, 198 U. S. 45, reviewing a state statute which restricted the employment of all persons in bakeries to ten hours in any one day. The court referred to Holden v. Hardy, supra, and, declaring it to be inapplicable, held the statute unconstitutional as an unreasonable, unnecessary and arbitrary interference with the liberty of contract and therefore void under the Constitution.

[Here follow several quotations from Justice Peckham's opinion in Lochner v. New York.]

Subsequent cases in this court have been distinguished from that decision, but the principles therein stated have never been disapproved.

In Bunting v. Oregon, 243 U. S. 426, a state statute forbidding the employment of any person in any mill, factory, or manufacturing establishment more than ten hours in any one day, and providing payment for overtime not exceeding three hours in any one day at the rate of time and a half of the regular wage, was sustained on the ground that, since the state legislature and state Supreme Court had found such a law necessary for the preservation of the health of employees in these industries, this court would accept their judgment, in the absence of facts to support the contrary conclusion. The law was attacked on the ground that it constituted an attempt to fix wages, but that contention was rejected and the law sustained as a reasonable regulation of hours of service.

Wilson v. New, 243 U. S. 332, involved the validity of the so-called Adamson Law, which established an eight-hour day for employees of interstate carriers for which it fixed a scale of minimum wages with proportionate increases for overtime, to be enforced, however, only for a limited period. The act was sustained primarily upon the ground that it was a regulation of a business charged with a public interest. The court, speaking through the Chief Justice, pointed out that regarding "the private right and private interest as contradistinguished from the public interest the power exists between the parties, the employers and employees, to agree as to a standard of wages free from legislative interference," but that this did not affect the power to deal with the matter with a view to protect the public right, and then said (p. 353):

"And this emphasizes that there is no question here of purely private right since the law is concerned only with those who are engaged in a business charged with a public interest where the subject dealt with as to all the parties is one involved in that business and which we have seen comes under the control of the right to regulate to the extent that the power to do so is appropriate or relevant to the business regulated."

Moreover, in sustaining the wage feature, of the law, emphasis was put upon the fact (p. 345) that it was in this respect temporary "leaving the employers and employees free as to the subject of wages to govern their relations by their own agreements after the specified time." The act was not only temporary in this respect, but it was passed to meet a sudden and great emergency. This feature of the law was sustained principally because the parties, for the time being, could not or would not agree. Here they are forbidden to agree.

The same principle was applied in the Rent Cases (Block v. Hirsh, 256 U. S. 135, and Marcus Brown Holding Co. v. Feldman, 256 U. S. 170) where this court sustained the legislative power to fix rents as between landlord and tenant upon the ground that the operation of the statutes was temporary to tide over an emergency and that the circumstances were such as to clothe "the letting of buildings * * * with a public interest so great as to justify regulation by law." The court said (p. 157):

"The regulation is put and justified only as a temporary measure [citing Wilson v. New, supra]. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."

In a subsequent case, Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 416, this court, after saying, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change," pointed out that the Rent Cases dealt with laws intended to meet a temporary emergency and "went to the verge of the law."

In addition to the cases cited above, there are the decisions of this court dealing with laws especially relating to hours of labor for women: Muller v. Oregon, 208 U. S. 412; Riley v. Massachusetts, 232 U. S. 671; Miller v. Wilson, 236 U. S. 373; Bosley v. McLaughlin, 236 U. S. 385.

In the Muller Case the validity of an Oregon statute, forbidding the employment of any female in certain industries more than ten hours during any one day was upheld. The decision proceeded upon the theory that the difference between the sexes may justify a different rule respecting hours of labor in the case of women than in the case of men. It is pointed out that these consist in differences of physical structure, especially in respect of the maternal functions, and also in the fact that historically woman has always been dependent upon man, who has established his control by superior physical strength. The Cases of Riley, Miller, and Bosley follow in this respect the Muller Case. But the ancient inequality of the sexes, otherwise than physical, as suggested in the Muller Case (p. 421) has continued "with diminishing intensity." In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris,* require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships. In passing, it may be noted that the instant statute applies in the case of a woman employer contracting with a woman employee as it does when the former is a man.

The essential characteristics of the statute now under consideration, which differentiate it from the laws fixing hours of labor, will be made to appear as we proceed. It is sufficient now to point out that the latter, as well as the statutes mentioned under paragraph (3), deal with incidents of the employment having no necessary effect upon the heart of the contract; that is, the amount of wages to be paid and received. A law forbidding work to continue beyond a given number of hours leaves the parties free to contract about wages and thereby equalize whatever additional burdens may be imposed upon the employer as a result of the restrictions as to hours, by an adjustment in respect of the amount of wages. Enough has been said to show that the authority to fix hours of labor cannot be exercised except in respect of those occupations where work of long continued duration is detrimental to health. This court has been careful in every case where the question has been raised, to place its decision upon this limited authority of the legislature to regulate hours of labor and to disclaim any purpose to uphold the legislation as fixing wages, thus recognizing an essential difference between the two. It seems plain that these decisions afford no real support for any form of law establishing minimum wages.

If now, in the light furnished by the foregoing exceptions to the general rule forbidding legislative interference with freedom of contract, we examine and analyze the statute in question, we shall see that it differs from them in every material respect. It is not a law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee. The price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment, and, while it has no other basis to support its validity than the assumed necessities of the employee, it takes no account of any independent resources she may have. It is based wholly on the opinions of the members of the board and their advisers—perhaps an average of their opinions, if they do not precisely agree—as to what will be necessary to provide a living for a woman, keep her in health and preserve her morals. It applies to any and every occupation in the District, without regard to its nature or the character of the work.

The standard furnished by the statute for the guidance of the board is so vague as to be impossible of practical application with any reasonable degree of accuracy. What is sufficient to supply the necessary cost of living for a woman worker and maintain her in good health and protect her morals is obviously not a precise or unvarying sum—not even approximately so. The amount will depend upon a variety of circumstances: the individual temperament, habits of thrift, care, ability to buy necessaries intelligently, and whether the woman live alone or with her family. To those who practice economy, a given sum will afford comfort, while to those of contrary habit the same sum will be wholly inadequate. The co-operative economies of the family group are not taken into account, though they constitute an important consideration in estimating the cost of living, for it is obvious that the individual expense will be less in the case of a member of a family than in the case of one living alone. The relation between earnings and morals is not capable of standardization. It cannot be shown that well-paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages, and there is, certainly, no such prevalent connection between the two as to justify a broad attempt to adjust the latter with reference to the former. As a means of safeguarding morals the attempted classification, in our opinion, is without reasonable basis. No distinction can be made between women who work for others and those who do not; nor is there ground for distinction between women and men, for, certainly, if women require a minimum wage to preserve their morals men require it to preserve their honesty. For these reasons, and others which might be stated, the inquiry in respect of the necessary cost of living and of the income necessary to preserve health and morals presents an individual and not a composite question, and must be answered for each individual considered by herself and not by a general formula prescribed by a statutory bureau.

This uncertainty of the statutory standard is demonstrated by a consideration of certain orders of the board already made. These orders fix the sum to be paid to a woman employed in a place where food is served or in a mercantile establishment, at $16.50 per week; in a printing establishment, at $15.50 per week; and in a laundry, at $15 per week, with a provision reducing this to $9 in the case of a beginner. If a woman employed to serve food requires a minimum of $16.50 per week, it is hard to understand how the same woman working in a printing establishment or in a laundry is to get on with an income lessened by from $1 to $7.50 per week. The board probably found it impossible to follow the indefinite standard of the statute, and brought other and different factors into the problem; and this goes far in the direction of demonstrating the fatal uncertainty of the act, an infirmity which, in our opinion, plainly exists.

The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. Within the limits of the minimum sum, he is precluded, under penalty of fine and imprisonment, from adjusting compensation to the differing merits of his employees. It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. The law is not confined to the great and powerful employers but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

The feature of this statute, which perhaps more than any other, puts upon it the stamp of invalidity, is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals. The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz. that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered, and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer, by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays, he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker, or grocer to buy food, he is morally entitled to obtain the worth of his money; but he is not entitled to more. If what he gets is worth what he pays, he is not justified in demanding more, simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support, and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things, and solely with relation to circumstances apart from the contract of employment, the business affected by it, and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States.

We are asked, upon the one hand, to consider the fact that several states have adopted similar statutes, and we are invited, upon the other hand, to give weight to the fact that three times as many states, presumably as well informed and as anxious to promote the health and morals of their people, have refrained from enacting such legislation. We have also been furnished with a large number of printed opinions approving the policy of the minimum wage, and our own reading has disclosed a large number to the contrary. These are all proper enough for the consideration of the lawmaking bodies, since their tendency is to establish the desirability or undesirability of the legislation; but they reflect no legitimate light upon the question of its validity, and that is what we are called upon to decide. The elucidation of that question cannot be aided by counting heads.

It is said that great benefits have resulted from the operation of such statutes, not alone in the District of Columbia but in the several states where they have been in force. A mass of reports, opinions of special observers and students of the subject, and the like, has been brought before us in support of this statement, all of which we have found interesting, but only mildly persuasive. That the earnings of women now are greater than they were formerly, and that conditions affecting women have become better in other respects, may be conceded; but convincing indications of the logical relation of these desirable changes to the law in question are significantly lacking. They may be, and quite probably are, due to other causes. We cannot close our eyes to the notorious fact that earnings everywhere in all occupations have greatly increased—not alone in states where the minimum wage law obtains but in the country generally—quite as much or more among men as among women, and in occupations outside the reach of the law as in those governed by it. No real test of the economic value of the law can be had during periods of maximum employment, when general causes keep wages up to or above the minimum; that will come in periods of depression and struggle for employment, when the efficient will be employed at the minimum rate, while the less capable may not be employed at all.

Finally, it may be said that if, in the interest of the public welfare, the police power may be invoked to justify the fixing of a minimum wage, it may, when the public welfare is thought to require it, be invoked to justify a maximum wage. The power to fix high wages connotes, by like course of reasoning, the power to fix low wages. If, in the face of the guaranties of the Fifth Amendment, this form of legislation shall be legally justified, the field for the operation of the police power will have been widened to a great and dangerous degree. If, for example, in the opinion of future lawmakers, wages in the building trades shall become so high as to preclude people of ordinary means from building and owning homes, an authority which sustains the minimum wage will be invoked to support a maximum wage for building laborers and artisans, and the same argument which has been here urged to strip the employer of his constitutional liberty of contract in one direction will be utilized to strip the employee of his constitutional liberty of contract in the opposite direction. A wrong decision does not end with itself; it is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity of the arc to the other.

It has been said that legislation of the kind now under review is required in the interest of social justice, for whose ends freedom of contract may lawfully be subjected to restraint. The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good, and the line beyond which the power of interference may not be pressed is neither definite nor unalterable, but may be made to move, within limits not well defined, with changing need and circumstance. Any attempt to fix a rigid boundary would be unwise as well as futile. But, nevertheless, there are limits to the power, and, when these have been passed, it becomes the plain duty of the courts in the proper exercise of their authority to so declare. To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good, but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.

It follows, from what has been said, that the act in question passes the limit prescribed by the Constitution, and accordingly the decrees of the court below are

Affirmed.

MR. JUSTICE BRANDEIS took no part in the consideration or decision of these cases.

MR. CHIEF JUSTICE TAFT, dissenting.

I regret much to differ from the court in these cases.

The boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments to the Constitution is not easy to mark. Our court has been laboriously engaged in pricking out a line in successive cases. We must be careful, it seems to me, to follow that line as well as we can, and not to depart from it by suggesting a distinction that is formal rather than real.

Legislatures in limiting freedom of contract between employee and employer by a minimum wage proceed on the assumption that employees, in the class receiving least pay, are not upon a full level of equality of choice with their employer and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweating system and of the long hours and low wages which are characteristic of it are well known. Now, I agree that it is a disputable question in the field of political economy how far a statutory requirement of maximum hours or minimum wages may be a useful remedy for these evils, and whether it may not make the case of the oppressed employee worse than it was before. But it is not the function of this court to hold congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound.

Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law, and that while in individual cases, hardship may result, the restriction will inure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large.

The right of the legislature under the Fifth and Fourteenth Amendments to limit the hours of employment on the score of the health of the employee, it seems to me, has been firmly established.

As to that, one would think, the line had been pricked out so that it has become a well formulated rule. In Holden v. Hardy, 169 U. S. 366, it was applied to miners and rested on the unfavorable environment of employment in mining and smelting. In Lochner v. New York, 198 U. S. 45, it was held that restricting those employed in bakeries to ten hours a day was an arbitrary and invalid interference with the liberty of contract secured by the Fourteenth Amendment. Then followed a number of cases beginning with Muller v. Oregon, 208 U. S. 412, sustaining the validity of a limit on maximum hours of labor for women to which I shall hereafter allude, and following these cases came Bunting v. Oregon, 243 U. S. 426. In that case, this court sustained a law limiting the hours of labor of any person, whether man or woman, working in any mill, factory, or manufacturing establishment to ten hours a day with a proviso as to further hours to which I shall hereafter advert. The law covered the whole field of industrial employment and certainly covered the case of persons employed in bakeries. Yet the opinion in the Bunting Case does not mention the Lochner Case. No one can suggest any constitutional distinction between employment in a bakery and one in any other kind of a manufacturing establishment which should make a limit of hours in the one invalid, and the same limit in the other permissible. It is impossible for me to reconcile the Bunting Case and the Lochner Case, and I have always supposed that the Lochner Case was thus overruled *sub silentio*. Yet the opinion of the court herein in support of its conclusion quotes from the opinion in the Lochner Case as one which has been sometimes distinguished but never overruled. Certainly there was no attempt to distinguish it in the Bunting Case.

However, the opinion herein does not overrule the Bunting Case in express terms, and therefore I assume that the conclusion in this case rests on the distinction between a minimum of wages and a maximum of hours in the limiting of liberty to contract. I regret to be at variance with the court as to the substance of this distinction. In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to one is not any greater in essence than the other, and is of the same kind. One is the multiplier and the other the multiplicand.

If it be said that long hours of labor have a more direct effect upon the health of the employee than the low wage, there is very respectable authority from close observers, disclosed in the record and in the literature on the subject quoted at length in the briefs that they are equally harmful in this regard. Congress took this view and we cannot say it was not warranted in so doing.

With deference to the very able opinion of the court and my brethren who concur in it, it appears to me to exaggerate the importance of the wage term of the contract of employment as more inviolate than its other terms. Its conclusion seems influenced by the fear that the concession of the power to impose a minimum wage must carry with it a concession of the power to fix a maximum wage. This, I submit, is a *non sequitur*. A line of distinction like the one under discussion in this case is, as the opinion elsewhere admits, a matter of degree and practical experience and not of pure logic. Certainly the wide difference between prescribing a minimum wage and a maximum wage could as a matter of degree and experience be easily affirmed.

Moreover, there are decisions by this court which have sustained legislative limitations in respect to the wage term in contracts of employment. In McLean v. Arkansas, 211 U. S. 539, it was held within legislative power to make it unlawful to estimate the graduated pay of miners by weight after screening the coal. In Knoxville Iron Co. v. Harbison, 183 U. S. 13, it was held that store orders issued for wages must be redeemable in cash. In Patterson v. Bark Eudora, 190 U. S. 169, a law forbidding the payment of wages in advance was held valid. A like case is Strathearn S. S. Co. v. Dillon, 252 U. S. 348. While these did not impose a minimum on wages, they did take away from the employee the freedom to agree as to how they should be fixed, in what medium they should be paid, and when they should be paid, all features that might affect the amount or the mode of enjoyment of them. The first two really rested on the advantage the employer had in dealing with the employee. The third was deemed a proper curtailment of a sailor's right of contract in his own interest because of his proneness to squander his wages in port before sailing. In Bunting v. Oregon, supra, employees in a mill, factory, or manufacturing establishment were required if they worked over ten hours a day to accept for the three additional hours permitted not less than fifty per cent. more than their usual wage. This was sustained as a mild penalty imposed on the employer to enforce the limitation as to hours; but it necessarily curtailed the employee's freedom to contract to work for the wages he saw fit to accept during those three hours. I do not feel, therefore, that either on the basis of reason, experience, or authority, the boundary of the police power should be drawn to include maximum hours and exclude a minimum wage.

Without, however, expressing an opinion that a minimum wage limitation can be enacted for adult men, it is enough to say that the case before us involves only the application of the minimum wage to women. If I am right in thinking that the legislature can find as much support in experience for the view that a sweating wage has as great and as direct a tendency to bring about an injury to the health and morals of workers, as for the view that long hours injure their health, then I respectfully submit that Muller v. Oregon, 208 U. S. 412, controls this case. The law which was there sustained forbade the employment of any female in any mechanical establishment or factory or laundry for more than ten hours. This covered a pretty wide field in women's work, and it would not seem that any sound distinction between that case, and this can be built up on the fact that the law before us applies to all occupations of women with power in the board to make certain exceptions. Mr. Justice Brewer, who spoke for the court in Muller v. Oregon, based its conclusion on the natural limit to women's physical strength and the likelihood that long hours would therefore injure her health, and we have had since a series of cases which may be said to have established a rule of decision. Riley v. Massachusetts, 232 U. S. 671; Miller v. Wilson, 236 U. S. 373; Bosley v. McLaughlin, 236 U. S. 385. The cases covered restrictions in wide and varying fields of employment and in the later cases it will be found that the objection to the particular law was based, not on the ground that it had general application, but because it left out some employments.

I am not sure from a reading of the opinion whether the court thinks the authority of Muller v. Oregon is shaken by the adoption of the Nineteenth Amendment. The Nineteenth Amendment did not change the physical strength or limitations of women upon which the decision in Muller v. Oregon rests. The amendment did give women political power and makes more certain that legislative provisions for their protection will be in accord with their interests as they see them. But I do not think we are warranted in varying constitutional construction based on physical differences between men and women, because of the Amendment.

But for my inability to agree with some general observations in the forcible opinion of MR. JUSTICE HOLMES, who follows me, I should be silent and merely record my concurrence in what he says. It is perhaps wiser for me, however, in a case of this importance separately to give my reasons for dissenting.

I am authorized to say that MR. JUSTICE SANFORD concurs in this opinion.

MR. JUSTICE HOLMES, dissenting.

The question in this case is the broad one, Whether Congress can establish minimum rates of wages for women in the District of Columbia with due provision for special circumstances, or whether we must say that Congress had no power to meddle with the matter at all. To me, notwithstanding the deference due to the prevailing judgment of the court, the power of Congress seems absolutely free from doubt. The end, to remove conditions leading to ill health, immorality and the deterioration of the race, no one would deny to be within the scope of constitutional legislation. The means are means that have the approval of Congress, of many States, and of those governments from which we have learned our greatest lessons. When so many intelligent persons, who have studied the matter more than any of us can, have thought that the means are effective and are worth the price it seems to me impossible to deny that the belief reasonably may be held by reasonable men. If the law encountered no other objection than that the means bore no relation to the end or that they cost too much I do not suppose that anyone would venture to say that it was bad. I agree, of course, that a law answering the foregoing requirements might be invalidated by specific provisions of the Constitution. For instance it might take private property without just compensation. But in the present instance the only objection that can be urged is found within the vague contours of the Fifth Amendment, prohibiting the depriving any person of liberty or property without due process of law. To that I turn.

The earlier decisions upon the same words in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts. Without enumerating all the restrictive laws that have been upheld I will mention a few that seem to me to have interfered with liberty of contract quite as seriously and directly as the one before us. Usury laws prohibit contracts by which a man receives more than so much interest for the money that he lends. Statutes of frauds restrict many contracts to certain forms. Some Sunday laws prohibit practically all contracts during one-seventh of our whole life. Insurance rates may be regulated. German Alliance Ins. Co. v. Kansas, 233 U. S. 389. (I concurred in that decision without regard to the public interest with which insurance was said to be clothed. It seemed to me that the principle was general.) Contracts may be forced upon the companies. National Union Fire Ins. Co. v. Wanberg, 260 U. S. 71. Employers of miners may be required to pay for coal by weight before screening. McLean v. Arkansas, 211 U. S. 539. Employers generally may be required to redeem in cash store orders accepted by their employees in payment. Knoxville Iron Co. v. Harbison, 183 U. S. 13. Payment of sailors in advance may be forbidden. Patterson v. The Eudora, 190 U. S. 169. The size of a loaf of bread may be established. Schmidinger v. Chicago, 226 U. S. 578. The responsibility of employers to their employees may be profoundly modified. New

York Central R. R. Co. v. White, 243 U. S. 188; Arizona Employers' Liability Cases, 250 U. S. 400. Finally women's hours of labor may be fixed, Muller v. Oregon, 208 U. S. 412; Riley v. Massachusetts, 232 U. S. 671, 679; Hawley v. Walker, 232 U. S. 718; Miller v. Wilson, 236 U. S. 373; Bosley v. McLaughlin, 236 U. S. 385; and the principle was extended to men with the allowance of a limited overtime to be paid for "at the rate of time and one-half of the regular wage," in Bunting v. Oregon, 243 U. S. 426.

I confess that I do not understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for their hours of work. I fully assent to the proposition that here as elsewhere the distinctions of the law are distinctions of degree, but I perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate. Muller v. Oregon, I take it, is as good law today as it was in 1908. It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account. I should not hesitate to take them into account if I thought it necessary to sustain this Act. Quong Wing v. Kirkendall, 223 U. S. 59, 63. But after Bunting v. Oregon, 243 U. S. 426, I had supposed that it was not necessary, and that Lochner v. New York, 198 U. S. 45, would be allowed a deserved repose.

This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld. I see no greater objection to using a Board to apply the standard fixed by the Act than there is to the other commissions with which we have become familiar or than there is to the requirement of a license in other cases. The fact that the statute warrants classification, which like all classifications may bear hard upon some individuals, or in exceptional cases, notwithstanding the power given to the Board to issue a special license, is no greater infirmity than is incident to all law. But the ground on which the law is held to fail is fundamental and therefore it is unnecessary to consider matters of detail.

The criterion of constitutionality is not whether we believe the law to be for the public good. We certainly cannot be prepared to deny that a reasonable man reasonably might have that belief in view of the legislation of Great Britain, Victoria and a number of the states of this Union. The belief is fortified by a very remarkable collection of documents submitted on behalf of the appellants, material here, I conceive, only as showing that the belief reasonably may be held. In Australia the power to fix a minimum for wages in the case of industrial disputes extending beyond the limits of any one state was given to a Court, and its President wrote a most interesting account of its operation. 29 Harv. Law Rev. 13. If a legislature should adopt what he thinks the doctrine of modern economists of all schools, that "freedom of contract is a misnomer as applied to a contract between an employer and an ordinary individual employee," Ibid. 25, I could not pronounce an opinion with which I agree impossible to be entertained by reasonable men. If the same legislature should accept his further opinion that industrial peace was best attained by the device of a court having the above powers, I should not feel myself able to contradict it, or to deny that the end justified restrictive legislation quite as adequately as beliefs concerning Sunday or exploded theories about usury. I should have my doubts, as I have them about this statute—but they would be whether the bill that has to be paid for every gain, although hidden as interstitial detriments, was not greater than the gain was worth: a matter that is not for me to decide.

I am of opinion that the statute is valid and that the decree should be reversed.[60]

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[60] McKenna, J., one of the majority in this case, had said:

" * * * the fundamental and indisputable principle that personal liberty includes the power to make contracts. But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—can not be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance." Erie Railroad Co. v. Williams (1914) 233 U. S. 685, 699, 58 L. ed. 1155 (holding valid a state statute requiring railroads to pay wages semimonthly and forbidding contracts between such employers and their employees for longer periods of payment).

In 1917, Mr. Justice Clarke stated his understanding of the general attitude of the court at that time as follows:

"While this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare." Thomas Cusack Co. v. Chicago (1917) 242 U. S. 526, 530-531, 61 L. ed. 472.

Subsequently to the decision in Adkins v. Children's Hospital, Mr. Justice Sutherland has said: "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." Radice v. New York (1924) 264 U. S. 292, 294, 68 L. ed. 690.

On the authority of Adkins v. Children's Hospital, state minimum wage laws for adult women have been held invalid under the Fourteenth Amendment. Folding Furniture Works v. Industrial Comm. of Wisconsin (1924) 300 Fed. 991; Topeka Laundry Co. v. Court of Industrial Relations (1925) 119 Kans. 12, 237 Pac. 1041, 47 A. L. R. 208; Murphy v. Sardell (1925) 269 U. S. 530, 70 L. ed. 396, memo. opinion ("Mr. Justice Holmes requests that it be stated that his concurrence is solely upon the ground that he regards himself bound by the decision in Adkins v. Children's Hospital. Mr. Justice Brandeis dissents."); Donham v. West-Nelson Mfg. Co. (1927) 273 U. S. 657, 71 L. ed. 825, memo. opinion, Justice Brandeis dissenting.

A minors' minimum wage law was held valid in Stevenson v. St. Clair (1925) 161 Minn. 444, 201 N. W. 629. A statute has been held valid, which creates a commission with authority to inquire into wages paid to female employees, to obtain court orders to compel witnesses to testify, to make findings and recommendations as to what they deem adequate wages to supply the cost of living and maintain the worker in health, to publish the findings and recommendations, and the names of employers who fail or refuse to pay the approved minimum wages, but which has no direct legal sanction,—no compulsion except the force of publicity. Holcombe v. Creamer (1918) 231 Mass. 99, 120 N. E. 354. This decision has been said to be unaffected by the Adkins Case. Commonwealth v. Boston Transcript (1924) 249 Mass. 477, 480, 144 N. E. 400, 35 A. L. R. 1 (holding invalid the section of the statute which made it a penal offense for any newspaper to refuse to publish the findings and notices of the commission at the paper's regular rates for the space taken).

The article by Professor T. R. Powell, referred to below, contains a remarkable count of the appellate court judges who passed upon the validity of minimum-wage-for-women statutes. The state statutes of Oregon, Minnesota, Arkansas and Washington had been sustained by their respective supreme courts by a total vote of twenty-seven judges favorable and two (Arkansas) opposed. Stettler v. O'Hara (1914) 69 Ore. 519, 139 Pac. 743, L. R. A. 1917C, 944, Ann. Cas. 1916A, 217; Simpson v. O'Hara (1914) 70 Ore. 261, 141 Pac. 158; Williams v. Evans (1917) 139 Minn. 32, 165 N. W. 495; Miller Tel. Co. v. Minimum Wage Commission (1920) 145 Minn. 262, 177 N. W. 341; State v. Crowe (1917) 130 Ark. 272, 197 S. W. 4, L. R. A. 1918A, 567, Ann. Cas. 1918D, 460; Larsen v. Rice (1918) 100 Wash. 642, 171 Pac. 1037; Spokane Hotel Co. v. Younger (1920) 113 Wash. 359, 194 Pac. 595. In Stettler v. O'Hara and Simpson v. O'Hara (1917) 243 U. S. 629, 61 L. ed. 937, the Supreme Court affirmed the judgments in the two Oregon cases, supra, the court being evenly divided, four to four,—Justice Brandeis not participating because he had been of counsel in the cases below. It is now evident from his repeated dissents in Murphy v. Sardell (1925) 269 U. S. 530, 70 L. ed. 396 and Donham v. West-Nelson Mfg. Co. (1927) 273 U. S. 657, 71 L. ed. 825, that had he participated, the Oregon statute would have been held valid by a vote of five to four. Four changes in membership of the Supreme Court occurred before the Adkins Case came up for decision. Chief Justice White had been succeeded by Chief Justice Taft; Mr. Justice Clarke, by Mr. Justice Sutherland; Mr. Justice Day, by Mr. Justice Butler; Mr. Justice Pitney, by Mr. Justice Sanford. That case reached the Supreme Court through the Court of Appeals of the District of Columbia, where, in its two hearings, two judges voted in favor of the Act of Congress and two against it. Thus the known vote of judges, prior to the Supreme Court's decision stood 29 to 4, not counting the Supreme Court's 4 to 4 tie in 1917. Professor Powell, commenting on the changes in the court, says: "The bench sitting in 1917 continued to the end of the October term of 1920. During the October term of 1921 the only change was that of Chief Justice Taft in place of Chief Justice White. If our guess as to Chief Justice White [that he considered the Act unconstitutional] is correct, the Supreme Court from October, 1921, to June, 1922, contained six Justices who thought minimum-wage legislation constitutional. One of these was Mr. Justice Brandeis who doubtless

GERMAN ALLIANCE INS. CO. v. LEWIS, SUPERINTENDENT OF INSURANCE OF THE STATE OF KANSAS.

1914. Supreme Court of the United States. 233 U. S. 389.

[The insurance company filed a bill in the Circuit Court of the United States for the District of Kansas to restrain enforcement of a Kansas statute, Ch. 152, Session Laws of 1909, which empowered the state Superintendent of Insurance to establish the rates for fire insurance in the state. From a decree dismissing the bill this appeal was taken.]

MR. JUSTICE MCKENNA delivered the opinion of the court. * * *

We may put aside, therefore, all merely adventitous considerations and come to the bare and essential one, whether a contract of fire insurance is private and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical propositon, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation. We can best explain by examples. The

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would have refrained from sitting then as he did in 1923. The others were Chief Justice Taft and Justices Holmes, Day, Pitney and Clarke." Commenting on the other three changes later occurring he says, "It can, however, hardly be attributed to anything but chance that the resignations after June, 1922, were of two or three Justices favoring minimum-wage legislation and that the new appointments added two justices opposing it. It can not well be attributed to any assumed leanings of the appointing authority, since the four new justices appointed by President Harding were evenly divided on the issue. The political complexion of the bench at the time is of no significance. * * * Suffice it to say that minimum-wage legislation is now unconstitutional, not because the Constitution makes it so, not because its economic results or its economic propensities would move a majority of judges to think it so, but because it chanced not to come before a particular Supreme Court bench" * * * .

Query, what light does this remarkable variation of the views of judges throw upon the invalidation of legislation by invocation of the due process clauses? For very full discussion see: Thomas Reed Powell, The Judiciality of Minimum Wage Legislation (1924) 37 Harv. L. Rev. 545-573; Barbara N. (Grimes) Armstrong, Minimum Wage for Women, 11 Cal. L. Rev. 353-362; C. G. Haines, Minimum Wage Act for District of Columbia Held Unconstitutional (1923) 2 Texas L. Rev. 99-111. For further valuable comment see: George Gorham Groat, Economic Wage and Legal Wage (1924) 33 Yale L. J. 489-500; Francis Bowes Sayre, The Minimum Wage Decision (1923) 50 The Survey 150; Thomas I. Parkinson, Minimum Wage and the Constitution (1923) 13 Am. Labor Legis. Rev. 131-136; George W. Goble, The Minimum Wage Decision (1923) 12 Ky. L. J. 3-9, and notes in (1923) 18 Ill. L. Rev. 118-123 (A. A. Bruce); (1923) 32 Yale L. J. 829-831 (Edwin M. Borchard); (1923) 21 Mich. L. Rev. 906-910 (Frank M. Parrish); 71 U. of Pa. L. Rev. 360-365 (Samuel A. Goldberg); (1923) 23 Col. L. Rev. 565-567 (I. Maurice Wormser); (1923) 9 Va. L. Rev. 639-644 (William C. Howard, favorable comment); (1923) 8 St. Louis L. Rev. 263-264.

transportation of property—business of common carriers—is obviously of public concern and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other utilities which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation nor at the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the state has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the "test of whether the use is public or not is whether a public trust is imposed upon the property and whether the public has a legal right to the use which cannot be denied;" or, as we have said, quoting counsel, "Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist." Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle (Noble State Bank v. Haskell, 219 U. S. 104), nor has the other contention that the service which cannot be demanded cannot be regulated.

Munn v. Illinois, 94 U. S. 113, is an instructive example of legislative power exerted in the public interest. The Constitution of Illinois declared all elevators or storehouses, where grain or other property was stored for a compensation, to be public warehouses, and a law was subsequently enacted fixing rates of storage. In other words, that which had been private property had from its uses become, it was declared, of public concern and the compensation to be charged for its use prescribed. The law was sustained against the contention that it deprived the owners of the warehouses of their property without due process of law. We can only cite the case and state its principle, not review it at any length. The principle was expressed to be, quoting Lord Chief Justice Hale, "that when private property is 'affected with a public interest it ceases to be *juris privati*' only" and it becomes "clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large"; and, so using it, the owner "grants to the public an interest in that use, and must submit to be controlled by the public for the common good." And it was said that the application of the principle could not be denied because no precedent could be found for a statute precisely like the one reviewed. It presented a case, the court further said, "for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress." The principle was expressed as to property, and the instance of its application was to property, but it is manifestly broader than that instance. It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest.

That the case had broader application than the use of property is manifest from the grounds expressed in the dissenting opinion. The basis of the opinion was that the business regulated was private and had "no special privilege connected with it, nor did the law ever extend to it any greater protection than it extended to all other private business." The argument encountered opposing examples, among others, the regulation of the rate of interest on money. The regulation was accounted for on the ground that the act of Parliament permitting the charging of some interest was a relaxation of a prohibition of the common law against charging any interest, but this explanation overlooked the fact that both the common law and the act of Parliament were exercises of government regulation of a strictly private business in the interest of public policy, a policy which still endures and still dictates regulating laws. Against that conservatism of the mind, which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired.

Munn v. Illinois was approved in many state decisions, but it was brought to the review of this court in Budd v. New York, 143 U. S. 517, and its doctrine, after elaborate consideration, reaffirmed, and against the same arguments which are now urged against the Kansas statute. * * *

In Brass v. Stoeser, 153 U. S. 391, Munn v. Illinois and Budd v. New York were affirmed. A law of the state of North Dakota was sustained which made all buildings, elevators and warehouses used for the handling of grain for a profit public warehouses, and fixed a storage rate. The case is important. It extended the principle of the other two cases and denuded it of the limiting element which was supposed to beset it—that to justify regulation of a business the business must have a monopolistic character. That distinction was pressed and answered. It was argued, the court said (p. 402), "that the statutes of Illinois and New York [passed on in the Munn and Budd Cases] are intended to operate in great trade centers, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the state of North Dakota and the small population of its country towns and villages are said to present no such opportunities." And it was also urged that the method of carrying on business in North Dakota and the Eastern cities was different, that the elevators in the latter were essentially means of transporting grain from the lakes to the railroads and those who owned them could, if uncontrolled by law, extort such charges as they pleased, and stress was laid upon the expression in the other cases which represented the business as a practical monopoly. A contrast was made between those conditions and those which existed in an agricultural state where land was cheap and limitless in quantity. It was replied that this difference in conditions was "for those who make, not for those who interpret, the laws." And considering the expressions in the other cases which, it was said, went rather to the expediency of the laws, than to their validity, yet, it was further said, the expressions had their value because the "obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law" (page 404).

The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in People v. Budd, 117 N. Y. 1, 27, that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported. "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation." Is the business of insurance within the principle? It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses today. We proceed then to consider whether the business of insurance is within the principle.

A contract for fire insurance is one for indemnity against loss and is personal. The admission, however, does not take us far in the solution of the question presented. Its personal character certainly does not of itself preclude regulation, for there are many examples of governmental regulation of personal contracts, and in the statutes of every state in the Union superintendence and control over the business of insurance are exercised, varying in details and extent. We need not particularize in detail. * * *

Those regulations exhibit it to be the conception of the lawmaking bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause. The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis. Accidental fires are inevitable and the extent of loss very great. The effect of insurance—indeed, it has been said to be its fundamental object—is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country, the disaster to an individual is shared by many, the disaster to a community shared by other communities; great catastrophes are thereby lessened, and, it may be, repaired. In assimilation of insurance to a tax, the companies have been said to be the mere machinery by which the inevitable losses by fire are distributed so as to fall as lightly as possible on the public at large, the body of the insured, not the companies, paying the tax. Their efficiency, therefore, and solvency are of great concern. The other objects, direct and indirect, of insurance we need not mention. Indeed, it may be enough to say, without stating other effects of insurance, that a large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it and we need not dispute with the economists that this is the result of the "substitution of certain for uncertain loss" or the diffusion of positive loss over a large group of persons, as we have already said to be certainly one of its effects. We can see, therefore, how it has come to be considered a matter of public concern to regulate it, and, governmental insurance has its advocates and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals. We may say in passing that when the effect goes beyond that, there are many examples of regulation. [Citing, with other cases, Holden v. Hardy, ante, p. 736; Muller v. Oregon, ante, p. 748.]

Complainant feels the necessity of accounting for the regulatory state legislation and refers it to the exertion of the police power, but, while expressing the power in the broad language of the cases, seeks to restrict its application. Counsel states that this power may be exerted to "pass laws whose purpose is the health, safety, morals and the general welfare of the people." The admission is very comprehensive. What makes for the general welfare is necessarily in the first instance a matter of legislative judgment and a judicial review of such judgment is limited. "The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." Chicago, Burlington & Quincy Railroad Co. v. McGuire, 219 U. S. 549, 569.

The restrictions upon the legislative power which complainant urges we have discussed, or rather the considerations which take, it is contended, the business of insurance outside of the sphere of the power. To the contention that the business is private we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times—certainly the sense of the modern world—is of the greatest public concern. It is, therefore, within the principle we have announced. * * *

We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that "it is illusory to speak of a liberty of contract." It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute, and the problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads, steam or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or be secured in a night's accommodation at a wayside inn, or in the weight of a five-cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power.

We have summarized the provisions of the Kansas statute, and it will be observed from them that they attempt to systematize the control of insurance. The statute seeks to secure rates which shall be reasonable both to the insurer and the insured, and as a means to this end it prescribes equality of charges, forbids initial discrimination or subsequently by the refund of a portion of the rates, or the extension to the insured of any privilege; to this end it requires publicity in the basic schedules and of all of the conditions which affect the rates or the value of the insurance to the insured, and also adherence to the rates published. Whether the requirements are necessary to the purpose, or—to confine ourselves to that which is under review—whether rate regulation is necessary to the purpose, is a matter for legislative judgment, not judicial. Our function is only to determine the existence of power. * * *

Decree affirmed.

Mr. Justice Lurton was not present when this case was argued, and took no part in its decision.

Mr. Justice Lamar dissenting.

I dissent from the decision and the reasoning upon which it is based. The case does not deal with a statute affecting the safety or morals of the public. It presents no question of monopoly in a prime necessity of life, but relates solely to the power of the state to fix the price of a strictly personal contract. The court holds that fire insurance though personal is affected with a public interest and therefore, that the business may not only be regulated but that the premium or price to be paid to the insurer for entering into that personal contract can be fixed by law.

The fixing of the price for the use of private property is as much a taking as though the fee itself had been condemned for a lump sum—that taking, whether by fixing rates for the use or by paying a lump sum for the fee, has always heretofore been thought to be permissible only when it was for a public use. But the court in this case holds that there is no distinction between the power to take for public use and the power to regulate the exercise of private rights for the public good. * * *

The Chief Justice [White] and Mr. Justice Van Devanter concur in this dissent.

CHAS. WOLFF PACKING CO. v. COURT OF INDUSTRIAL RELATIONS OF STATE OF KANSAS.

1923. Supreme Court of the United States. 262 U. S. 522.

This case involves the validity of the Court of Industrial Relations Act of Kansas. Chapter 29, Special Session, Laws of 1920. The act declares the following to be affected with a public interest: First, manufacture and preparation of food for human consumption; second, manufacture of clothing for human wear; third, production of any substance in common use for fuel; fourth, transportation of the foregoing; fifth, public utilities and common carriers. The act vests an industrial court of three judges with power upon its own initiative or on complaint to summon the parties and hear any dispute over wages or other terms of employment in any such industry, and if it shall find the peace and health of the public imperiled by such controversy, it is required to make findings and fix the wages and other terms for the future conduct of the industry. After 60 days, either party may ask for a readjustment, and then the order is to continue in effect for such reasonable time as the court shall fix, or until changed by agreement of the parties. The Supreme Court of the state may review such orders, and in case of disobedience to an order that court may be appealed to for enforcement.

The Charles Wolff Packing Company, the plaintiff in error, is a corporation of Kansas engaged in slaughtering hogs and cattle and preparing the meat for sale and shipment. It has $600,000 capital stock and total annual sales of $7,000,000. More than half its products are sold beyond the state. It has 300 employees. There are many other packing houses in Kansas, of greater capacity. This is considered a small one.

In January, 1921, the president and secretary of the Meat Cutters' Union filed a complaint with the industrial court against the

Packing Company respecting the wages its employees were receiving. The company appeared and answered and a hearing was had. The court made findings, including one of an emergency, and an order as to wages, increasing them over the figures to which the company had recently reduced them. The company refused to comply with the order and the industrial court then instituted mandamus proceedings in the Supreme Court to compel compliance. That court appointed a commissioner to consider the record, to take additional evidence, and report his conclusions. He found that the company had lost $100,000 the previous year, and that there was no sufficient evidence of an emergency or danger to the public from the controversy to justify action by the industrial court. The Supreme Court overruled his report and held that the evidence showed a sufficient emergency.

The prescribed schedule of wages and the limitation of hours and the rate of pay required for overtime resulted in an increase in wages of more than $400 a week.

It appeared from the evidence that the company and plant were under the control of, and in business association with, what were called "The Allied Packers" who have plants in various cities and compete with the so-called Big Five Packers, the largest in the country; that the products of the Wolff Packing Company are sold in active competition with such products made by other concerns throughout the United States. It appeared, further, that about the time of this controversy a strike was threatened in the packing houses of the Big Five, which the President of the United States used his good offices to settle. The chief executive of the Wolff Company testified that there had been no difficulty in securing all the labor it desired at the reduced rates offered. The industrial court conceded that the Wolff Company could not operate on the schedule fixed without a loss, but relied on the statement by its president that he hoped for more prosperous times.

The packing company brings this case here on the ground that the validity of the Industrial Court Act was upheld although challenged as in conflict with the provision of the Fourteenth Amendment that no state shall deprive any person of liberty or property without due process of law.

Mr. Chief Justice Taft, after stating the case as above, delivered the opinion of the court.

The necessary postulate of the Industrial Court Act is that the state, representing the people, is so much interested in their peace, health, and comfort that it may compel those engaged in the manufacture of food and clothing, and the production of fuel, whether owners or workers, to continue in their business and employment on terms fixed by an agency of the state, if they cannot agree. Under the construction adopted by the state Supreme Court the act gives the industrial court authority to permit the owner or employer to go out of the business, if he shows that he can only continue on the terms fixed at such heavy loss that collapse will follow; but this privilege under the circumstances is generally illusory. Block v. Hirsh, 256 U. S. 135, 157. A laborer dissatisfied with his wages is permitted to quit, but he may not agree with his fellows to quit or combine with others to induce them to quit.

These qualifications do not change the essence of the act. It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. Meyer v. Nebraska, 262 U. S. 390. While there is no such thing as absolute freedom of contract, and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. Adkins v. Children's Hospital, 261 U. S. 525.

It is argued for the state that such exceptional circumstances exist in the present case and that the act is neither arbitrary nor unreasonable. Counsel maintain:

First. The act declares that the preparation of human food is affected by a public interest and the power of the Legislature so to declare and then to regulate the business is established in Munn v. Illinois, 94 U. S. 113; Budd v. New York, 143 U. S. 517; Brass v. Stoeser, 153 U. S. 391; Noble State Bank v. Haskell, 219 U. S. 104; German Alliance Insurance Co. v. Lewis, 233 U. S. 389; and Block v. Hirsh, 256 U. S. 135.

Second. The power to regulate a business affected with a public interest extends to fixing wages and terms of employment to secure continuity of operation. Wilson v. New, 243 U. S. 332, 352, 353.

Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial Legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills. State v. Edwards, 86 Me. 102; Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, 254.

(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly. Munn v. Illinois, 94 U. S. 113; Spring Valley Water Works v. Schottler, 110 U. S. 347; Budd v. New York, 117 N. Y. 1, 27; S. C. 143 U. S. 517; Brass v. Stoeser, 153 U. S. 391; Noble State Bank v. Haskell, 219 U. S. 104; German Alliance Insurance Co. v. Lewis, 233 U. S. 389; Van Dyke v. Geary, 244 U. S. 39, 47; Block v. Hirsh, 256 U. S. 135.

It is manifest from an examination of the cases cited under the third head that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression "clothed with a public interest," as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of Munn v. Illinois and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.

It is urged upon us that the declaration of the Legislature that the business of food preparation is affected with a public interest and devoted to a public use should be most persuasive with the court, and that nothing but the clearest reason to the contrary will prevail with the court to hold otherwise. To this point, counsel for the state cite Clark v. Nash, 198 U. S. 361; Strickley v. Highland Boy Mining Co., 200 U. S. 527; Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 600; Union Lime Co. v. Chicago & North Western Ry. Co., 233 U. S. 211; Jones v. Portland, 245 U. S. 217; and Green v. Frazier, 253 U. S. 233. These cases are not especially helpful in determining how a business must be devoted to a public use to clothe it with a public interest so as to permit regulation of rates or prices.

They were of two classes—one where condemnation proceedings were opposed on the groud that private property could only be taken for a public use and the use contemplated by the legislature was not a public one. The other was of tax suits in which the validity of the tax was denied because the use for which the tax was levied was not a public one. "Public use" in such cases would seem to be a term of wider scope than where it is used to describe that which clothes property or business "with a public interest." In the former, the private owner is fully compensated for his property. In the latter, the use for which the tax is laid may be any purpose in which the state may engage and this covers almost any private business if the legislature thinks the state's engagement in it will help the general public and is willing to pay the cost of the plant and incur the expense of operation.

It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.

An ordinary producer, manufacturer, or shopkeeper may sell or not sell as he likes, United States v. Freight Association, 166 U. S. 290, 320; Terminal Cab Co. v. Kutz, 241 U. S. 252, 256, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, German Alliance Ins. Co. v. Lewis, 233 U. S. 389, it usually distinguishes private from quasi-public occupations.

In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.

In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been, has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above where fear of monopoly prompted, and was held to justify regulation of rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are country-wide, a short supply is not likely, and the danger from local monopolistic control less than ever.

It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become "clothed with a public interest." All business is subject to some kinds of public regulation, but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction. We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi public businesses, noted above, because, even so, the valid regulation to which it might be subjected as such, could not include what this act attempts.

To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation.

If, as, in effect, contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention. Civil Rights Cases, 109 U. S. 3, 24. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment.

This brings us to the nature and purpose of the regulation under the Industrial Court Act. The avowed object is continuity of food, clothing and fuel supply. By section 6 reasonable continuity and efficiency of the industries specified are declared to be necessary for the public peace, health and general welfare, and all are forbidden to hinder, limit or suspend them. Section 7 gives the industrial court power in case of controversy between employers and workers which may endanger the continuity or efficiency of service, to bring the employer and employees before it and after hearing and investigation to fix the terms and conditions between them. The employer is bound by this act to pay the wages fixed and while the worker is not required to work, at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against them and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him.

There is no authority of this court to sustain such exercise of power in respect to those kinds of businesses affected with a public interest by a change in pais, first fully recognized by this court in Munn v. Illinois, supra, where it said:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."*

These words refute the view that public regulation in such cases can secure continuity of a business against the owner. The theory is that of revocable grant only. Weems Steamboat Co. v. People's Steamboat Co., 214 U. S. 345. If that be so with the owner and employer, a fortiori must it be so with the employee. It involves a more drastic exercise of control to impose limitations of continuity growing out of the public character of the business upon the employee than upon the employer; and without saying that such limitations upon both may not be sometimes justified, it must be where the obligation to the public of continuous service is direct, clear, and mandatory, and arises as a contractual condition express or implied of entering the business either as owner or worker. It can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service.

We are considering the validity of the act as compelling the employer to pay the adjudged wages, and as forbidding the employees to combine against working and receiving them. The penalties of the act are directed against effort of either side to interfere with the settlement by arbitration. Without this joint compulsion, the whole theory and purpose of the act would fail. The state cannot be heard to say, therefore, that upon complaint of the employer the effect upon the employee should not be a factor in our judgment.

Justification for such regulation is said to be found in Wilson v. New, 243 U. S. 332. It was there held that in a nation-wide dispute over wages between railroad companies and their train operatives, with a general strike, commercial paralysis, and grave loss and suffering overhanging the country, Congress had power to prescribe wages not confiscatory, but obligatory on both for a reasonable time to enable them to agree. * * *

But the chief and conclusive distinction between Wilson v. New and the case before us is that already referred to. The power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier, which accepts a railroad franchise, is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous loss, Brooks-Scanlon Co. v. R. R. Commission, 251 U. S. 396; Bullock v. Railroad Commission, 254 U. S. 513, it may give up its franchise and enterprise, but, short of this, it must continue. Not so the owner, when by mere changed conditions his business becomes clothed with a public interest. He may stop at will, whether the business be losing or profitable.

The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce, furnishes no precedent for regulation of the business of the plaintiff in error, whose classification as public is at the best doubtful. It is not too much to say that the ruling in Wilson v. New went to the border line, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster. Certainly there is nothing to justify extending the drastic regulation sustained in that exceptional case to the one before us.

We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment, and deprives it of its property and liberty of contract without due process of law.

The judgment of the court below must be reversed.[61]

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[61] The Kansas system of compulsory arbitration "is unconstitutional, also, as applied to the coal mines of that state." Dorchy v. Kansas (1924) 264 U. S. 286, 289, 68 L. ed. 686. Cf. People v. United Mine Workers of America, Dist. 15 (1921) 70 Colo. 269, 201 Pac. 54.

TYSON & BRO.—UNITED THEATRE TICKET OFFICES, INC. v. BANTON.

1927. Supreme Court of the United States, 273 U. S. 418.

[See the facts and procedure in this case ante, page 83.]

MR. JUSTICE SUTHERLAND delivered the opinion of the court.

* * *

Strictly, the question for determination relates only to the maximum price for which an entrance ticket to a theater, etc., may be resold. But the answer necessarily must be to a question of greater breadth. The statutory declaration (§ 167) is that the price of or charge for admission to a theater, place of amusement or entertainment or other place where public exhibitions, games, contests or performances are held, is a matter affected with a public interest. To affirm the validity of § 172 is to affirm this declaration completely, since appellant's business embraces the resale of entrance tickets to all forms of entertainment therein enumerated. And since the ticket broker is a mere appendage of the theater, etc., and the *price of* or *charge for admission* is the essential element in the statutory declaration, it results that the real inquiry is whether every public exhibition, game, contest or performance, to which an admission charge is made, is clothed with a public interest, so as to authorize a law-making body to fix the maximum amount of the charge, which its patrons may be required to pay.

In the endeavor to reach a correct conclusion in respect to this inquiry, it will be helpful, by way of preface, to state certain pertinent considerations. The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, Case of the State Freight Tax, 15 Wall. 232, 278, and, as such, within the protection of the due process of law clauses of the Fifth and Fourteenth Amendments. See City of Carrollton v. Bazzette, 159 Ill. 284, 294. The power to regulate property, services, or business can be invoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars it exists to regulate in others or in all.

The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238, 246, but exists only where the business or the property involved has become "affected with a public interest." This phrase, first used by Lord Hale 200 years ago, Munn v. Illinois, 94 U. S. 113, 126, it is true, furnishes at best an indefinite standard, and attempts to define it have resulted, generally, in producing little more than paraphrases, which themselves require elucidation. Certain properties and kinds of business it obviously includes, like common carriers, telegraph and telephone companies, ferries, wharfage, etc. Beyond these, its application not only has not been uniform, but many of the decisions disclose the members of the same court in radical disagreement. Its full meaning, like that of many other generalizations, cannot be exactly defined—it can only be approximated.

A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease, or enjoyment from the existence or operation of the business; and, while the word has not always been limited narrowly as strictly denoting "a right," that synonym more nearly than any other expresses the sense in which it is to be understood.

The characterizations in some decisions of businesses as "quasi public," People v. King, 110 N. Y. 418, 428, "not 'strictly' private" Aaron v. Ward, 203 N. Y. 351, 356, and the like, while well enough for the purpose for which they were employed, namely, as a basis for upholding police regulations in respect of the conduct of particular businesses, cannot be accepted as equivalents for the description "affected with a public interest," as that phrase is used in the decisions of this court as a basis for legislative regulation of prices. The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on.

And, finally, the mere declaration by the legislature that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation. The matter is one which is always open to judicial inquiry. Wolff Co. v. Industrial Court, 262 U. S. 522, 536.

In the Wolff Case, this court held invalid the wage fixing provisions of the compulsory arbitration statute of Kansas as applied to a meat packing establishment. The power of a legislature, under any circumstances, to fix prices or wages in the business of preparing and selling food was seriously doubted, but the court concluded that, even if the legislature could do so in a public emergency, no such emergency appeared, and, in any event, the power would not extend to giving compulsory continuity to the business by compulsory arbitration. In the course of the opinion (p. 535), it was said that businesses characterized as clothed with a public interest might be divided into three classes:

[Here are quoted the paragraphs of the classification in the opinion of Taft, C. J., ante, pp. 802, 803.]

If the statute now under review can be sustained as valid, it must be in virtue of the doctrine laid down in the third paragraph; and it will aid in the effort to reach a correct conclusion in that respect if we shall first consider the principal decisions of this court where that doctrine has been applied. The leading, as well as the earliest, definite decision dealing with a business falling within that class is Munn v. Illinois, supra, which sustained the validity of an Illinois statute fixing the maximum charge to be made for the use of elevators and warehouses for the elevation and storage of grain.

As ground for that decision the opinion recites, [Here follows an abstract of the facts set out in the opinion, ante, at p. 645, as to the dominating position of the Chicago elevators in the grain trade.]

There is some general language in the opinion which, superficially, might seem broad enough to cover cases like the present one. It was said, for example (p. 126):

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large."

Literally, that would include all the large industries and some small ones; but in accordance with the well-settled rule the words must be limited to the case under consideration. Cohens v. Virginia, 6 Wheat. 264, 399; Plumley v. Massachusetts, 155 U. S. 461, 474. Indeed, the language quoted is qualified immediately by a statement of the general rule that:

"When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

The significant requirement is that the property shall be devoted to a use in which the public has an interest, which simply means, as in terms it is expressed at page 130, that it shall be devoted to "a public use." Stated in another form, a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect *granted* to the public. See Louisville, etc., R. R. Co. v. West Coast Co., 198 U. S. 483, 500. The subsequent elevator and warehouse cases, Budd v. New York, 143 U. S. 517, and Brass v. Stoeser, 153 U. S. 391, while presenting conditions of less gravity, rest upon the authority of the Munn Case. The differences among the three cases are in matters of degree.

[A reference to Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, is here omitted.]

German Alliance Ins. Co. v. Kansas, 233 U. S. 389, carries the doctrine further and marks the extreme limit to which this court thus far has gone in sustaining price fixing legislation. There the court said that a business might be affected with a public interest so as to permit price regulation although no public trust was impressed upon the property and although the public might not have a legal right to demand and receive service; and it was held that fire insurance was such a business. [Here follow quotations from the opinion in that case to show special grounds for the decision.]

Answering the objection that the reasoning of the opinion would subject every act of human endeavor and the price of every article of human use to regulation, it was said (p. 415):

> "And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become 'clothed with a public interest,' and therefore subject 'to be controlled by the public for the common good.'"

This observation fairly may be regarded as a warning at least to be cautious about invoking the decision as a precedent for the determination of cases involving other kinds of business. And this view is borne out by a general consideration of the case. The decision proceeds upon the ground that the insurance business is to be distinguished from ordinary private business; that an insurance company, in effect, is an instrumentality which gathers funds upon the basis of equality of risk from a great number of persons—sufficiently large in number to cause the element of chance to step out and the law of averages to step in as the controlling factor—and holds the numerous amounts so collected as a general fund to be paid out to those who shall suffer losses. Insurance companies do not sell commodities; they do not sell anything. They are engaged in making contracts with and collecting premiums from a large number of persons, the effect of their activities being to constitute a guaranty against individual loss and to put a large number of individual contributions into a common fund for the purpose of fulfilling the guaranty. In this fund all are interested, not in some vague or sentimental way, but in a very real, practical and definite sense. It was from the foregoing and other considerations peculiar to the insurance business that the court drew its conclusion that the business was clothed with a public interest. * * *

From the foregoing review it will be seen that each of the decisions of this court upholding governmental price regulation, aside from cases involving legislation to tide over temporary emergencies, has turned upon the existence of conditions, peculiar to the business under consideration, which bore such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use.

Lord Hale's statement that, when private property is "affected with a public interest, it ceases to be juris privati only," is accepted by this court as the guiding principle in cases of this character. That this phrase was not intended by its author to include private undertakings, like those enumerated in the statute now under consideration, is apparent when we consider the connection in which it was used. It occurs in Lord Hale's manuscript, De Portibus Maris, 1 Harg. Law Tracts, 78, in which the three-fold rights of the proprietor, the public and the king in ports are considered. It first is pointed out that no man can erect a public port without the king's license, though if he set up a port for his private advantage he may take what rates he and his customers can agree upon. But, it is said, if the king or the subject have a public wharf, to which all persons must come, because it is the wharf only licensed by the king, or there is no other wharf in that port, arbitrary and excessive charges cannot be made. For it is then affected with a public interest and ceases to be juris privati only; "as if a man set out a street in new building on his own land, it is now no longer bare private interest, but it is affected with a public interest."

It is clear that, as there announced, the rule is confined to conveniences made public because the privilege of maintaining them has been *granted* by the government or because there has arisen what may be termed a *constructive grant* of the use to the public. That this is what Lord Hale had in mind is borne out, and the question now under consideration is illuminated, by the illustration, which he evidently conceived to be pertinent, of a street opened to the public, in which case the assumed grant and resulting public right of use is very apparent.

A theater or other place of entertainment does not meet this conception of Lord Hale's aphorism or fall within the reasons of the decisions of this court based upon it. A theater is a private enterprise, which, in its relation to the public, differs obviously and widely, both in character and degree, from a grain elevator, standing at the gateway of commerce and exacting toll, amounting to a common charge, for every bushel of grain which passes on its way among the states; or stockyards, standing in like relation to the commerce in live stock; or an insurance company, engaged, as a sort of common agency, in collecting and holding a guaranty fund in which definite and substantial rights are enjoyed by a considerable portion of the public sustaining interdependent relations in respect of their interests in the fund. Sales of theater tickets bear no relation to the commerce of the country, and they are not interdependent transactions, but stand, both in form and effect, separate and apart from each other, "terminating in their effect with the instances." And certainly a place of entertainment is in no legal sense a public utility; and quite as certainly its activities are not such that their enjoyment can be regarded under any conditions from the point of view of an emergency.

The interest of the public in theaters and other places of entertainment may be more nearly, and with better reason, assimilated to the like interest in provision stores and markets, and in the rental of houses and apartments for residence purposes, although in importance it falls below such an interest in the proportion that food and shelter are of more moment than amusement or instruction. As we have shown, there is no legislative power to fix the prices of provisions or clothing or the rental charges for houses or apartments, in the absence of some controlling emergency; and we are unable to perceive any dissimilarities of such quality or degree as to justify a different rule in respect of amusements and entertainments. * * *

While theaters have existed for centuries and have been regulated in a variety of ways, and while price fixing by legislation is an old story, it does not appear that any attempt hitherto has been made to fix their charges by law. This is a fact of some significance in connection with the historical argument, and, when set in contrast with the practice in respect of innkeepers and others, whose charges have been subjected to legislative regulation from a very early period, it persuasively suggests that by general legislative acquiescence theaters, historically, have been regarded as falling outside the classes of things which should be thus controlled. It will not do to say that this failure of legislative bodies to act in the matter has been due to the absence of complaints on the part of the public, for it hardly is probable that a privilege as ancient and as amply exercised as that of complaining about prices in general, has not been freely indulged in the matter of charges for entertainment. * * *

If it be within the legitimate authority of government to fix maximum charges for admission to theaters, lectures (where perhaps the lecturer alone is concerned), baseball, football, and other games of all degrees of interest, circuses, shows (big and little), and every possible form of amusement, including the lowly merry-go-round with its adjunct, the hurdy-gurdy, Commonwealth v. Bow, 177 Mass. 347, it is hard to see where the limit of power in respect of price fixing is to be drawn.

It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like. That such evils exist in some degree in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in other kinds of business. But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. * * *

The evil of collusive alliances between the proprietors of theaters and ticket brokers or scalpers seems to have been effectively dealt with in Illinois by an ordinance which required (1) that the price of every theater ticket shall be printed on its face and (2) that no proprietor, employee, etc., of a theater shall receive or enter into any arrangement or agreement to receive more. This ordinance was sustained as valid by the state Supreme Court in People v. Thompson, 283 Ill. 87, 97, and that decision is cited here in support of the present statute. But the important distinction between that case and this is that the ordinance did not forbid the resale of the ticket by a purchaser of it for any price he was able to secure, or forbid the fixing of any price by the proprietor which he thought fit, provided that price was printed on the face of the ticket. * * *

We are of opinion that the statute assailed contravenes the Fourteenth Amendment and that the decree must be

Reversed.

Mr. Justice Holmes, dissenting.

We fear to grant power and are unwilling to recognize it when it exists. The States very generally have stripped jury trials of one of their most important characteristics by forbidding the judges to advise the jury upon the facts (Graham v. United States, 231 U. S. 474, 480), and when Legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. The former expression is convenient, to be sure, to conciliate the mind to something that needs explanation; the fact that the constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much; that some play must be allowed to the joints if the machine is to work. But police power often is used in a wide sense to cover and, as I said, to apologize for the general power of the Legislature to make a part of the community uncomfortable by a change.

I do not believe in such apologies. I think the proper course is to recognize that state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the state, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain. Coming down to the case before us I think, as I intimated in Adkins v. Children's Hospital, 261 U. S. 525, 569, that the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the Legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. Lotteries were thought useful adjuncts of the State a century or so ago; now they are believed to be immoral and they have been stopped. Wine has been thought good for man from the time of the Apostles until recent years. But when public opinion changed it did not need the Eighteenth Amendment, notwithstanding the Fourteenth, to enable a State to say that the business should end. Mugler v. Kansas, 123 U. S. 623. What has happened to lotteries and wine might happen to theaters in some moral storm of the future, not because theaters were devoted to a public use, but because people had come to think that way.

But if we are to yield to fashionable conventions, it seems to me that theaters are as much devoted to public use as anything well can be. We have not that respect for art that is one of the glories of France. But to many people the superfluous is the necessary, and it seems to me that Government does not go beyond its sphere in attempting to make life livable for them. I am far from saying that I think this particular law a wise and rational provision. That is not my affair. But if the people of the State of New York speaking by their authorized voice say that they want it, I see nothing in the Constitution of the United States to prevent their having their will.

Mr. Justice Brandeis concurs in this opinion.

Mr. Justice Stone, dissenting.

I can agree with the majority that "constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, and they may not be remolded by lawmakers or judges to save exceptional cases of inconvenience, hardship, or injustice." But I find nothing written in the Constitution, and nothing in the case or common law development of the Fourteenth Amendment, which would lead me to conclude that the type of regulation attempted by the state of New York is prohibited.

The scope of our inquiry has been repeatedly defined by the decisions of this court. As was said in Munn v. Illinois, 94 U. S. 113, 132, by Chief Justice Waite:

"For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the Legislature is the exclusive judge."

The attitude in which we should approach new problems in the field of price regulation was indicated in German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 409:

"Against that conservatism of the mind, which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guarantees impaired."

Again, in sustaining the constitutionality of a zoning ordinance under the Fourteenth Amendment, this court has recently said:

"Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." Village of Euclid v. Ambler Realty Co., 272 U. S. 365.

The question with which we are here concerned is much narrower than the one which has been principally discussed by the court. It is not whether there is constitutional power to fix the price which theater owners and producers may charge for admission. Although the statute in question declares that the price of tickets of admission to places of amusement is affected with a public interest, it does not purport to fix prices of admission. The producer or theater proprietor is free to charge any price he chooses. The statute requires only that the sale price, whatever it is, be printed on the face of the ticket, and prohibits the licensed ticket broker, an intermediary in the marketing process, from reselling the ticket at an advance of more than 50 cents above the printed price.[62] Nor is it contended that this limit on the profit is unreasonable. It appears affirmatively that the business is now being carried on profitably by ticket brokers under this very restriction. But if it were not, there could be judicial relief without affecting the constitutionality of the measure. In these respects, the case resembles Munn v. Illinois, supra, where the attempt was not to fix the price of grain but to fix the price of the service rendered by the proprietors of grain elevators in connection with the transportation and distribution of grain, the cost of which entered into the price ultimately paid by the consumer. The statute there, as the statute here, was designed in part to protect a large class of consumers from exorbitant prices made possible by the strategic position of a group of intermediaries in the distribution of a product from producer to consumer.

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[62] Turning to the broader question, the public importance of theatres has been manifested in regulatory legislation in this country from the earliest times. Beale, Innkeepers, § 325n; Cecil v. Green, 161 Ill. 265, 268. In New York, physical construction of theatres with respect to fire escapes, exits and seating is regulated, Village Law, § 90, par. 25; licenses to produce shows are required, Town Law, § 217; Sunday entertainments of certain kinds, Penal Code, § 2145, cf. People v. Hoym, 20 How. Prac. 76; Neuendorff v. Duryea, 6 Daly 276; discrimination because of race or color, Penal Code, § 514, People v. King, 110 N. Y. 418, or against persons wearing United States uniforms, Penal Code, § 517; appearance of children under fourteen upon the stage, People v. Ewer, 141 N. Y. 129; admission of children under sixteen, Penal Code, § 484; presentation of certain types of exhibitions, Penal Code, §§ 831, 833; or immoral shows and exhibitions, Penal Code, § 1140a; or plays in which a living character represents the Deity, Penal Code, § 2074; are all prohibited. Section 3657, Page Ohio Gen. Code, empowering municipalities to require licensing of theatrical exhibitions and theatre ticket selling and § 12600-2 *et seq.* regulating physical construction, etc., are typical of present day statutes. This Court has upheld legislation regulating admissions to public entertainments, Western Turf Association v. Greenberg, 204 U. S. 359; and providing for censorship of motion pictures, Mutual Film Corp. v. Ohio Industrial Commission, 236 U. S. 230.—Note by Mr. Justice Stone.

There are about 60 first-class theaters in the borough of Manhattan. Brokers annually sell about 2,000,000 tickets, principally for admission to these theaters. Appellant sells 300,000 tickets annually. The practice of the brokers, as revealed by the record, is to subscribe, in advance of the production of the play and frequently before the cast is chosen, for tickets covering a period of eight weeks. The subscriptions must be paid two weeks in advance and about 25 per cent. of the tickets unsold may be returned. A virtual monopoly of the best seats, usually the first 15 rows, is thus acquired, and the brokers are enabled to demand extortionate prices of theater goers. Producers and theater proprietors are eager to make these advance sales, which are an effective insurance against loss arising from unsuccessful productions. The brokers are in a position to prevent the direct purchase of tickets to the desirable seats and to exact from the patrons of the successful productions a price sufficient to pay the loss of those which are unsuccessful, plus an excessive profit to the broker.

It is undoubtedly true as a general proposition that one of the incidents of the ownership of property is the power to fix the price at which it may be disposed. It may be also assumed that as a general proposition, under the decisions of this court, the power of state governments to regulate and control prices may be invoked only in special and not well defined circumstances. But when that power is invoked in the public interest and in consequence of the gross abuse of private right disclosed by this record, we should make searching and critical examination of those circumstances which in the past have been deemed sufficient to justify the exercise of the power, before concluding that it may not be exercised here.

The phrase "business affected with a public interest" seems to me to be too vague and illusory to carry us very far on the way to a solution. It tends in use to become only a convenient expression for describing those businesses, regulation of which has been permitted in the past. To say that only those businesses affected with a public interest may be regulated is but another way of stating that all those businesses which may be regulated are affected with a public interest. It is difficult to use the phrase free of its connotation of legal consequences and hence when used as a basis of judicial decision, to avoid begging the question to be decided. The very fact that it has been applied to businesses unknown to Lord Hale, who gave sanction to its use, should caution us against the assumption that the category has now become complete or fixed and that there may not be brought into it new classes of business or transactions not hitherto included, in consequence of newly devised methods of extortionate price exaction.

The constitutional theory that prices normally may not be regulated rests upon the assumption that the public interest and private right are both adequately protected when there is "free" competition among buyers and sellers, and that in such a state of economic society, the interference with so important an incident of the ownership of private property as price fixing is not justified and hence is a taking of property without due process of law.

Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community. Whether this situation arises from the monopoly conferred upon public service companies or from the circumstance that the strategical position of a group is such as to enable it to impose its will in matters of price upon those who sell, buy or consume, as in Munn v. Illinois, supra; or from the predetermination of prices in the councils of those who sell, promulgated in schedules of practically controlling constancy, as in German Alliance Ins. Co. v. Kansas, supra; or from a housing shortage growing out of a public emergency as in Block v. Hirsh, 256 U. S. 135; Marcus Brown Co. v. Feldman, 256 U. S. 170; Levy Leasing Co. v. Siegel, 258 U. S. 242; cf. Chastleton Corp. v. Sinclair, 264 U. S. 543, —the result is the same. Self-interest is not permitted to invoke constitutional protection at the expense of the public interest and reasonable regulation of price is upheld.

That should be the result here. We need not attempt to lay down any universal rule to apply to new and unknown situations. It is enough for present purposes that this case falls within the scope of the earlier decisions and that the exercise of legislative power now considered was not arbitrary. The question as stated is not one of reasonable prices, but of the constitutional right in the circumstances of this case to exact exorbitant profits beyond reasonable prices. The economic consequences of this regulation upon individual ownership is no greater, nor is it essentially different from that inflicted by regulating rates to be charged by laundries, Oklahoma Operating Co. v. Love, 252 U. S. 331 (semble), by anti-monopoly laws, Sunday laws, usury statutes, Griffith v. Connecticut, 218 U. S. 563; Workmen's Compensation Acts, New York Central R. R. v. White, 243 U. S. 188; the zoning ordinance upheld in Village of Euclid v. Ambler Realty Co., supra, or state statutes restraining the owner of land from leasing it to Japanese or Chinese aliens, upheld in Terrace v. Thompson, 263 U. S. 197; Webb v. O'Brien, 263 U. S. 313; or state prohibition laws upheld in Mugler v. Kansas, 123 U. S. 623; or legislation prohibiting option contracts for future sales of grain, Booth v. Illinois, 184 U. S. 425, or invalidating sales of stock on margin or for "futures," Otis v. Parker, 187 U. S. 606; or statutes preventing the maintenance of pool parlors, Murphy v. California, 225 U. S. 623; or in numerous other cases in which the exercise of private rights has been restrained in the public interest. [Citing cases.] Nor is the exercise of the power less reasonable because the interests protected are in some degree less essential to life than some others. Laws against monopoly which aim at the same evil and accomplish their end by interference with private rights quite as much as the present law are not regarded as arbitrary or unreasonable or unconstitutional because they are not limited in their application to dealings in the bare necessities of life.

The problem sought to be dealt with has been the subject of earlier legislation in New York and has engaged the attention of the legislators of other states.[63] That it is one involving serious injustice to great numbers of individuals who are powerless to protect themselves cannot be questioned. Its solution turns upon considerations of economics about which there may be reasonable differences of opinion. Choice between these views takes us from the judicial to the legislative field. The judicial function ends when it is determined that there is basis for legislative action in a field not withheld from legislative power by the Constitution as interpreted by the decisions of this court. Holding these views, I believe the judgment below should be affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS join in this dissent.

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[63] Acts & Resolves of Mass. 1924, c. 497, controlling resale of tickets with maximum brokerage charges similar to the New York statute was approved in Opinion of Justices, 247 Mass. 497. Conn. Pub. Acts, 1923, c. 48; New Jersey Laws 1923, c. 71; Cal. Penal Code, § 526, make it a misdemeanor to sell tickets in excess of the printed price. The California Act was declared unconstitutional in Ex parte Quarg, 149 Cal. 79. A similar statute in Illinois was held invalid, People v. Steele, 231 Ill. 340. A license ordinance of ticket peddlers was also declared invalid in California. Ex parte Dees, 46 Cal. App. 656. Those enactments are clearly more drastic than the New York statute. A Chicago ordinance prohibiting secret alliances and profit sharing between proprietors and scalpers was upheld. People v. Thompson, 283 Ill. 87. See also, Laws of Ill. 1923, p. 322.—Note by Mr. Justice Stone.

MR. JUSTICE SANFORD, dissenting.

I regret that I cannot agree with the opinion of the Court in this case. My own view is more nearly that expressed by Mr. Justice Stone. * * *[64]

RIBNIK v. McBRIDE, COMMISSIONER OF LABOR OF THE STATE OF NEW JERSEY.

1928. Supreme Court of the United States. 277 U. S. 350.

[Writ of error to the Court of Errors and Appeals of the State of New Jersey to review a decision which sustained a statute of that state after construing it as requiring private employment agencies to charge no higher fees than those deemed reasonable by the state Commissioner of Labor. After quoting from Chas. Wolff Packing Co. v. Court of Industrial Relations, ante, p. 800, Adkins v. Children's Hospital, ante, p. 773, and Tyson & Bro. v. Banton, ante, p. 808, the opinion of the court continues:]

MR. JUSTICE SUTHERLAND: The business of securing employment for those seeking work and employees for those seeking workers is essentially that of a broker, that is, of an intermediary. While we do not undertake to say that there may not be a deeper concern on the part of the public in the business of an employment agency, that business does not differ in substantial character from the business of a real estate broker, ship broker, merchandise broker or ticket broker. In the Tyson case, supra, we declared unconstitutional an act of the New York legislature which sought to fix the price at which theatre tickets should be sold by a ticket broker, and it is not easy to see how, without disregarding that decision, price-fixing legislation in respect of other brokers of like character can be upheld.

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[64] In Fairmont Creamery Co. v. Minnesota (1927) 274 U. S. 1, 71 L. ed. 893, 52 A. L. R. 163, a state statute was held invalid which prohibited any buyer of milk or cream for re-sale or manufacture to discriminate between different sections of the state by buying at a higher price in one locality than in another, allowance being permitted only for difference in cost of transportation to place of manufacture or re-sale. The statute did not make intent to create a monopoly or to destroy the business of a competitor an essential element of the offense defined by it. The argued purpose of the act was to prevent buying at low prices in localities where a buyer had little or no competition, and at high prices in localities where he had competition. The court said: "It seems plain enough that the real evil supposed to threaten the cream business was payment of excessive prices by powerful buyers for the purpose of destroying competition. * * *

"As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequent. Enforcement of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions."

But where intent to destroy competition is made an element of the offense, statutes otherwise like the above are valid as against buyers of farm products, State v. Fairmont Creamery Co. (1911) 153 Iowa 702, 133 N. W. 895, 42 L. R. A. (N. S.) 821; State v. Bridgeman & Russell Co. (1912) 117 Minn. 186, 134 N. W. 496, Ann. Cas. 1913D, 41. Likewise a statute is valid which makes it an offense for a seller of "any commodity in general use" to sell at a lower price in one locality than in another, except for equalizing the cost of transportation, where intent to destroy competition is made an ingredient of the offense, Central Lumber Co. v. South Dakota (1912) 226 U. S. 157, 57 L. ed. 164; or intent to create a monopoly, Opinion of the Justices (1912) 211 Mass. 620, 99 N. E. 294.

An employment agency is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer, and the apartment or tenement house owner and the broker who acts as intermediary between such owner and his tenants. Of course, anything which substantially interferes with employment is a matter of public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern. The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that "public interest" which the law contemplates as the basis for legislative price control. Wolff Co. v. Industrial Court, supra, p. 536. Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of a grave emergency, Tyson & Brother v. Banton, supra, pp. 431, 437, the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power. And we perceive no reason for applying a different rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employee or an employee for a place.

Brazee v. Michigan, 241 U. S. 340, cited by defendant in error lends no support to the judgment below. That case involved the validity of a Michigan statute in respect of employment agencies. Section 5 of the act attempted to limit the fees which should be charged. The state Supreme Court held that the business was one properly subject to police regulation and control, but did not rule concerning the validity of § 5. This court held that it was within the power of the state to require licenses for employment agencies and prescribe reasonable regulations to be enforced by the commissioner of labor. But it was said (page 344):

"Provisions of § 5 in respect of fees to be demanded or retained are severable from other portions of the act and, we think, might be eliminated without destroying it. Their validity was not passed upon by the Supreme Court of the state and has not been considered by us."

And we since have held definitely that the power to require a license for and to regulate the conduct of a business is distinct from the power to fix prices. "The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on." Tyson & Brother v. Banton, supra, page 431. And see pages 440-441.

To urge that extortion, fraud, imposition, discrimination, and the like have been practiced to some, or to a great, extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this court. These are grounds for regulation, but not for price fixing as we have already definitely decided. Tyson & Brother v. Banton, supra, 442-445.

There are a number of states which have statutes like that now under consideration, and we are asked to give weight to that circumstance. It is to be observed, however, that with the exception of the decision now under review none of these statutes has been judicially considered, except in the State of California, where the legislation was declared unconstitutional. Ex parte Dickey, 144 Cal. 234; In re Smith, 193 Cal. 337. And it was said in oral argument, and not disputed, that, while legislation of this character existed in several states, generally it was not enforced, in some instances because the state's attorney-general had advised that the legislation was unconstitutional. In any event, under all the circumstances, and in the face of our prior decisions, we do not regard the mere existence in other states of statutory provisions like the one now under review as entitled to persuasive force.

Judgment reversed.

Mr. Justice Sanford, concurring.

I concur in this result upon the controlling authority of Tyson v. Banton, 273 U. S. 418, which, as applied to the question in this case, I am unable to distinguish.

Mr. Justice Stone, dissenting.

The question is whether a state has constitutional power to require employment agencies to charge only reasonable fees for their services to those seeking employment. As the case is presented we must take it that the New Jersey Commissioner of Labor was right in holding that Ribnik's list of fees was unreasonably high.

Under the decisions of this Court not all price regulation, as distinguished from other forms of regulation, is forbidden. As those decisions have been explained, price regulation is within the constitutional power of a state legislature when the business concerned is "affected with a public interest." That phrase is not to be found in the Constitution. Concededly it is incapable of any precise definition. It has and can have only such meaning as may be given to it by the decisions of this court. As I read those decisions, such regulation is within a state's power whenever any combination of circumstances seriously curtails the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole. [Citations omitted.] The price regulation may embrace businesses "which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation." Wolff Co. v. Industrial Court, 262 U. S. 522, 535. The use by the public generally of the specific thing or business affected is not the test. The nature of the service rendered, the exorbitance of the charges and the arbitrary control to which the public may be subjected without regulation, are elements to be considered in determining whether the "public interest" exists. Wolff Co. v. Industrial Court, supra, 538. The economic disadvantage of a class and the attempt to ameliorate its condition may alone be sufficient to give rise to the "public interest" and to justify the regulation of contracts with its members, Knoxville Iron Co. v. Harbison, 183 U. S. 13; McLean v. Arkansas, 211 U. S. 539; Mutual Loan Co. v. Martell, 222 U. S. 225, and obviously circumstances may so change in point of time or so differ in space as to clothe a business with such an interest which at other times or in other places would be a matter purely of private concern. Block v. Hirsh, 256 U. S. 135, 155.

I cannot say *a priori* that the business of employment agencies in New Jersey lacks the requisite "public interest." We are judicially aware that the problem of unemployment is of grave public concern; that the conduct of the employment agency business bears an important relationship to that larger problem and affects vitally the lives of great numbers of the population, not only in New Jersey but throughout the United States; that employment agencies, admittedly subject to regulation in other respects, Brazee v. Michigan, 241 U. S. 340, and in fact very generally regulated, deal with a necessitous class, the members of which are often dependent on them for opportunity to earn a livelihood, are not free to move from place to place, and are often under exceptional economic compulsion to accept such terms as the agencies offer. We are not judicially ignorant of what all human experience teaches, that those so situated are peculiarly the prey of the unscrupulous and designing. In Adams v. Tanner, 244 U. S. 590, a statute of Washington which in effect attempted to abolish the business was held unconstitutional because employment agencies were deemed not "inherently immoral or dangerous to public welfare," but, as was there emphasized, capable, under regulation, of being conducted in a useful and honest manner. But it was not questioned that the business was subject to grave abuses, involving frauds and impositions upon a peculiarly helpless class, among which the exaction of exorbitant fees was perhaps the least offensive. The Supreme Court of New Jersey, in an opinion in the present case which was adopted by the Court of Errors and Appeals, said: "It is common knowledge that an employment agency is a business dealing with a great body of our population, native and foreign born, which is susceptible to imposition, deception, and immoral influences. * * *"

In dealing with the question of power to require reasonable prices in this particular business, we should remember what was specifically pointed out by the court in Tyson v. Banton, 273 U. S. 418, 438, that whether a business is affected with a "public interest" turns "upon the existence of conditions, peculiar to the business under consideration." In the respects mentioned, or most of them, and in others to be pointed out, it seems to me that there is a marked difference between the character of this business and that of real estate brokers, ship brokers, merchandise brokers, and, more than all, of ticket brokers, who were involved in Tyson v. Banton, supra. There the attempt was made to limit the advance which brokers might charge over box office prices for theater tickets, an expedient adopted to break up their monopolistic control of a luxury, not a necessity. Those affected by the practices of the ticket brokers constituted a relatively small part of the population within a comparatively small area of the state of New York. They were not necessitous. The consequences of the fraud and extortion practiced upon them were not visited upon the community as a whole in any such manner as are fraud and imposition practiced upon workers seeking employment. Here the effort is made, as in Knoxville Iron Co. v. Harbison, supra, McLean v. Arkansas, supra, Mutual Loan Co. v. Martell, supra, and Erie R. R. v. Williams, 233 U. S. 685, first, to protect from abuses a class unable to protect itself, for whose welfare the police power has often been allowed broad play, and, second, to mitigate the evils which unemployment brings upon the community as a whole.

Some presumption should be indulged that the New Jersey Legislature had an adequate knowledge of such local conditions as the circumstances of those seeking employment, the number and distribution of employment agencies, the local efficacy of competition, the prevalent practices with respect to fees. On this deserved respect for the judgment of the local lawmaker depends, of course, the presumption in favor of constitutionality, for the validity of a regulation turns "upon the existence of conditions, peculiar to the business under consideration." Tyson v. Banton, supra, 438. Moreover, we should not, when the matter is not clear, oppose our notion of the seriousness of the problem or the necessity of the legislation to that of local tribunals. "This Court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt." Adkins v. Children's Hospital, 261 U. S. 525, 544. And the enactments of state legislatures are entitled to no less respect. If, therefore, our consideration of the general conditions surrounding employment agencies, which it was thought in Brazee v. Michigan, supra, made them subject to regulation, was to go no further than that of the Court, I should still have supposed that plaintiff in error had not sustained the burden which rests on him to show that this law is unconstitutional. Erie R. R. v. Williams, supra. But even if the presumption is not to be indulged, and the burden no longer to be cast on him who attacks the constitutionality of a law, we need not close our eyes to available data throwing light on the problem with which the legislature had to deal. See Muller v. Oregon, 208 U. S. 412, 420-421; McLean v. Arkansas, supra, 549.

For thirty years or more the evils found to be connected with the business of employment agencies in the United States have been the subject of repeated investigations, official and unofficial, and of extensive public comment. They have been the primary reason for the establishment of public employment offices in the various states.

Quite apart from the other evils laid at the door of the private agencies, the data supplied by these investigations and reports afford a substantial basis for the conclusion of the New Jersey Legislature that the business is peculiarly subject to abuses relating to fee charging, and that for the correction of these the restriction to a reasonable maximum charge is the only effective remedy. These data, to be gathered from numerous independent and public investigations, may be briefly summarized as follows:

First. They show that the agencies, left to themselves, very generally charge extortionate fees.[65] * * *

Second. These data show that the fees charged are often discriminatory. It is made known in slack season that but few jobs are available, and that to these will be referred the applicants who tender the larger "extra fees" or "presents." * * *

Third. Fee-splitting has been a recurrent subject of complaint. It "is frequently practiced, part of the fee charged to the worker being paid over by the private employment agent to the employer or his foreman. * * *" A Legislature would certainly not be unreasonable in concluding that the fixing of a reasonable maximum fee was the appropriate and only effective method of assuring private agencies fair compensation while preventing them from abuses of this character.

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[65] In support of this and other statements of facts, references are made in footnotes, here omitted, to numerous official and unofficial reports and to legislation.

Fourth. It is reported that at times of widespread unemployment the private agencies are known to raise their fees out of all proportion to the reasonable value of their services. There is a public interest at such times in bringing about a prompt readjustment of the labor supply to industry's need for labor. The additional barrier to a quick readjustment created by the agencies' raising of their rates affects that interest adversely. The establishment of a reasonable maximum rate is well calculated to obviate the abuse.

Fifth. Finally, it is pointed out that the private agencies charge the employee and do not charge the employer for a service that is rendered to both. The convenience of being furnished with employees is similar to that of being directed to a position; but less effort is required to collect compensation for the whole service from the employee alone. His necessities are normally greater. His bargaining power is normally weaker. The setting of a maximum fee need not mean—in New Jersey, does not mean—that an absolute limit is placed on the agency's return. The agency may still charge the employer in addition for such service as is rendered to him. The establishment of reasonable fees is thus, in one aspect, merely a method of providing that the patrons of the agency shall be required to pay only for the service rendered to them.

Legislation for the correction of these and other evils has been general throughout the United States. Among the earliest comprehensive schemes for that purpose was the Act of June 19, 1906, c. 3438, 34 Stat. 304, adopted by Congress for the District of Columbia. * * * Among the states, twenty-one have limited the total fees that may be charged, ten by fixing a stated maximum, and eleven by restricting the charge to a named percentage of the salary earned during some period. * * *

It is of course true that the enactment of a particular type of legislation, even though general, and a widespread and competent opinion that it is wise and necessary, do not establish its constitutionality. But that such legislation has been enacted and continued in force over considerable periods of time and in widely separated areas, and is supported by a concurrence of informed opinion, may not be disregarded in determining, first, whether the conditions peculiar to the business under consideration make it one in which, as in insurance companies, there is a paramount public concern; and, second, whether the regulation adopted is reasonably calculated to safeguard that interest. See Muller v. Oregon, supra, 420, 421; McLean v. Arkansas, supra.

Examination of the various reports of public bodies and the legislation referred to can, I think, leave no doubt that the practices of the private agencies with respect to their fees presented a problem for legislative consideration different from any other that this court has passed on in ruling on the power to regulate prices, but certainly more akin to that in Munn v. Illinois, supra, and German Alliance Insurance Co. v. Lewis, supra, than to that in Tyson v. Banton, supra, and, unless we are to establish once and for all the rule that only public utilities may be regulated as to price, the validity of the statute at hand would seem to me to be beyond doubt. Certainly it would be difficult to show a greater necessity for price regulation.

It is said that if there be abuses in this business, the business may be regulated but not by the fixing of reasonable prices, and that that was decided in Tyson v. Banton, supra. So far as the significant facts in that case are concerned, it bears little resemblance to this one. Ticket brokers and employment brokers are similar in name: in no other respect do they seem alike to me. To overcharge a man for the privilege of hearing the opera is one thing; to control the possibility of his earning a livelihood would appear to be quite another. And I shall not stop to argue that the state has a larger interest in seeing that its workers find employment without being imposed upon, than in seeing that its citizens are entertained. Here, too, if the business is subject to regulation, as seems to be admitted, the regulation which is appropriate and effective is some curtailment of the exorbitant fees charged and not some other form of control which would have no tendency to correct the evils aimed at.

I cannot accept as valid the distinction on which the opinion of the majority seems to me necessarily to depend, that granted constitutional power to regulate there is any controlling difference between reasonable regulation of price, if appropriate to the evil to be remedied, and other forms of appropriate regulation which curtail liberty of contract or the use and enjoyment of property. Obviously, even in the case of businesses affected with a public interest, other control than price regulation may be appropriate, and price regulation may be so inappropriate as to be arbitrary or unreasonable, and hence unconstitutional. To me it seems equally obvious that the Constitution does not require us to hold that a business, subject to every other form of reasonable regulation, is immune from the requirement of reasonable prices, where that requirement is the only remedy appropriate to the evils encountered. In this respect I can see no difference between a reasonable regulation of price and a reasonable regulation of the use of property, which affects its price or economic return. The privilege of contract and the free use of property are as seriously cut down in the one case as in the other.

To say that there is constitutional power to regulate a business or a particular use of property because of the public interest in the welfare of a class peculiarly affected, and to deny such power to regulate price for the accomplishment of the same end, when that alone appears to be an appropriate and effective remedy, is to make a distinction based on no real economic difference, and for which I can find no warrant in the Constitution itself nor any justification in the opinions of this court.

The price paid for property or services is only one of the terms in a bargain; the effect on the parties is similar whether the restriction on the power to contract affects the price, or the goods or services sold. Apart from the cases involving the historic public-callings, immemorially subject to the closest regulation, this court has sustained regulations of the price in cases where the legislature fixed the charges which grain elevators, Brass v. Stoeser, 153 U. S. 391; Budd v. New York, 143 U. S. 517; and insurance companies might make, German Alliance Insurance Co. v. Lewis, supra; or required miners to be paid per ton of coal unscreened instead of screened, McLean v. Arkansas, supra; Rail Coal Co. v. Ohio Industrial Commission, 236 U. S. 338; or required employers who paid their men in store orders to redeem them in cash, Knoxville Iron Co. v. Harbison, supra; Dayton Coal Co. v. Barton, 183 U. S. 23; Keokee Coke Co. v. Taylor, 234 U. S. 224; or fixed the fees chargeable by attorneys appearing for injured employees before workmen's compensation commissions, Yeiser v. Dysart, 267 U. S. 540; or fixed the rate of pay for overtime work, Bunting v. Oregon, 243 U. S. 426; or fixed the time within which the services of employees must be paid for, Erie R. R. v. Williams, supra; or established maximum rents, Block v. Hirsh, 256 U. S. 135; Marcus Brown Co. v. Feldman, 256 U. S. 170; or fixed the maximum rate of interest chargeable on loans, Griffith v. Connecticut, 218 U. S. 563. It has sustained restrictions on the other element in the bargain where legislatures have established maximum hours of labor for men, Holden v. Hardy, 169 U. S. 366, or for women, Muller v. Oregon, 208 U. S. 412; Hawley v. Walker, 232 U. S. 718; Riley v. Massachusetts, 232 U. S. 671; Miller v. Wilson, 236 U. S. 373; Bosley v. McLaughlin, 236 U. S. 385; or prohibited the payment of wages in advance, Patterson v. Bark Eudora, 190 U. S. 169; Strathearn S. S. Co. v. Dillon, 252 U. S. 348; or required loaves of bread to be of a certain size, Schmidinger v. Chicago, 226 U. S. 578. In each of these cases the police power of the state was held broad enough to warrant an interference with free bargaining in cases where, despite the competition that ordinarily attends that freedom, serious evils persisted.

Similar evils are now observed in the conduct of employment agencies. I see no reason why a state may not resort to the same remedy. There may be reasonable differences of opinion as to the wisdom of the solution here attempted. These I would be the first to admit. But a choice between them involves a step from the judicial to the legislative field. Erie R. R. v. Williams, supra, 699; German Alliance Ins. Co. v. Kansas, supra; Munn v. Illinois, supra, 132. That choice should be left where, it seems to me, it was left by the Constitution—to the States and to Congress.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS join in this dissent.[66]

COPPAGE v. STATE OF KANSAS.

1915. Supreme Court of the United States. 236 U. S. 1.

MR. JUSTICE PITNEY delivered the opinion of the court.

In a local court in one of the counties of Kansas, plaintiff in error was found guilty and adjudged to pay a fine, with imprisonment as the alternative, upon an information charging him with a violation of an act of the legislature of that state, approved March 13, 1903, being Chap. 222 of the session laws of that year, found also as §§ 4674 and 4675, Gen. Stat. Kansas 1909. The act reads as follows:

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[66] In Williams v. Standard Oil Co. of Louisiana (1929) 278 U. S. 235, 73 L. ed. —, a Tennessee statute was held invalid which required applicants for licenses to sell gasoline to file schedules of prices with the state superintendent of motors and motor fuels and empowered the latter to fix other prices if those submitted were not deemed reasonable by him, subject to appeal to the state commissioner of finance, and from the latter to the courts (the methods common in rate-making for public utilities). The court, after stating that the decision was controlled by Chas. Wolff Packing Co. v. Court of Industrial Relations, Tyson & Bro. v. Banton, Fairmont Creamery Co. v. Minnesota, note 64, above and Ribnik v. McBride, said:

"In support of the act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the state of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the state. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase "affected with a public interest." Those decisions control the present case.

"There is nothing in the point that the act in question may be justified on the ground that the sale of gasoline in Tennessee is monopolized by appellees, or by either of them, because, objections to the materiality of the contention aside, an inspection of the pleadings and of the affidavits submitted to the lower court discloses an utter failure to show the existence of such monopoly."

"SECTION 1. That it shall be unlawful for any individual or member of any firm, or any agent, officer or employé of any company or corporation, to coerce, require, demand or influence any person or persons to enter into any agreement, either written or verbal, not to join or become or remain a member of any labor organization or association, as a condition of such person or persons securing employment, or continuing in the employment of such individual, firm, or corporation.

"SECTION 2. Any individual or member of any firm or any agent, officer or employé of any company or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than fifty dollars or imprisoned in the county jail not less than thirty days."

The judgment was affirmed by the Supreme Court of the State, two justices dissenting (87 Kansas, 752), and the case is brought here upon the ground that the statute, as construed and applied in this case, is in conflict with that provision of the Fourteenth Amendment of the Constitution of the United States which declares that no State shall deprive any person of liberty or property without due process of law.

The facts, as recited in the opinion of the Supreme Court, are as follows: About July 1, 1911, one Hedges was employed as a switchman by the St. Louis & San Francisco Railway Company, and was a member of a labor organization called the Switchmen's Union of North America. Plaintiff in error was employed by the railway company as superintendent, and as such he requested Hedges to sign an agreement, which he presented to him in writing, at the same time informing him that if he did not sign it he could not remain in the employ of the company. The following is a copy of the paper thus presented:

Fort Scott, Kansas, ———— —, 1911.

Mr. T. B. Coppage, Superintendent Frisco Lines, Fort Scott:

We, the undersigned, have agreed to abide by your request, that is, to withdraw from the Switchmen's Union, while in the service of the Frisco Company.

(Signed) ————————————

Hedges refused to sign this, and refused to withdraw from the labor organization. Thereupon plaintiff in error, as such superintendent, discharged him from the service of the company.

At the outset, a few words should be said respecting the construction of the act. It uses the term "coerce," and some stress is laid upon this in the opinion of the Kansas supreme court. But, on this record, we have nothing to do with any question of actual or implied coercion or duress, such as might overcome the will of the employé by means unlawful without the act. In the case before us, the state court treated the term "coerce" as applying to the mere insistence by the employer, or its agent, upon its right to prescribe terms upon which alone it would consent to a continuance of the relationship of employer and employé. In this sense we must understand the statute to have been construed by the court, for in this sense it was enforced in the present case; there being no finding, nor any evidence to support a finding, that plaintiff in error was guilty in any other sense. The entire evidence is included in the bill of exceptions returned with the writ of error, and we have examined it to the extent necessary in order to determine the Federal right that is asserted (Southern P. Co. v. Schuyler, 227 U. S. 601, 611, and cases cited). There is neither finding nor evidence that the contract of employment was other than a general or indefinite hiring, such as is presumed to be terminable at the will of either party. The evidence shows that it would have been to the advantage of Hedges, from a pecuniary point of view and otherwise, to have been permitted to retain his membership in the union, and at the same time to remain in the employ of the railway company. In particular, it shows (although no reference is made to this in the opinion of the court) that, as a member of the union, he was entitled to benefits in the nature of insurance to the amount of $1,500, which he would have been obliged to forego if he had ceased to be a member. But, aside from this matter of pecuniary interest, there is nothing to show that Hedges was subjected to the least pressure or influence, or that he was not a free agent, in all respects competent, and at liberty to choose what was best from the standpoint of his own interests. Of course, if plaintiff in error, acting as the representative of the railway company, was otherwise within his legal rights in insisting that Hedges should elect whether to remain in the employ of the company or to retain his membership in the Union, that insistence is not rendered unlawful by the fact that the choice involved a pecuniary sacrifice to Hedges. Silliman v. United States, 101 U. S. 465, 470, 471; Hackley v. Headley, 45 Mich. 569, 576; Emery v. Lowell, 127 Mass. 138, 141; Custin v. City of Viroqua, 67 Wis. 314, 320. And if the right that plaintiff in error exercised is founded upon a constitutional basis, it cannot be impaired by merely applying to its exercise the term "coercion." We have to deal, therefore, with a statute that, as construed and applied, makes it a criminal offense, punishable with fine or imprisonment, for an employer or his agent to merely prescribe, as a condition upon which one may secure certain employment or remain in such employment (the employment being terminable at will), that the employé shall enter into an agreement not to become or remain a member of any labor organization while so employed; the employé being subject to no incapacity or disability, but, on the contrary, free to exercise a voluntary choice.

In Adair v. United States, 208 U. S. 161, this court had to deal with a question not distinguishable in principle from the one now presented. * * * Adair was convicted upon an indictment charging that he, as agent of a common carrier subject to the provisions of the Act, unjustly discriminated against a certain employé by discharging him from the employ of the carrier because of his membership in a labor organization. The court held that portion of the Act upon which the conviction rested to be an invasion of the personal liberty as well as of the right of property guaranteed by the Fifth Amendment, which declares that no person shall be deprived of liberty or property without due process of law. Speaking by Mr. Justice Harlan, the court said (208 U. S., p. 174): * * *

"It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage [the employé in that case] because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land." * * *

It is true that, while the statute that was dealt with in the Adair Case contained a clause substantially identical with the Kansas act now under consideration—a clause making it a misdemeanor for an employer to require an employé or applicant for employment, as a condition of such employment, to agree not to become or remain a member of a labor organization,—the conviction was based upon another clause, which related to discharging an employé because of his membership in such an organization; and the decision, naturally, was confined to the case actually presented for decision. * * *

But, * * * is there any real distinction? The constitutional right of the employer to discharge an employé because of his membership in a labor union being granted, can the employer be compelled to resort to this extreme measure? May he not offer to the employé an option, such as was offered in the instant case, to remain in the employment if he will retire from the union; to sever the former relationship only if he prefers the latter? Granted the equal freedom of both parties to the contract of employment, has not each party the right to stipulate upon what terms only he will consent to the inception, or to the continuance, of that relationship?

These queries answer themselves. The answers, as we think, lead to a single conclusion: Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if it be terminable at will. It follows that this case cannot be distinguished from Adair v. United States. * * *

An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the state. But, notwithstanding the strong general presumption in favor of the validity of state laws, we do not think the statute in question, as construed and applied in this case, can be sustained as a legitimate exercise of that power. To avoid possible misunderstanding, we should here emphasize, what has been said before, that so far as its title or enacting clause expresses a purpose to deal with coercion, compulsion, duress, or other undue influence, we have no present concern with it, because nothing of that sort is involved in this case. * * *

Laying aside, therefore, as immaterial for present purposes, so much of the statute as indicates a purpose to repress coercive practices, what possible relation has the residue of the Act to the public health, safety, morals or general welfare? None is suggested, and we are unable to conceive of any. The Act, as the construction given to it by the state court shows, is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. They are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general welfare. If they were, a different question would be presented.

As to the interest of the employed, it is said by the Kansas Supreme Court (87 Kansas, p. 759) to be a matter of common knowledge that "employés, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making contracts of purchase thereof." No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employé. Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a state shall not "deprive any person of life, liberty or property without due process of law," gives to each of these an equal sanction; it recognizes "liberty" and "property" as co-existent human rights, and debars the states from any unwarranted interference with either.

And since a state may not strike them down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty.

We need not refer to the numerous and familiar cases in which this court has held that the power may properly be exercised for preserving the public health, safety, morals, or general welfare, and that such police regulations may reasonably limit the enjoyment of personal liberty, including the right of making contracts. They are reviewed in Holden v. Hardy, 169 U. S. 366, 391; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 566; Erie R. Co. v. Williams, 233 U. S. 685; and other recent decisions. An evident and controlling distinction is this: that in those cases it has been held permissible for the states to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare, even though the enjoyment of private rights of liberty and property be thereby incidentally hampered; while in that portion of the Kansas statute which is now under consideration—that is to say, aside from coercion, etc.—there is no object or purpose, expressed or implied, that is claimed to have reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving one who has property of some part of what is characterized as his "financial independence." In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare. But, in our opinion, the

Fourteenth Amendment debars the states from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated "public welfare," and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.

It is said in the opinion of the state court that membership in a labor organization does not necessarily affect a man's duty to his employer; that the employer has no right, by virtue of the relation, "to dominate the life nor to interfere with the liberty of the employé in matters that do not lessen or deteriorate the service"; and that "the statute implies that labor unions are lawful and not inimical to the rights of employers." The same view is presented in the brief of counsel for the state, where it is said that membership in a labor organization is the "personal and private affair" of the employé. To this line of argument it is sufficient to say that it cannot be judicially declared that membership in such an organization has no relation to a member's duty to his employer; and therefore, if freedom of contract is to be preserved, the employer must be left at liberty to decide for himself whether such membership by his employé is consistent with the satisfactory performance of the duties of the employment.

Of course we do not intend to say, nor to intimate, anything inconsistent with the right of individuals to join labor unions, nor do we question the legitimacy of such organizations so long as they conform to the laws of the land as others are required to do. Conceding the full right of the individual to join the union, he has no inherent right to do this and still remain in the employ of one who is unwilling to employ a union man, any more than the same individual has a right to join the union without the consent of that organization. Can it be doubted that a labor organization—a voluntary association of working men—has the inherent and constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with nonunion men? Or that a union man has the constitutional right to decline proffered employment unless the employer will agree not to employ any nonunion man? (In all cases we refer, of course, to agreements made voluntarily, and without coercion or duress as between the parties. And we have no reference to questions of monopoly, or interference with the rights of third parties or the general public. These involve other considerations, respecting which we intend to intimate no opinion.) [Citations omitted.] And can there be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers? We think not; and since the relation of employer and employé is a voluntary relation, as clearly as is that between the members of a labor organization, the employer has the same inherent right to prescribe the terms upon which he will consent to the relationship, and to have them fairly understood and expressed in advance.

When a man is called upon to agree not to become or remain a member of the union while working for a particular employer, he is in effect only asked to deal openly and frankly with his employer, so as not to retain the employment upon terms to which the latter is not willing to agree. And the liberty of making contracts does not include a liberty to procure employment from an unwilling employer, or without a fair understanding. Nor may the employer be foreclosed by legislation from exercising the same freedom of choice that is the right of the employé. * * *

Judgment reversed.

MR. JUSTICE DAY with whom MR. JUSTICE HUGHES concurs, dissenting: * * * The right to join labor unions is undisputed, and has been the subject of frequent affirmation in judicial opinions. Acting within their legal rights, such associations are as legitimate as any organization of citizens formed to promote their common interest. They are organized under the laws of many states, by virtue of express statutes passed for that purpose, and, being legal, and acting within their constitutional rights, the right to join them, as against coercive action to the contrary may be the legitimate subject of protection in the exercise of the police authority of the states. This statute, passed in the exercise of that particular authority called the police power, the limitations of which no court has yet undertaken precisely to define, has for its avowed purpose the protection of the exercise of a legal right, by preventing an employer from depriving the employé of it as a condition of obtaining employment. I see no reason why a state may not, if it chooses, protect this right, as well as other legal rights. * * *

The act under consideration is said to have the effect to deprive employers of a part of their liberty of contract, for the benefit of labor organizations. It is urged that the statute has no object or purpose, express or implied, that has reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving him who has property of some part of his "financial independence."

But this argument admits that financial independence is not independence of law or of the authority of the legislature to declare the policy of the state as to matters which have a reasonable relation to the welfare, peace and security of the community. * * *

It is constantly emphasized that the case presented is not one of coercion. But in view of the relative positions of employer and employed, who is to deny that the stipulation here insisted upon and forbidden by the law is essentially coercive? No form of words can strip it of its true character. Whatever our individual opinions may be as to the wisdom of such legislation, we cannot put our judgment in place of that of the legislature and refuse to acknowledge the existence of the conditions with which it was dealing. Opinions may differ as to the remedy, but we cannot understand upon what ground it can be said that a subject so intimately related to the welfare of society is removed from the legislative power. Wherein is the right of the employer to insert this stipulation in the agreement any more sacred than his right to agree with another employer in the same trade to keep up prices? He may think it quite as essential to his "financial independence" and so in truth it may be if he alone is to be considered. But it is too late to deny that the legislative power reaches such a case. It would be difficult to select any subject more intimately related to good order and the security of the community than that under consideration—whether one takes the view that labor organizations are advantageous or the reverse. It is certainly as much a matter for legislative consideration and action as contracts in restraint of trade.

* * *

I entirely agree that there should be the same rule for employers and employed, and the same liberty of action for each. In my judgment, the law may prohibit coercive attempts, such as are here involved, to deprive either of the free right of exercising privileges which are theirs within the law. So far as I know, no law has undertaken to abridge the right of employers of labor in the exercise of free choice as to what organizations they will form for the promotion of their common interests, or denying to them free right of action in such matters. * * *

I think that the act now under consideration, and kindred ones, are intended to promote the same liberty of action for the employé as the employer confessedly enjoys. * * *

[Mr. Justice Holmes also delivered a dissenting opinion.][67]

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[67] Dissenting in Adair v. United States (1908) 208 U. S. 161, 191, 52 L. ed. 436, 13 Ann. Cas. 764, Mr. Justice Holmes said: "It can not be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along. But suppose the only effect really were to tend to bring about the complete unionizing of such railroad laborers as Congress can deal with, I think that object alone would justify the act. I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ,—I think that laboring men sometimes attribute to them advantages, as many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind—but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large."

See Thomas Reed Powell, Collective Bargaining before the Supreme Court, 33 Pol. Sci. Quart. 396.

CHAS. WOLFF PACKING CO. v. COURT OF INDUSTRIAL RELATIONS OF KANSAS.

1925. Supreme Court of the United States. 267 U. S. 552.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was an original proceeding in mandamus in the Supreme Court of Kansas to compel the Wolff Packing Company to put into effect an order of a state agency, called the Court of Industrial Relations, determining a dispute respecting wages, hours of labor and working conditions in a slaughtering and packing plant owned and operated by the company. The order was made in a compulsory proceeding under a Kansas statute, called the Industrial Relations Act, Laws Special Session 1920, c. 29, and consisted of 19 distinct paragraphs—some fixing wages, some fixing hours of labor and pay for overtime, and others prescribing working conditions. After a hearing, the Supreme Court eliminated the paragraphs relating to working conditions, because made without the required notice, and awarded a peremptory writ of mandamus commanding obedience to the other paragraphs; 109 Kan. 629, 111 Kan. 501. That judgment was brought to this court for review and was reversed, with a direction that the case be remanded for further proceedings not inconsistent with the opinion rendered at the time. 262 U. S. 522.

* * *

In the proceedings which followed the receipt of the mandate, the state court held that the other parts of the act were separable from those permitting the fixing of wages, and also pronounced them constitutional. As the question of separability was a state question, the decision of that court thereon is conclusive here. Dorchy v. Kansas, 264 U. S. 286; Hallanan v. Eureka Pipe Line Co., 261 U. S. 393, 397. The decision on the constitutional question is all that we can review. * * *

The declared and adjudged purpose of the act is to insure continuity of operation and production in certain businesses which it calls "essential industries." To that end it provides for the compulsory settlement by a state agency of all labor controversies in such businesses which endanger the intended continuity. It proceeds on the assumption that the public has a paramount interest in the subject which justifies the compulsion. The businesses named include, among others, that of manufacturing or preparing food products for sale and human consumption. The controversies to be settled include, among others, those arising between employer and employees over either wages or hours of labor. The state agency charged with the duty of making the settlement is the Court of Industrial Relations. Although called a court, it is an administrative board. It is to summon the disputants before it, to give them a hearing, to settle the matter in controversy—as by fixing wages or hours of labor, where they are what is in dispute—to embody its findings and determination in an order, and, if need be, to institute mandamus proceedings in the Supreme Court of the state to compel compliance with its order. The order is to continue in effect for such reasonable time as the agency may fix, or until changed by agreement of the parties with its approval. The employer may discontinue the business (a) where it can be conducted conformably to the order only at a loss; or (b) where for good cause shown the agency approves; and individual employees may quit the service in the exercise of a personal privilege, but may not induce others to quit or combine with them to do so. With these qualifications, both employer and employees are required to continue the business on the terms fixed in the order; violations and evasions being penalized. The authority given to the agency to fix wages or hours of labor is not general, nor is it to be exerted independently of the system of compulsory settlement. On the contrary, it is but a feature of that system, and correspondingly limited in purpose and field of application. No distinction is made between wages and hours of labor; both are put on the same plane. In the fixing of wages regard is to be had for what is fair between employer and employees, and in the fixing of hours of labor regard is to be had for what are healthful periods; but neither is to be fixed save in the compulsory adjustment of an endangering controversy to the end that the business shall go on.

The following excerpt from the opinion of the Supreme Court of the state in State ex rel. v. Howat, 109 Kan. 376, 417, explains the pervading theory of the act:

"Heretofore the industrial relationship has been tacitly regarded as existing between two members—industrial manager, and industrial worker. They have joined whole-heartedly in excluding others. The Legislature proceeded on the theory there is a third member of those industrial relationships which have to do with production, preparation and distribution of the necessaries of life—the public. The Legislature also proceeded on the theory the public is not a silent partner. Whenever the dissensions of the other two become flagrant, the third member may see to it the business does not stop."

On three occasions when the act was before us we referred to it as undertaking to establish a system of "compulsory arbitration." Howat v. Kansas, 258 U. S. 181, 184; Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 542; Dorchy v. Kansas, 264 U. S. 286, 288. The Supreme Court of the state in a recent opinion criticizes this use of the term "arbitration." State v. Howat, 116 Kan. 412, 415. We recognize that in its usual acceptation the term indicates a proceeding based entirely on the consent of the parties.

And we recognize also that this act dispenses with their consent. Under it they have no voice in selecting the determining agency, or in defining what that agency is to investigate and determine. And yet the determination is to bind them, even to the point of preventing them from agreeing on any change in the terms fixed therein, unless the agency approves. To speak of a proceeding with such attributes merely as an arbitration might be subject to criticism, but we think its nature is fairly reflected when it is spoken of as a compulsory arbitration. Of course, our present concern is with the essence of the system rather than its name. In this connection it is well to observe that in the opinion last mentioned the state court recognizes that the system, while intended to be just between employer and employees, proceeds on the theory that the public interest is paramount, as was explained in State ex rel. v. Howat, supra.

The survey just made of the act, as construed and applied in the decisions of the Supreme Court of the state, shows very plainly that its purpose is not to regulate wages or hours of labor either generally or in particular classes of business, but to authorize the state agency to fix them where, and in so far as, they are the subjects of a controversy the settlement of which is directed in the interest of the public. In short, the authority to fix them is intended to be merely a part of the system of compulsory arbitration and to be exerted in attaining its object, which is continuity of operation and production.

When the case was first here the question chiefly agitated, and therefore discussed and decided, was whether the authority to fix wages as an incident of the compulsory arbitration could be applied to a business like that of the Wolff Company consistently with the protection which the due process of law clause of the Fourteenth Amendment affords to the liberty of contract and rights of property. The question was answered in the negative and the act was held invalid in so far as it gives that authority. The subject was much considered and the principles which were recognized and applied were distinctly stated.

[Here the court quoted at length from its opinion in Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, printed ante, 800.]

Applying these principles, the court was of opinion that the business in question is one which the state is without power to compel the owner and employees to continue.

On further reflection we regard the principles so stated and applied as entirely sound. They are as applicable now as they were then. The business is the same and the parties are the same. So we reach the same conclusion now that we reached then.

The system of compulsory arbitration which the act establishes is intended to compel, and if sustained will compel, the owner and employees to continue the business on terms which are not of their making. It will constrain them, not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. True, the terms have some qualifications, but as shown in the prior decision the qualifications are rather illusory and do not subtract much from the duty imposed. Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment.

"The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." Meyer v. Nebraska, 262 U. S. 390, 399, 43 S. Ct. 625, 627 (67 L. Ed. 1042, 29 A. L. R. 1446).

The authority which the act gives respecting the fixing of hours of labor is merely a feature of the system of compulsory arbitration and has no separate purpose. It was exerted by the state agency as a part of that system and the state court sustained its exertion as such. As a part of the system it shares the invalidity of the whole. Whether it would be valid had it been conferred independently of the system and made either general or applicable to all businesses of a particular class we need not consider, for that was not done.

It follows that the state court should have declined to give effect to any part of the order of the state agency. * * *[68]

DORCHY v. STATE OF KANSAS.

1926. Supreme Court of the United States. 272 U. S. 306.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Section 17 of the Court of Industrial Relations Act, Laws of Kansas, 1920, Special Session, c. 29, while reserving to the individual employee the right to quit his employment at any time, makes it unlawful to conspire "to induce others to quit their employment for the purpose and with the intent to hinder, delay, limit or suspend the operation of" mining. Section 19 makes it a felony for an officer of a labor union wilfully to use the power or influence incident to his office to induce another person to violate any provision of the Act. Dorchy was prosecuted criminally for violating § 19. The jury found him guilty through inducing a violation of § 17; the trial court sentenced him to fine and imprisonment; and its judgment was affirmed by the Supreme Court of the state, Kansas v. Howat, 112 Kan. 235. Dorchy duly claimed in both state courts that § 19 as applied was void because it prohibits strikes; and that to do so is a denial of the liberty guaranteed by the Fourteenth Amendment. Because this claim was denied the case is here under § 237 of the Judicial Code as amended. * * *

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[68] See Herbert Rabinowitz, The Kansas Industrial Court Act (1923) 12 Cal. L. Rev. 1; Sidney Post Simpson, Constitutional Limitations on Compulsory Industrial Arbitration (1925) 38 Harv. L. Rev. 753; William Reynolds Vance, The Kansas Court of Industrial Relations with its Background (1921) 30 Yale L. J. 456; Edward Berman, The Present Status of the Kansas System of Compulsory Arbitration, (1928) 23 Ill. L. Rev. 30.

The question requiring decision is not, however, the broad one whether the legislature has power to prohibit strikes. It is whether the prohibition of § 19 is unconstitutional as here applied. Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 289. The special facts out of which the strike arose must, therefore, be considered.

Some years prior to February 3, 1921, the George H. Mackie Fuel Company had operated a coal mine in Kansas. Its employees were members of District No. 14, United Mine Workers of America. On that day, Howat, as president, and Dorchy, as vice-president of the union, purporting to act under direction of its executive board, called a strike. So far as appears, there was no trade dispute. There had been no controversy between the company and the union over wages, hours or conditions of labor; over discipline or the discharge of an employee; concerning the observance of rules; or over the employment of non-union labor. Nor was the strike ordered as a sympathetic one in aid of others engaged in any such controversy. The order was made and the strike was called to compel the company to pay a claim of one Mishmash for $180. The men were told this; and they were instructed not to return to work until they should be duly advised that the claim had been paid. The strike order asserted that the claim had "been settled by the Joint Board of Miners and Operators but [that] the company refuses * * * to pay Brother Mishmash any part of the money that is due him." There was, however, no evidence that the claim had been submitted to arbitration, nor of any contract requiring that it should be. The claim was disputed. It had been pending nearly two years. So far as appears, Mishmash was not in the company's employ at the time of the strike order. The men went out in obedience to the strike order; and they did not return to work until after the claim was paid, pursuant to an order of the Court of Industrial Relations. While the men were out on strike this criminal proceeding was begun. * * *

The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. In the absence of a valid agreement to the contrary, each party to a disputed claim may insist that it be determined only by a court. Compare Guaranty Trust Co. v. Green Cove R. R., 139 U. S. 137, 143; Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109. To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise. Compare People v. Barondess, 16 N. Y. Supp. 436; 133 N. Y. 649. And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike. Compare Aikens v. Wisconsin, 195 U. S. 194, 204-5.

Affirmed.

MEYER v. STATE OF NEBRASKA.

1923. Supreme Court of the United States. 262 U. S. 390.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Plaintiff in error was tried and convicted in the District Court for Hamilton County, Nebraska. * * * The information is based upon "An act relating to the teaching of foreign languages in the State of Nebraska," approved April 9, 1919. * * *

The Supreme Court of the state affirmed the judgment of conviction. 107 Neb. 657. It declared the offense charged and established was "the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade," in the parochial school maintained by the Zion Evangelical Lutheran Congregation, a collection of Biblical stories being used therefor. * * * The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. * * * While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [Citations are omitted.] The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. Lawton v. Steele, 152 U. S. 133, 137.

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.

The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the state has held that "the so-called ancient or dead languages" are not "within the spirit or the purpose of the act." Nebraska District of Evangelical Lutheran Synod v. McKelvie, 187 N. W. 927. Latin Greek, Hebrew are not proscribed; but German, French, Spanish, Italian and every other alien speech are within the ban. Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals; and "that the English language should be and become the mother tongue of all children reared in this state." It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means. * * * The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court. Adams v. Tanner, 244 U. S. 590, 594, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.

As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.

The judgment of the court below must be reversed.[69]

[Mr. Justice Holmes delivered a short dissenting opinion in which Mr. Justice Sutherland concurred.]

GITLOW v. PEOPLE OF NEW YORK.[70]

1925. Supreme Court of the United States. 268 U. S. 652.

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. New York Penal Laws, §§ 160, 161. He was separately tried, convicted, and sentenced to imprisonment. The judgment was affirmed by the Appellate Division and by the Court of Appeals. 195 App. Div. 773; 234 N. Y. 132 and 539. The case is here on writ of error to the Supreme Court, to which the record was remitted. 260 U. S. 703.

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[69] In Pierce v. Society of Sisters (1925) 268 U. S. 510, 69 L. ed. 1070, 39 A. L. R. 468, a statute of Oregon was held invalid which required all children in the state between the ages of eight and sixteen years (except children not normal and those who resided too remotely) to be sent to the public schools, for the full school period each year. For further facts and procedural points see ante, p. 87, note 9. The court, by Reynolds, J., said:

"Under the doctrine of Meyer v. Nebraska, 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

"Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. Northwestern Life Ins. Co. v. Riggs, 203 U. S. 243, 255; Western Turf Association v. Greenberg, 204 U. S. 359, 363. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools."

An act of the Territory of Hawaii, described by the court as a "deliberate plan to bring [private] foreign language schools under a strict governmental control," has been held to violate the due process clause of Amendment V. Farrington, Governor of Hawaii v. Tokushige (1927) 273 U. S. 284, 71 L. ed. 646.

[70] In Patterson v. Colorado (1907) 205 U. S. 454, 462, 31 L. ed. 879, 10 Ann. Cas. 689, and in Gilbert v. Minnesota (1920) 254 U. S. 325, 65 L. ed. 287, the court expressly declined to decide whether the Constitution of the United States imposed any limitation on a state in restricting speech. Brandeis, J., dissenting in the latter, said: "As the Minnesota statute is in my opinion invalid because it interferes with federal functions and with the right of a citizen of the United States to discuss them, I see no occasion to consider whether it violates also the Fourteenth Amendment. But I have difficulty in believing that the liberty guaranteed by the Constitution, which has been held to protect against state denial the right of an employer to discriminate against a workman because he is a member of a trade union, Coppage v. Kansas, 236 U. S. 1, the right of a business man to conduct a private employment agency, Adams v. Tanner, 244 U. S. 590, or to contract outside the state for insurance of his property, Allgeyer v. Louisiana, 165 U. S. 578, 589, although the legislature

The contention here is that the statute, by its terms and as applied in this case, is repugnant to the due process clause of the Fourteenth Amendment. Its material provisions are:

"§ 160. Criminal anarchy defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

"§ 161. Advocacy of criminal anarchy. Any person who:

"1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

"2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means * * *,

"Is guilty of a felony and punishable" by imprisonment or fine, or both.

The indictment was in two counts. The first charged that the defendant had advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized govern-

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deems it inimical to the public welfare, does not include liberty to teach, either in the privacy of the home or publicly, the doctrine of pacifism; so long, at least, as Congress has not declared that the public safety demands its suppression. I can not believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property." (p. 343). The decision in the case was that the national Constitution does not forbid a state to make it a criminal offense to speak orally against enlistment in the military forces of the United States or of the state, in any public place where more than five persons are assembled, or to teach or advocate in writing or printing that persons in the state should not aid the United States in carrying on a war.

In Prudential Ins. Co. v. Cheek (1922) 259 U. S. 530, 543, 66 L. ed. 1044, 27 A. L. R. 27, Pitney, J., delivering the opinion of the court, said: "Neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes on the states any restrictions about 'freedom of speech' * * * ."

The cases printed above, Gitlow v. New York, Whitney v. California, and Fiske v. Kansas, were the next cases (and the last up to 1929) touching this subject. Has the due process clause of the Fourteenth Amendment "expanded" to include some immunity of speech or expression, from state interference? If so, what is the scope of this immunity?

ment by force, violence and unlawful means, by certain writings therein set forth entitled "The Left Wing Manifesto"; the second that he had printed, published and knowingly circulated and distributed a certain paper called "The Revolutionary Age," containing the writings set forth in the first count advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means.

The following facts were established on the trial by undisputed evidence and admissions: The defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of "moderate Socialism." Membership in both is open to aliens as well as citizens. The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different states. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a "Manifesto." This was published in The Revolutionary Age, the official organ of the Left Wing. The defendant was on the board of managers of the paper and was its business manager. He arranged for the printing of the paper and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Sixteen thousand copies were printed, which were delivered at the premises in New York City used as the office of the Revolutionary Age and the headquarters of the Left Wing, and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped and mailed out copies of the paper under the defendant's direction; and copies were sold from this office. It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption; and that he was responsible for the Manifesto as it appeared, that "he knew of the publication, in a general way and he knew of its publication afterwards, and is responsible for the circulation."

There was no evidence of any effect resulting from the publication and circulation of the Manifesto.

No witnesses were offered in behalf of the defendant.

Extracts from the Manifesto are set forth in the margin.[71] Coupled with a review of the rise of Socialism, it condemned the dominant "moderate Socialism" for its recognition of the necessity of the democratic parliamentary state; repudiated its policy of introducing Socialism by legislative measures; and advocated, in plain and unequivocal language, the necessity of accomplishing the "Communist Revolution" by a militant and "revolutionary Socialism," based on "the class struggle" and mobilizing the "power of the proletariat in action," through mass industrial revolts developing into mass political strikes and "revolutionary mass action," for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a "revolutionary dictatorship of the proletariat," the system of Communist Socialism. The then recent strikes in Seattle and Winnipeg were cited as instances of a development already verging on revolutionary action and suggestive of proletarian dictatorship, in which the strike-workers were "trying to usurp the functions of municipal government"; and revolutionary Socialism, it was urged, must use these mass industrial revolts to broaden the strike, make it general and militant, and develop it into mass political strikes and revolutionary mass action for the annihilation of the parliamentary state.

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[71] Omitted here.

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The defendant's counsel submitted two requests to charge which embodied in substance the statement that to constitute criminal anarchy within the meaning of the statute it was necessary that the language used or published should advocate, teach or advise the duty, necessity or propriety of doing "some definite or immediate act or acts" of force, violence or unlawfulness directed toward the overthrowing of organized government. These were denied further than had been charged. Two other requests to charge embodied in substance the statement that to constitute guilt the language used or published must be "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness, with the object of overthrowing organized government. These were also denied. * * *

MR. JUSTICE SANFORD delivered the opinion of the court.

The sole contention here is, essentially, that as there was no evidence of any concrete result flowing from the publication of the Manifesto or of circumstances showing the likelihood of such a result, that the statute as construed and applied by the trial court penalizes the mere utterance, as such, of "doctrine" having no quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful sequences; and that, as the exercise of the right of free expression with relation to government is only punishable "in circumstances involving likelihood of substantive evil," the statute contravenes the due process clause of the Fourteenth Amendment. The argument in support of this contention rests primarily upon the following propositions: 1st, That the "liberty" protected by the Fourteenth Amendment includes the liberty of speech and of the press; and 2nd, That while liberty of expression "is not absolute," it may be restrained "only in circumstances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely," and as the statute "takes no account of circumstances," it unduly restrains this liberty and is therefore unconstitutional.

The precise question presented, and the only question which we can consider under this writ of error, then is, whether the statute, as construed and applied in this case by the state courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.

The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action. Advocacy is defined in the Century Dictionary as: "1. The act of pleading for, supporting, or recommending; active espousal." It is not the abstract "doctrine" of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose. It was so construed and applied by the trial judge, who specifically charged the jury that:

"A mere grouping of historical events and a prophetic deduction from them would neither constitute advocacy, advice or teaching of a doctrine for the overthrow of government by force, violence or unlawful means. [And] if it were a mere essay on the subject, as suggested by counsel, based upon deductions from alleged historical events, with no teaching, advice or advocacy of action, it would not constitute a violation of the statute. * * *"

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words:

"The proletariat revolution and the Communist reconstruction of society—*the struggle for these*—is now indispensable. * * * The Communist International calls the proletariat of the world to the final struggle!"

This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement.

The means advocated for bringing about the destruction of organized parliamentary government, namely, mass industrial revolts usurping the functions of municipal government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear.

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the states. We do not regard the incidental statement in Prudential Ins. Co. v. Cheek, 259 U. S. 530, 543, that the Fourteenth Amendment imposes no restrictions on the states concerning freedom of speech, as determinative of this question.

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. 2 Story on the Constitution, 5th ed., § 1580, p. 634; Robertson v. Baldwin, 165 U. S. 275, 281; Patterson v. Colorado, 205 U. S. 454, 462; Fox v. Washington, 236 U. S. 273, 276; Schenck v. United States, 249 U. S. 47, 52; Frohwerk v. United States, 249 U. S. 204, 206; Debs v. United States, 249 U. S. 211, 213; Schaefer v. United States, 251 U. S. 466, 474; Gilbert v. Minnesota, 254 U. S. 325, 332; Warren v. United States, (C. C. A.) 183 Fed. 718, 721. Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

That a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. Robertson v. Baldwin, supra, p. 281; Patterson v. Colorado, supra, p. 462; Fox v. Washington, supra, p. 277; Gilbert v. Minnesota, supra, p. 339; People v. Most, 171 N. Y. 423, 431; State v. Holm, 139 Minn. 267, 275; State v. Hennessy, 114 Wash. 351, 359; State v. Boyd, 86 N. J. L. 75, 79; State v. McKee, 73 Conn. 18, 27. Thus it was held by this Court in the Fox Case, that a State may punish publications advocating and encouraging a breach of its criminal laws; and, in the Gilbert Case, that a state may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

And, for yet more imperative reasons, a state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story (supra) does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. State v. Holm, supra, p. 275. It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the state. People v. Most, supra, pages 431, 432. And a state may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several states, by violence or other unlawful means. People v. Lloyd, 304 Ill. 23, 34. See also, State v. Tachin, 92 N. J. Law, 269, 274, and People v. Steelik, 187 Cal. 361, 375. In short this freedom does not deprive a state of the primary and essential right of self-preservation; which, so long as human governments endure, they cannot be denied. Turner v. Williams, 194 U. S. 279, 294. In Toledo Newspaper Co. v. United States, 247 U. S. 402, 419, it was said:

"The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions."

By enacting the present statute the state has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. * * * That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the state. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency.

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the state unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

This being so it may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. This principle is illustrated in Fox v. Washington, supra, p. 277; Abrams v. United States, 250 U. S. 616, 624; Schaefer v. United States, supra, pp. 479, 480; Pierce v. United States, 252 U. S. 239, 250, 251; and Gilbert v. Minnesota, supra, p. 333. In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certian acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such case it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. Schenck v. United States, supra, p. 51; Debs v. United States, supra, pp. 215, 216. And the general statement in the Schenck Case, p. 52, that the "question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,"—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.

The defendant's brief does not separately discuss any of the rulings of the trial court. It is only necessary to say that, applying the general rules already stated, we find that none of them involved any invasion of the constitutional rights of the defendant. It was not necessary, within the meaning of the statute, that the defendant should have advocated "some definite or immediate act or acts" of force, violence or unlawfulness. It was sufficient if such acts were advocated in general terms; and it was not essential that their immediate execution should have been advocated. Nor was it necessary that the language should have been "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness. The advocacy need not be addressed to specific persons. Thus, the publication and circulation of a newspaper article may be an encouragement or endeavor to persuade to murder, although not addressed to any person in particular. Queen v. Most, L. R. 7 Q. B. D. 244. * * *

Affirmed.

MR. JUSTICE HOLMES, dissenting.

MR. JUSTICE BRANDEIS and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right, then I think that the criterion sanctioned by the full court in Schenck v. United States, 249 U. S. 47, 52, applies. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the state] has a right to prevent." It is true that in my opinion this criterion was departed from in Abrams v. United States, 250 U. S. 616, but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and Schaefer v. United States, 251 U. S. 466, have settled the law. If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.

WHITNEY v. PEOPLE OF STATE OF CALIFORNIA.

1927. Supreme Court of the United States. 274 U. S. 357.

Mr. Justice Sanford delivered the opinion of the court:

By a criminal information filed in the superior court of Alameda county, California, the plaintiff in error was charged, in five counts, with violations of the Criminal Syndicalism Act of that state. Statutes 1919, chap. 188, p. 281. She was tried, convicted on the first count, and sentenced to imprisonment. The judgment was affirmed by the district court of appeal. 57 Cal. App. 449, 207 Pac. 698. Her petition to have the case heard by the supreme court was denied. Id. 453. And the case was brought here on a writ of error which was allowed by the presiding justice of the court of appeal, the highest court of the state in which a decision could be had. Judicial Code, § 237. * * *

The pertinent provisions of the Criminal Syndicalism Act are:

"Section 1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

"Sec. 2. Any person who: * * * 4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; * * *

"Is guilty of a felony and punishable by imprisonment."

The first count of the information, on which the conviction was had, charged that on or about November 28, 1919, in Alameda county, the defendant, in violation of the Criminal Syndicalism Act, "did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously organize and assist in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism." * * *

1. While it is not denied that the evidence warranted the jury in finding that the defendant became a member of and assisted in organizing the Communist Labor Party of California, and that this was organized to advocate, teach, aid or abet criminal syndicalism as defined by the act, it is urged that the act, as here construed and applied, deprived the defendant of her liberty without due process of law in that it has made her action in attending the Oakland convention unlawful by reason of "a subsequent event brought about against her will, by the agency of others," with no showing of a specific intent on her part to join in the forbidden purpose of the association, and merely because, by reason of a lack of "prophetic" understanding, she failed to foresee the quality that others would give to the convention. The argument is, in effect, that the character of the state organization could not be forecast when she attended the convention; that she had no purpose of helping to create an instrument of terrorism and violence; that she "took part in formulating and presenting to the convention a resolution which, if adopted, would have committed the new organization to a legitimate policy of political reform by the use of the ballot;" that it was not until after the majority of the convention turned out to be "contrary minded, and other less temperate policies prevailed" that the convention could have taken on the character of criminal syndicalism; and that, as this was done over her protest, her mere presence in the convention, however violent the opinions expressed therein, could not thereby become a crime. This contention, while advanced in the form of a constitutional objection to the act, is in effect nothing more than an effort to review the weight of the evi-

dence for the purpose of showing that the defendant did not join and assist in organizing the Communist Labor Party of California with a knowledge of its unlawful character and purpose. This question, which is foreclosed by the verdict of the jury,—sustained by the court of appeal over the specific objection that it was not supported by the evidence,—is one of fact merely which is not open to review in this court, involving as it does no constitutional question whatever. And we may add that the argument entirely disregards the fact that the defendant had previously taken out a membership card in the national party; that the resolution which she supported did not advocate the use of the ballot to the exclusion of violent and unlawful means of bringing about the desired changes in industrial and political conditions; and that, after the constitution of the California party had been adopted, and this resolution had been voted down and the national program accepted, she not only remained in the convention, without protest, until its close, but subsequently manifested her acquiescence by attending as an alternate member of the state executive committee and continuing as a member of the Communist Labor Party. * * *

4. Nor is the Syndicalism Act as applied in this case repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association.

That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. Gitlow v. New York, 268 U. S. 652, 666-668, and cases cited.

By enacting the provisions of the Syndicalism Act the state has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the state, that these acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, Mugler v. Kansas, 123 U. S. 623, 661, and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the state in the public interest. Great Northern Railway v. Clara City, 246 U. S. 434, 439.

The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. See People v. Steelik, 187 Cal. 361, 376. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the state.

We find no repugnancy in the Syndicalism Act as applied in this case to either the due process or equal protection clauses of the Fourteenth Amendment on any of the grounds upon which its validity has been here challenged.

The order dismissing the writ of error will be vacated and set aside, and the judgment of the Court of Appeal

Affirmed.

Mr. Justice Brandeis (concurring.) Miss Whitney was convicted of the felony of assisting in organizing, in the year 1919, the Communist Labor Party of California, of being a member of it, and of assembling with it. These acts are held to constitute a crime, because the party was formed to teach criminal syndicalism. The statute which made these acts a crime restricted the right of free speech and of assembly theretofore existing. The claim is that the statute, as applied, denied to Miss Whitney the liberty guaranteed by the Fourteenth Amendment.

The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or assembling with others for that purpose is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus the accused is to be punished, not for contempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.

Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth

Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights. See Meyer v. Nebraska, 262 U. S. 390; Pierce v. Society of Sisters, 268 U. S. 510; Gitlow v. New York, 268 U. S. 652, 666; Farrington v. Tokushige, 273 U. S. 284. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled. See Schenck v. United States, 249 U. S. 47, 52.

It is said to be the function of the legislature to determine whether at a particular time and under the particular circumstances the formation of, or assembly with, a society organized to advocate criminal syndicalism constitutes a clear and present danger of substantive evil; and that by enacting the law here in question the legislature of California determined that question in the affirmative. Compare Gitlow v. New York, 268 U. S. 652, 668, 671. The legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity. Prohibitory legislation has repeatedly been held invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business.[72] The powers of the courts to strike down an offending law are no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly.

This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.

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[72] Compare Frost v. R. R. Comm. of California, 271 U. S. 583; Weaver v. Palmer Bros. Co., 270 U. S. 402; Jay Burns Baking Co. v. Bryan, 264 U. S. 504; Pennsylvania Coal Co. v. Mahon, 260 U. S. 393; Adams v. Tanner, 244 U. S. 590.—This and the three following notes are those of Mr. Justice Brandeis.

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[73] They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be a violation of it.[74] Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

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[73] Compare Thomas Jefferson: "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge." Quoted by Charles A. Beard, The Nation, July 7, 1926, vol. 123, p. 8. Also in first Inaugural Address: "If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

[74] Compare Judge Learned Hand in Masses Publishing Co. v. Patten, 244 Fed. 535, 540; Judge Amidon in United States v. Fontana, Bull. Dept. of Justice No. 148, pp. 4-5; Chafee, "Freedom of Speech," pp. 46-56, 174.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.[75] Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a state might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross uninclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.

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[75] Compare Z. Chafee, Jr., "Freedom of Speech", pp. 24-39, 207-221, 228, 262-265; H. J. Laski, "Grammar of Politics", pp. 120, 121; Lord Justice Scrutton in Rex v. Secretary of Home Affairs, Ex parte O'Brien, [1923] 2 K. B. 361, 382: "You really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous; * * * ." Compare Warren, "The New Liberty Under the Fourteenth Amendment," 39 Harvard Law Review, 431, 461.

The California Syndicalism Act recites in § 4:

"Inasmuch as this act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this state advocating, teaching, and practicing criminal syndicalism, this act shall take effect upon approval by the Governor."

This legislative declaration satisfies the requirement of the Constitution of the state concerning emergency legislation. In re McDermott, 180 Cal. 783. But it does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the federal Constitution. As a statute, even if not void on its face, may be challenged because invalid as applied (Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239), the result of such an inquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger, whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied.

Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute as applied to her violated the federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. I am unable to assent to the suggestion in the opinion of the court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the State court cannot be disturbed.

Our power of review in this case is limited not only to the question whether a right guaranteed by the federal Constitution was denied, Murdock v. City of Memphis, 20 Wall. 590; Haire v. Rice, 204 U. S. 291, 301; but to the particular claims duly made below, and denied. Seaboard Air Line Ry. v. Duvall, 225 U. S. 477, 485-488. We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases vital errors, although the objection was not taken in the trial court. Wiborg v. United States, 163 U. S. 632, 658-660; Clyatt v. United States, 197 U. S. 207, 221-222. This is a writ of error to a state court. Because we may not inquire into the errors now alleged I concur in affirming the judgment of the state court.

Mr. Justice Holmes joins in this opinion.

FISKE v. STATE OF KANSAS.

1927. Supreme Court of the United States. 274 U. S. 280.

Mr. Justice Sanford delivered the opinion of the court.

The plaintiff in error was tried and convicted in the District Court of Rice County, Kansas, upon an information charging him with violating the Criminal Syndicalism Act of that State. Laws Spec. Sess. 1920, c. 37. The judgment was affirmed by the Supreme Court of the State, 117 Kan. 69; and this writ of error was allowed by the Chief Justice of that court.

The only substantial federal question presented to and decided by the state court, and which may therefore be re-examined by this court, is whether the Syndicalism Act as applied in this case is repugnant to the due process clause of the Fourteenth Amendment.

The relevant provisions of the Act are:

"Section 1. 'Criminal Syndicalism' is hereby defined to be the doctrine which advocates crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods, as a means of accomplishing or effecting industrial or political ends, or as a means of effecting industrial or political revolution, or for profit. * * * Sec. 3. Any person who, by word of mouth, or writing, advocates, affirmatively suggests or teaches the duty, necessity, propriety or expediency of crime, criminal syndicalism, or sabotage * * * is guilty of a felony. * * *"

The information charged that the defendant did "by word of mouth and by publicly displaying and circulating certain books and pamphlets and written and printed matter, advocate, affirmatively suggest and teach the duty, necessity, propriety and expediency of crime, criminal syndicalism, and sabotage by * * * knowingly and feloniously persuading, inducing and securing" certain persons "to sign an application for membership in * * * and by issuing to" them "membership cards" in a certain Workers' Industrial Union, "a branch of and component part of the Industrial Workers of the World organization, said defendant then and there knowing that said organization unlawfully teaches, advocates and affirmatively suggests: 'That the working class and the employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of working people and the few who make up the employing class have all the good things of life.' And that, 'Between these two classes a struggle must go on until the workers of the World organize as a class, take possession of the earth and the machinery of production and abolish the wage system.' And that: 'Instead of the conservative motto, "A fair day's wages for a fair day's work," we must inscribe on our banner the revolutionary watchword, "Abolition of the wage system." By organizing industrially we are forming the structure of the new society within the shell of the old.'"

The defendant moved to quash the information as insufficient, for the reason, among others, that it failed to specify the character of the organization in which he was alleged to have secured members. This was overruled.

On the trial the state offered no evidence as to the doctrines advocated, suggested or taught by the Industrial Workers of the World organization other than a copy of the preamble to the constitution of that organization containing the language set forth and quoted in the information. * * *

A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under § 237 of the Judicial Code. Dahnke-Walker Co. v. Bondurant, 257 U. S. 282, 288. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented. Ward & Gow v. Krinsky, 259

U. S. 503, 510; Cudahy Co. v. Parramore, 263 U. S. 418, 422. And see St. Louis, &c., Railway v. Wayne, 224 U. S. 354, 359.

And this court will review the finding of facts by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts. Northern Pacific R. v. North Dakota, 236 U. S. 585, 593; Ætna Life Ins. Co. v. Dunken, 266 U. S. 389, 394; and cases cited.

Here the state court held the Syndicalism Act not to be repugnant to the due process clause as applied in a case in which the information in effect charged the defendant with violation of the Act in that he had secured members in an organization which taught, advocated and affirmatively suggested the doctrines set forth in the extracts from the preamble to its constitution, and in which there was no evidence that the organization, taught, advocated or suggested any other doctrines. No substantial inference can, in our judgment, be drawn from the language of this preamble, that the organization taught, advocated or suggested the duty, necessity, propriety, or expediency of crime, criminal syndicalism, sabotage, or other unlawful acts or methods. There is no suggestion in the preamble that the industrial organization of workers as a class for the purpose of getting possession of the machinery of production and abolishing the wage system, was to be accomplished by any other than lawful methods; nothing advocating the overthrow of the existing industrial or political conditions by force, violence or unlawful means. And standing alone, as it did in this case, there was nothing which warranted the court or jury in ascribing to this language, either as an inference of law or fact, "the sinister meaning attributed to it by the state." In this respect the language of the preamble is essentially different from that of the manifesto involved in Gitlow v. New York, 268 U. S. 652, 665, and lacks the essential elements which brought that document under the condemnation of the law. And it is not as if the preamble were shown to have been followed by further statements or declarations indicating that it was intended to mean, and to be understood as advocating, that the ends outlined therein would be accomplished or brought about by violence or other related unlawful acts or methods. Compare Whitney v. California, 274 U. S. 357 and Burns v. United States, 274 U. S. 328.

The result is that the Syndicalism Act has been applied in this case to sustain the conviction of the defendant, without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts or methods as a means of effecting industrial or political changes or revolution.

Thus applied the Act is an arbitrary and unreasonable exercise of the police power of the state, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment. The judgment is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.[76]

BUCK v. BELL, SUPERINTENDENT.

1927. Supreme Court of the United States. 274 U. S. 200.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a writ of error to review a judgment of the Supreme Court of Appeals of the State of Virginia, affirming a judgment of the Circuit Court of Amherst County, by which the defendant in error, the superintendent of the State Colony for Epileptics and Feeble Minded, was ordered to perform the operation of salpingectomy upon Carrie Buck, the plaintiff in error, for the purpose of making her sterile. 143 Va. 310, 130 S. E. 516. The case comes here upon the contention that the statute authorizing the judgment is void under the Fourteenth Amendment as denying to the plaintiff in error due process of law and the equal protection of the laws.

Carrie Buck is a feeble-minded white woman who was committed to the State Colony above mentioned in due form. She is the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child. She was eighteen years old at the time of the trial of her case in the Circuit Court in the latter part of 1924. An Act of Virginia approved March 20, 1924 (Laws 1924, c. 394) recites that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives, under careful safeguard, etc.; that the sterilization may be effected in males by vasectomy and in females by salpingectomy, without serious pain or substantial danger to life; that the Commonwealth is supporting in various institutions many defective persons who if now discharged would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society; and that experience has shown that heredity plays an important part in the transmission of insanity, imbecility, etc. The statute then enacts that whenever the superintendent of certain institutions including the above-named State Colony shall be of opinion that it is for the best interest of the patients and of society that an inmate under his care should be sexually sterilized, he may have the operation performed upon any patient afflicted with hereditary forms of insanity, imbecility, etc., on complying with the very careful provisions by which the act protects the patients from possible abuse.

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[76] The cases on the free speech immunity secured by the First Amendment follow similar lines and divergencies. The following cases involved convictions under the Act of Congress of June 15, 1917, known as the Espionage Act: Schenck v. United States (1919) 249 U. S. 47, 63 L. ed. 470; Frohwerk v. United States (1919) 249 U. S. 204, 63 L. ed. 561; Abrams v. United States (1919) 250 U. S. 616, 63 L. ed. 1173; Schaefer v. United States (1920) 251 U. S. 466, 64 L. ed. 360.

The superintendent first presents a petition to the special board of directors of his hospital or colony, stating the facts and the grounds for his opinion, verified by affidavit. Notice of the petition and of the time and place of the hearing in the institution is to be served upon the inmate, and also upon his guardian, and if there is no guardian the superintendent is to apply to the Circuit Court of the County to appoint one. If the inmate is a minor notice also is to be given to his parents, if any, with a copy of the petition. The board is to see to it that the inmate may attend the hearings if desired by him or his guardian. The evidence is all to be reduced to writing, and after the board has made its order for or against the operation, the superintendent, or the inmate, or his guardian, may appeal to the Circuit Court of the County. The Circuit Court may consider the record of the board and the evidence before it and such other admissible evidence as may be offered, and may affirm, revise, or reverse the order of the board and enter such order as it deems just. Finally any party may apply to the Supreme Court of Appeals, which, if it grants the appeal, is to hear the case upon the record of the trial in the Circuit Court and may enter such order as it thinks the Circuit Court should have entered. There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process at law.

The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds. The judgment finds the facts that have been recited and that Carrie Buck "is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization," and thereupon makes the order. In view of the general declarations of the Legislature and the specific findings of the Court obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Jacobson v. Massachusetts, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765. Three generations of imbeciles are enough.

But, it is said, however it might be if this reasoning were applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.

Judgment affirmed.[77]

MR. JUSTICE BUTLER dissents.

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[77] See J. H. Landman, The History of Human Sterilization in the United States—Theory, Statute, Adjudication (1929) 23 Ill. L. Rev. 463-480; Burke Shartel, Sterilization of Mental Defectives (1926) 16 Journ. of Criminal Law 537, and authorities there cited; and note in (1929) 17 Cal. L. Rev. 270-276.

The Wisconsin "eugenics law" is not unconstitutional which requires men, but not women, to obtain and file a certificate of freedom from venereal disease as a condition to obtaining a license to marry, Peterson v. Widule (1914) 157 Wis. 641, 147 N. W. 966, 52 L. R. A. (N. S.) 778, Ann. Cas. 1916B, 1040; nor a statute forbidding epileptics under forty-five years of age to marry, Gould v. Gould (1905) 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531. See also Kitzman v. Werner (1918) 167 Wis. 308, 166 N. W. 789. On validity of prohibitions of inter-racial marriages see notes in 2 L. R. A. (N. S.) 532, 52 L. R. A. (N. S.) 778.

READINGS ON THIS CHAPTER.

The literature on the topic of this chapter is voluminous. Some select discussions are: Henry Wolf Bikle, Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action (1924) 38 Harv. L. Rev. 6; Ray A. Brown, Police Power—Legislation for Health and Personal Safety (1929) 42 Harv. L. Rev. 866; Ray A. Brown, Due Process of Law, Police Power and the Supreme Court (1927) 40 Harv. L. Rev. 929; Robert E. Cushman, Social and Economic Interpretation of the Fourteenth Amendment (1922) 20 Mich. L. Rev. 737; Felix Frankfurter, Hours of Labor and Realism in Constitutional Law (1916) 29 Harv. L. Rev. 353; Felix Frankfurter, Mr. Justice Holmes and the Constitution (1927) 41 Harv. L. Rev. 121; Felix Frankfurter, Twenty Years of Mr. Justice Holmes' Constitutional Opinions (1923) 36 Harv. L. Rev. 909; Ernst Freund, Standards of American Legislation (1917); Charles M. Hough, Due Process of Law—To-day (1919) 32 Harv. L. Rev. 218;

Arthur M. Kales, "Due Process," the Inarticulate Major Premise and the Adamson Act (1917) 26 Yale L. J. 519; Rodney L. Mott, Due Process of Law (1926); Roscoe Pound, Liberty of Contract (1909) 18 Yale L. J. 454; Robert P. Reeder, The Due Process Clauses and "the Substance of Individual Rights" (1910) 58 U. of P. L. Rev. 191; Charles Warren, The Progressiveness of the United States Supreme Court (1913) 13 Col. L. Rev. 294.

CHAPTER VI.

EQUAL PROTECTION OF THE LAWS.

"The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. * * * A person within the jurisdiction of the state * * * is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation."—Day, J., in Southern R. Co. v. Greene (1910) 216 U. S. 400, 412, 54 L. ed. 536, 17 Ann. Cas. 1247.

MISSOURI v. LEWIS.

1880. Supreme Court of the United States. 101 U. S. 22.

[The constitution of Missouri created the St. Louis Court of Appeals giving it jurisdiction of appeals from the circuit courts of St. Louis and four adjoining counties, its decision being final in all except certain enumerated types of cases. Disbarment proceedings were not excepted. From the circuit courts of the other counties of the state appeals lay to the State Supreme Court. A judgment of disbarment of one Bowman given in the circuit court of St. Louis County was affirmed by the St. Louis Court of Appeals. He petitioned the Supreme Court of the state to issue a mandamus to compel Lewis and the other judges of the St. Louis Court of Appeals to allow an appeal from the affirmance. The state Supreme Court denied the petition and this writ of error was taken.]

Mr. Justice Bradley delivered the opinion of the court. * * *

The plaintiff in error contends that this feature of the judicial system of Missouri is in conflict with the Fourteenth Amendment of the Constitution of the United States, because it denies to suitors in the courts of Saint Louis and the counties named the equal protection of the laws, in that it denies to them the right of appeal to the Supreme Court of Missouri in cases where it gives that right to suitors in the courts of the other counties of the state.

If this position is correct, the Fourteenth Amendment has a much more far-reaching effect than has been supposed. It would render invalid all limitations of jurisdiction based on the amount or character of the demand. A party having a claim for only five dollars could with equal propriety complain that he is deprived of a right enjoyed by other citizens, because he cannot prosecute it in the superior courts; and another might equally complain that he cannot bring a suit for real estate in a justice's court, where the expense is small and the proceedings are expeditious. There is no difference in principle between such discriminations as these in the jurisdictions of courts and that which the plaintiff in error complains of in the present case.

If, however, we take into view the general objects and purposes of the Fourteenth Amendment, we shall find no reasonable ground for giving it any such application. * * * It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. The Amendment could never have been intended to prevent a state from arranging and parceling out the jurisdiction of its several courts at its discretion. * * * The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a state to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the Amendments thereto.

We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For as before said it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. * * * Diversities which are allowable in different states are allowable in different parts of the same state. Where part of a state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions —trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the state government if it could not, in its discretion, provide for these various exigencies. * * *

It is not impossible that a distinct territorial establishment and jurisdiction might be intended as, or might have the effect of, a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district. Should such a case ever arise, it will be time enough then to consider it. No such case is pretended to exist in the present instance. * * *

Judgment affirmed.[1]

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[1] The Fort Smith Traction Company of Fort Smith, Arkansas, complained of a state statute which operated upon it alone, requiring it to defray the cost of paving streets occupied by it. The court, by Stone, J., said: "The act is in form a general statute, but by reason of provisions making it applicable to street railways operating under indeterminate permits in cities of the first class other than in Miller County, it in fact applied to the plaintiff in error alone. * * * The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state. * * * If a state may delegate to a municipality power to require paving by a street railway located within its limits, Public Service Co. v. Durham, 261 U. S. 149, we perceive no reason why it may not, by a legislative act, make a like requirement limited to a single municipality." Ft. Smith Light &c. Co. v. Board of Improvement (1927) 274 U. S. 387, 71 L. ed. 1112. See also Chappell Chemical &c. Co. v. Sulphur Mines Co. (1899) 172 U. S. 474, 43 L. ed. 517 (Maryland abridged the right of trial by jury in the courts of Baltimore but not elsewhere in the state); Hayes v. Missouri (1887) 120 U. S. 68, 30 L. ed. 578 (the prosecution was allowed fifteen peremptory challenges in large cities and eight elsewhere in the state); Cincinnati St. R. Co. v. Snell (1904) 193 U. S. 30, 48 L. ed. 604 (holding valid a state statute which provided that in a suit to which a corporation having fifty or more shareholders is a party, pending in the county where the corporation has its chief office, the opposing party should have an unqualified right to a change of venue, though no corresponding right was given the corporation); Gardner v. Michigan (1905) 199 U. S. 325, 333, 50 L. ed. 212 (different method of making up jury lists in one county than elsewhere in the state).

Making laws prohibiting sale of intoxicants operative in a particular city, county or township, by local option did not violate the Fourteenth Amendment. State of Ohio ex rel. v. Dollison (1904) 194 U. S. 445, 48 L. ed. 1062.

"An act of the legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on

JAUREZ v. STATE.

1925. Court of Criminal Appeals of Texas. 102 Tex. Cr. 297.

HAWKINS, JUDGE.—Appellant is under conviction for selling intoxicating liquor, punishment being one year in the penitentiary.

When the case was called for trial appellant filed a motion to set aside the indictment, claiming that the prosecution should be abated because in the selection of the grand jury which returned the bill he had been purposely discriminated against because of his religious convictions, and had thereby been deprived of equal protection of the law guaranteed under the 14th Amendment to the Constitution of the United States. The state excepted to this plea upon the ground, among others, that the plea should have been interposed by challenge to the array of grand jurors, * * *.

It is apparent that our Code of Procedure does not, either by challenge to the array of grand jurors, or by motion to set aside an indictment, specifically provide for raising the question of a denial to the accused of equal protection guaranteed by the 14th Amendment to the federal Constitution, nor point out the time nor manner of presenting such a plea. It is certain, however, that under the decisions of the Supreme Court of the United States the right to present and have heard such a plea cannot be denied. A challenge to the array of grand jurors, or to the qualifications of any individual summoned on the panel, if supported, affects the validity of every act of the grand jury impaneled over such challenge. This cannot be true where the complaint is that accused has been discriminated against as the member of a class, by purposely denying such class representation on the grand jury. Indictments returned by such a grand jury would be perfectly valid save those which charge crime to members of the class discriminated against.

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the ground of unjust discrimination and a denial of the equal protection of the laws. But that does not prevent a legislature, which has established a certain rule of procedure, and continued it in force for years, from subsequently repealing the act and establishing an entirely different mode of procedure. In other words, there is no absolute right vested in the individual as against the power of the legislature to change modes of procedure. And a similar thought controls where the courts of the state have construed a statute as prescribing one form of procedure, and parties have acted under that construction, and then subsequently the same court has held that the statute was theretofore misconstrued, and really provided a different mode of procedure. This last adjudication can not be set aside in the federal courts on the ground of an unjust discrimination or a denial of the equal protection of the laws." Brewer, J., for the court in Backus v. Fort Street Union Depot Co. (1898) 169 U. S. 557, 571, 42 L. ed. 853.

"The Fourteenth Amendment does not in guaranteeing equal protection of the laws assure uniformity of judicial decisions, Backus v. Fort Street Union Depot Co., 169 U. S. 557, 569, any more than in guaranteeing due process it assures immunity from judicial error, Central Land Co. v. Laidley, 159 U. S. 103; Tracy v. Ginzberg, 205 U. S. 170." Brandeis, J., for the court in Milwaukee Elec. R. &c. Co. v. Wisconsin ex rel. Milwaukee (1920) 252 U. S. 100, 106, 64 L. ed. 476, 10 A. L. R. 892.

Can it be said that a plea raising the federal point here involved questions either the legality of the grand jury or the qualification of any of its members? Is it not rather an attack on the validity of some particular act of the grand jury for the reason that the act done is directed against the member of a class against whom discrimination is charged in violation of the Amendment in question? If it be the latter, would a challenge to the array be the proper procedure? * * *

In the absence of any such rules of procedure we conclude that a special plea to abate the prosecution or to set aside the indictment is timely if presented before pleading to the indictment. All cases holding or intimating to the contrary are overruled on this point.

The indictment upon which appellant was convicted was returned by a grand jury of Bee county at the October term, 1923, of the district court. In his special plea appellant alleges that he has been deprived of the equal protection of the law guaranteed under the 14th Amendment to the Constitution of the United States, in that appellant is a Roman Catholic in his religious belief, and that in the county of the prosecution approximately twenty per cent. of the qualified jurors of said county are members of said religious faith; that notwithstanding this, no person of that faith was represented on the grand jury which returned the indictment, and that such condition was not the result of accident or chance, but that since the spring term of 1919 of the district court of said county no Catholic had been appointed or served on the jury commission of said county, and that since said term of court only one Catholic had ever served on any grand jury impaneled in said county, and that no Catholic had served on any grand jury since the fall term of 1920. Appellant then pleads specifically the personnel of the jury commissions appointed by the court and of the grand jury selected by them for each term of court from the spring term of 1919 up to and including the term of court at which the indictment against appellant was returned, alleging that all members of said various jury commissions and the said grand juries were all of the Protestant faith, save and except one member of the grand jury for the fall term of 1920. Appellant further alleges that said discrimination against appellant and denial to him of the equal protection of the law was by failure of the court to appoint other than Protestants upon the jury commission and by failure of the jury commissions to select any Catholics upon the grand jury; that this failure was the result of a design on the part of the officers to deny representation to the Catholics; that by reason of the discrimination against members of the Roman Catholic Church the rights of appellant guaranteed to him under the 14th Amendment of the Constitution had been abridged; and that the indictment should be quashed and the prosecution against him abated. This special plea is verified by the affidavit of appellant. The bill of exception bringing this point forward for review recites that, after presenting said special plea, appellant asked leave of the court to offer witnesses to prove and sustain the allegations therein contained, that the state presented exceptions generally and specifically to the plea and that appellant again tendered proof of its allegations, but that the court after hearing the exceptions overruled appellant's plea without investigation into the truth or falsity of the matters therein alleged and refused to hear testimony in support of the motion.

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The primary purpose of the 14th Amendment was to protect the recently freed negroes in their constitutional rights, and has been held by the Supreme Court of the United States to prevent a discrimination against them by excluding them from service on grand juries and juries, where such exclusion was intentional and because of their race, although effected by the act of a jury commission, because said commission was the agency of the state government, through which grand jurors were selected. The application of the 14th Amendment is illustrated by Carter v. Texas, 177 U. S. 442; Strauder v. West Virginia, 100 U. S. 303; Neil v. Delaware, 103 U. S. 370; Gibson v. Mississippi, 162 U. S. 565; Virginia v. Rives, 100 U. S. 313; Smith v. Mississippi, 162 U. S. 592; Williams v. Mississippi, 170 U. S. 213.[2]

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[2] "A mixed jury, some of which shall be of the same race with the accused, can not be demanded, as of right, in any case, nor is a jury of that character guaranteed by the Fourteenth Amendment. What an accused is entitled to demand, under the Constitution of the United States, is that in organizing the grand jury as well as in the empaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color. Virginia v. Rives, 100 U. S. 313, 323; In re Wood, 140 U. S. 278, 285. Whether such discrimination was practiced in this case could have been manifested only by proof overcoming the denial on the part of the state of the facts set out in the written motions to quash. The absence of any such proof from the record in this case is fatal to the charge of the accused that his rights under the Fourteenth Amendment were violated." Martin v. Texas (1906) 200 U. S. 316, 321, 50 L. ed. 497.

In the leading case, Strauder v. West Virginia (1880) 100 U. S. 303, 25 L. ed. 664, where the conviction of a negro in a court of West Virginia on an indictment for murder was reversed by the United States Supreme Court on the ground that the state *statutes* excluded negroes from grand and petit juries, it was said: "We do not say that within the limits from which it is not excluded by the Amendment, a state may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualications."

At common law women were not eligible to jury service. Did the Fourteenth Amendment give a woman accused of crime immunity from exclusion of women from the jury solely because of their sex? In a state where women are subject to jury duty, is trial of a man illegal if women are intentionally excluded in selection of jury (see State v. James (1921) 96 N. J. L. 132, 114 Atl. 553, 16 A. L. R. 1141), or trial of a woman, by a jury composed wholly of women (see People v. Manuel, 41 Cal. App. 153, 182 Pac. 306)?

In American Sugar Refining Co. v. State of Louisiana, 179 U. S. 89, Justice Brown states the general scope of the 14th Amendment and the discrimination it is intended to prevent in the following comprehensive language:

"Of course, if such discrimination was purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, * * * such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes."

In bringing about a violation of the provisions of the 14th Amendment the state cannot do indirectly through its officers or agents that which it could not do directly by legislative act. If the legislature of the state should pass a law saying that hereafter no man holding to the Baptist religious faith, or the Methodist religious faith, or to the Roman Catholic religious faith, should ever be permitted to serve on a grand jury in this state, and a party adhering to the religious faith so designated should claim that by such legislative act his rights under the 14th Amendment had been violated, the validity of such a law could never be sustained. This, as we understand it, is what appellant alleges in his plea, except that he avers the discrimination was designedly brought about through subordinate officers and agents of the state. * * *

It is well settled that when a plea such as was here interposed by appellant is meritorious on its face raising the federal question, it is the duty of the court to hear evidence upon the issue and determine the truth or falsity of the allegations supporting the plea. Whitney v. State, 42 Tex. Cr. R. 283; Carter v. State, 177 U. S. 442. * * *

The learned trial judge was in error in refusing to hear evidence tendered to sustain the averment of the special plea which demands the reversal of the judgment. It is so ordered and the cause is remanded.

ATCHISON, TOPEKA & SANTA FE R. CO. v. MATTHEWS.

1899. Supreme Court of the United States. 174 U. S. 96.

Error to the Supreme Court of the State of Kansas.

Mr. Justice Brewer delivered the opinion of the court.

In 1885 the legislature of Kansas passed the following act: "An act relating to the liability of railroads for damages by fire.

"Section 1. Be it enacted by the legislature of the State of Kansas: That in all actions against any railway company organized or doing business in this state, for damages by fire, caused by the operating of said railroad, it shall be only necessary for the plaintiff in said action to establish the fact that said fire complained of was caused by the operating of said railroad, and the amount of his damages, (which proof shall be prima facie evidence of negligence on the part of said railroad): Provided, That in estimating the damages under this act, the contributory negligence of the plaintiff shall be taken into consideration.

"Sec. 2. In all actions commenced under this act, if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment." (Sess. Laws 1885, c. 155, 258.)

Under it an action was brought in the district court of Cloud County which resulted in a judgment against the railroad company, plaintiff in error, for $2094 damages and $225 attorney's fees. This judgment having been affirmed by the Supreme Court of the state, the company brought the case here on error.

All questions of fact are settled by the decision of the state courts, Hedrick v. Atchison, Topeka &c. Railroad, 167 U. S. 673, 677, and cases cited in the opinion, and the single matter for our consideration is the constitutionality of this statute. It is contended that it is in conflict with the Fourteenth Amendment to the federal Constitution, and this contention was distinctly ruled upon by the Supreme Court of the state adversely to the railroad company. In support of this contention great reliance is placed upon Gulf, Colorado & Santa Fé Railway v. Ellis, 165 U. S. 150. In that case a statute of Texas allowing an attorney's fee to the plaintiffs in actions against railroad corporations on claims, not exceeding in amount $50, for personal services rendered or labor done, or for damages, or for overcharges on freight, or for stock killed or injured, was adjudged unconstitutional. It was held to be simply a statute imposing a penalty on railroad corporations for failing to pay certain debts, and not one to enforce compliance with any police regulations. It was so regarded by the Supreme Court of the state, and its construction was accepted in this court as correct. While the right to classify was conceded, it was said that such classification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted; that no mere arbitrary selection can ever be justified by calling it classification. And there is no good reason why railroad corporations alone should be punished for not paying their debts. Compelling the payment of debts is not a police regulation. We see no reason to change the views then expressed, and if the statute before us were the counterpart of that, we should be content to refer to that case as conclusive.

But while there is a similarity, yet there are important differences, and differences which in our judgment compel an opposite conclusion. The purpose of this statute is not to compel the payment of debts, but to secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains. This is obvious from the fact that liability for damages by fire is not cast upon such corporations in all cases, but only in those in which the fire is "caused by the operating" of the road. It is true that no special act of precaution was required of the railroad companies, failure to do which was to be visited with this penalty, so that it is not precisely like the statutes imposing double damages for stock killed where there has been a failure to fence. Missouri Pac. Railway v. Humes, 115 U. S. 512. And yet its purpose is not different. Its monition to the railroads is not, pay your debts without suit or you will, in addition, have to pay attorney's fees; but rather, see to it that no fire escapes from your locomotives, for if it does you will be liable, not merely for the damage it causes, but also for the reasonable attorney's fees of the owner of the property injured or destroyed. * * *

That there is peculiar danger of fire from the running of railroad trains is obvious. The locomotives, passing, as they do at great rates of speed, and often when the wind is blowing a gale, will, unless the utmost care is taken, (and sometimes in spite of such care,) scatter fire along the track. The danger to adjacent property is one which is especially felt in a prairie state like Kansas. * * * Fire catching in the dry grass often runs for miles, destroying not merely crops but houses and barns. * * *

In 1887 the legislature of the State of Missouri felt constrained to pass an act making every railroad corporation responsible in damages for all property destroyed by fire communicated directly or indirectly from its engines, and giving the corporation an insurable interest in the property along its road. This statute was, after a full examination of all the authorities, held by this court a valid exercise of the legislative power. St. Louis & San Francisco Railway v. Mathews, 165 U. S. 1. So, when the legislature of Kansas made a classification, and included in one class all corporations engaged in this business of peculiar hazard, it did so upon a difference having a reasonable relation to the object sought to be accomplished, to wit, the securing of protection of property from damage or destruction by fire.

While, as heretofore noticed, no special act of precaution was required, no statutory duty imposed upon railroad corporations in respect to protection against escaping fire, and a similar omission in the legislation of Texas was referred to in the opinion in the Ellis case as strengthening the argument that no police regulation was intended, yet we are of opinion that such omission is not conclusive upon the question of the validity of the statute. We have no right to consider the wisdom of such legislation. Our inquiry runs only to the matter of legislative power. If, in order to accomplish a given beneficial result—a result which depends on the action of a corporation—the legislature has the power to prescribe a specific duty and punish a failure to comply therewith by a penalty, either double damages or attorney's fees, has it not equal power to prescribe the same penalty for failing to accomplish the same result, leaving to the corporation the selection of the means it deems best therefor? Does the power of the legislature depend on the method it pursues to accomplish the result? As individuals we may think it better that the legislature prescribe the specific duties which the corporations must perform; we may think it better that the legislation should be like that of Missouri, prescribing an absolute liability, instead of that of Kansas, making the fact of fire prima facie evidence of negligence; but clearly as a court we may not interpose our personal views as to the wisdom or policy of either form of legislation. It cannot be too often said that forms are matters of legislative consideration; results and power only are to be considered by the courts.

Many cases have been before this court, involving the power of state legislatures to impose special duties or liabilities upon individuals and corporations, or classes of them, and while the principles of separation between those cases which have been adjudged to be within the power of the legislature and those beyond its power, are not difficult of comprehension or statement, yet their application often becomes very troublesome, especially when a case is near to the dividing line. It is easy to distinguish between the full light of day and the darkness of midnight, but often very difficult to determine whether a given moment in the twilight hour is before or after that in which the light predominates over the darkness. The equal protection of the law which is guaranteed by the Fourteenth Amendment does not forbid classification. That has been asserted in the strongest language. Barbier v. Connolly, 113 U. S. 27. In that case, after in general terms declaring that the Fourteenth Amendment designed to secure the equal protection of the laws, the court added (pp. 31 and 32):

"But neither the amendment—broad and comprehensive as it is —nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment." This declaration has, in various language, been often repeated, and the power of classification upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished. * * *

It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power. On the other hand, it is also true that the equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed. Yick Wo v. Hopkins, 118 U. S. 356, forcibly illustrates this. In that case a municipal ordinance of San Francisco, designed to prevent the Chinese from carrying on the laundry business was adjudged void. This court looked beyond the mere letter of the ordinance to the condition of things as they existed in San Francisco, and saw that under the guise of regulation an arbitrary classification was intended and accomplished.

While cases on either side and far away from the dividing line are easy of disposition, the difficulty arises as the statute in question comes near the line of separation. Is the classification or discrimination prescribed thereby purely arbitrary or has it some basis in that which has a reasonable relation to the object sought to be accomplished? It is not at all to be wondered at that as these doubtful cases come before this court the justices have often divided in opinion. To some the statute presented seemed a mere arbitrary selection; to others it appeared that there was some reasonable basis of classification. * * * [Citations omitted.] In some of them the court was unanimous. In others it was divided; but the division in all of them was, not upon the principle or rule of separation, but upon the location of the particular case one side or the other of the dividing line.

It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus, when the legislature imposes on railroad corporations a double liability for stock killed by passing trains it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay not only the damages which it has done, but twice that amount. If it succeeds, it recovers nothing. On the other hand, if it should sue an individual for destruction of its live stock it could under no circumstances recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality,[3] so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality.

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[3] "The exact point of objection is that the improvement [paving a street] is not to be made if a majority of the resident owners of the property liable to taxation therefor shall file with the city clerk a protest against such improvement, which privilege of protest is not given to nonresident owners, thereby discriminating against them. It is well settled, however, that not every discrimination of this character violates constitutional rights. It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the states from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed. Kentucky Railroad Tax Cases, 115 U. S. 321; ~~Hayes~~ v. Missouri, 120 U. S. 68; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283; Gulf, Colorado & Santa Fe Railroad v. Ellis, 165 U. S. 150. The alleged discrimination is certainly not an arbitrary one; the presence within the city of the resident property owners, their direct interest in the subject matter and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the nonresidents whom it may be difficult to reach. Furthermore, there is no discrimination among property owners in taxing for the improvement. When the assessment is made it operates upon all alike. It has been held to be within the power of the legislature of Missouri to authorize the council to order the improvement to be made without consulting property owners. Buchan v. Broadwell, 88 Missouri, 31. If the legislature saw fit to give to those most directly interested and whose consent could be most readily obtained, the right to protest, such action did not deprive other persons of rights guaranteed by the constitution." Field v. Barber Asphalt Pav. Co. (1904) 194 U. S. 618, 621-622, 48 L. ed. 1142.

Our conclusion in respect to this statute is that, for the reasons above stated, giving full force to its purpose as declared by the Supreme Court of Kansas, to the presumption which attaches to the action of a legislature that it has full knowledge of the conditions within the state, and intends no arbitrary selection or punishment, but simply seeks to subserve the general interest of the public, it must be sustained, and the judgment of the Supreme Court of Kansas is

Affirmed.

Mr. Justice Harlan, with whom concurred Mr. Justice Brown, Mr. Justice Peckham and Mr. Justice McKenna, dissenting. * * *

There is no classification here except one that denies the equal protection of the laws. It would seem that what was said in the Ellis case was exactly in point, namely, "as no duty is imposed there can be no penalty for non-performance." Instead of prescribing some penalty for the neglect by the railroad company of duties specifically enjoined upon it, the state attempts—and by the decision just rendered is enabled—to take from the company the right which we declared in the Ellis case was secured by the Constitution, namely, the right to "appeal to the courts as other litigants, under like conditions and with like protection." * * *

May the state meet the railroad corporation at the doors of its courts of justice and say to it, "If you enter here for the purpose of defending the suit brought against you it must be subject to the condition that a special attorney's fee shall be taxed against you if unsuccessful, while none shall be taxed against the plaintiff if he be unsuccessful?" * * * If there is one place under our system of government where all should be in a position to have equal and exact justice done to them, it is a court of justice—a principle which I had supposed was as old as Magna Charta.

In my opinion the statute of Kansas denies to a litigant, upon whom no duty has been imposed by statute and whose liability for wrongs done by it depends upon general principles of law applicable to all alike, that equality of right given by the law of the land to all suitors, and consequently it should be adjudged to deny the equal protection of the laws.

ATCHISON, TOPEKA & SANTA FE R. CO. v. VOSBURG.

1915. Supreme Court of the United States. 238 U. S. 56.

Mr. Justice Pitney delivered the opinion of the court. * * *

The enactment in question * * * provides that a railway company failing to furnish cars upon proper application shall pay, to the party applying, "five dollars per day for each car failed to be furnished as exemplary damages, * * * and all actual damages that such applicant may sustain for each car failed to be furnished, together with reasonable attorney-fees." At the same time it requires the applicant to load the cars within 48 hours after they are placed, "and upon failure to do so he shall pay to the company the sum of five dollars per day for each car not used, while held subject to the applicant's order. * * * And if the said applicant shall not use such cars so ordered by him, and shall so notify the said company or its agent, he shall forfeit and pay to the said railroad company, in addition to the penalty herein prescribed, the actual damages that such company may sustain by the said failure of the said applicant to use said cars."

We agree that this legislation is properly to be regarded as a police regulation, and in that respect differs from the act that was under consideration in the Ellis Case, 165 U. S. 150, which simply imposed a penalty upon railroad corporations for a failure to pay certain debts. But we cannot at all agree that a police regulation is not, like any other law, subject to the "equal protection" clause of the Fourteenth Amendment.[4] Nothing to that effect was held or intimated in any of the cases referred to. The constitutional guaranty entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation. Thus, in Atchison, Topeka &c. R. R. Co. v. Matthews, 174 U. S. 96, the responsibility imposed upon railroad companies for attorneys' fees in addition to damages was sustained because designed to enforce care on the part of those companies to prevent the communication of fire and the destruction of property along their lines,—a duty imposed upon them and not upon the owners of the property. We need not review the decisions; the subject being so familiar that extended discussion is unnecessary.

The precise question now presented is: What is there in the object of the legislation under consideration that furnishes a ground of distinction between railway company and shipper upon which it is reasonable to say that the latter should be allowed to recover attorney fees when it successfully sues the former, and not *vice versa?* The statute recognizes that the duty of the company to promptly furnish cars, and the duty of the shipper to promptly use them, are reciprocal, and for a breach of either duty the delinquent is penalized in favor of the other party in precisely the same amount—five dollars per day per car. The shipper may also recover his actual damages, if any. The company recovers actual damages, in addition to the penalty, only under special circumstances. No complaint is now made that this is a denial of equal protection, and we lay no stress upon it. But the statute clearly recognizes that either party may be obliged to sue the other in order to recover the penalty, or damages, or both. No reason is suggested, and none occurs to us, why the railroad company, when plaintiff in such an action, will not require the services of an attorney as well as the shipper when he is plaintiff. There is nothing in the nature of the cause of action that renders the burden of preparation more onerous, as a rule, to the shipper when he is plaintiff than to the company when it is plaintiff. There is nothing discernible, therefore, in the purposes of the legislation—which are: to require the prompt furnishing of cars for use, and the prompt use of cars when furnished, and to redress a disregard of either of these requirements by suit when necessary—to give ground for a distinction granting attorney's fees to the shipper when he sues, and denying attorney's fees to the company when it sues. In short, it is erroneous to test the classification by its supposed relation to the object of securing adequate car service, because it really relates rather to the object of securing adequate prosecution in court of actions respecting car service.

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[4] "The question of constitutional law to which we have referred can not be disposed of by saying that the statute in question may be referred to what are called the police powers of the state * * * . The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void." Harlan, J., for the court in Connolly v. Union Sewer Pipe Co. (1902) 184 U. S. 540, 558, 46 L. ed. 679.

In Missouri, Kansas & Texas Ry. v. Cade, 233 U. S. 642, 650, we had under consideration a Texas statute[5] respecting claims of certain classes against persons or corporations doing business in the state, which provided that if any such claims were not paid within a limited time after presentation, suit might be instituted thereon, and if plaintiff obtained judgment for the full amount of the claim as presented he should recover the amount claimed and costs, and in addition a reasonable amount as attorney's fees. In sustaining the act we said (p. 650): "If the classification is otherwise reasonable, the mere fact that attorney's fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the 'equal protection' clause. This is not a discrimination between different citizens or classes of citizens, since members of any and every class may either sue or be sued. *Actor* and *reus* differ in their respective attitudes towards a litigation; the former has the burden of seeking the proper jurisdiction and bringing the proper parties before it, as well as the burden of proof upon the main issues; and these differences may be made the basis of distinctive treatment respecting the allowance of an attorney's fee as a part of the costs." (Citing Atchison, Topeka &c. Railroad v. Matthews, 174 U. S. 96; and Farmers' &c. Ins. Co. v. Dobney, 189 U. S. 301.)

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[5] In the cited case the court said of the statute there involved: "It applies to claims 'against any person or corporation doing business in this state, for personal services rendered or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such persons or corporation, its agents or employees.' There is here no classification of debtors; the act bears equally against individuals and against corporations of any class doing business in the state. It applies only to certain kinds of claims; but these cover a wide range, and do not appear to have been grouped together for the purpose of bearing against any class or classes of citizens or corporations. * * * It is a police regulation designed to promote the prompt payment of small claims and to discourage unnecessary litigation in respect to them. * * * We may imagine that some other kinds of claims might as well have been included; but it is to be presumed that the legislature was dealing with an actual mischief, and made the act as broad in its scope as seemed necessary from the practical standpoint." Missouri, K. &c. R. Co. v. Cade, 233 U. S. 642, 649-650, 58 L. ed. 1135.

The present case is essentially different, for in the Kansas statute the distinction is not rested upon the fact that the plaintiff, whether shipper or company, has a special burden in the litigation that may reasonably be compensated by allowance of attorney's fees; on the contrary, the Act, while recognizing the existence of such burden, allows compensation for it in favor of one class of litigants, but does not allow like compensation to the other class when subjected to the like burden. This, in our opinion, is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.[6]

MISSOURI, KANSAS & TEXAS R. CO. v. MAY.

1904. Supreme Court of the United States. 194 U. S. 267.

Error to the County Court of Bell County, State of Texas.

Mr. Justice Holmes delivered the opinion of the court.

This is an action to recover a penalty of twenty-five dollars, brought by the owner of a farm contiguous to the railroad of the plaintiff in error, on the ground that the latter has allowed Johnson grass to mature and go to seed upon its road. The penalty is given to contiguous owners by a Texas statute of 1901, ch. 117, directed solely against railroad companies for permitting such grass or Russian thistle to go to seed upon their right of way, subject, however, to the condition that the plaintiff has not done the same thing. The case is brought here on the ground that the statute is contrary to the Fourteenth Amendment of the Constitution of the United States.

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[6] Numerous cases on validity of statutory provision for attorneys' fees are collected in (1921) 11 A. L. R. 884-910. See especially cases holding valid allowance of attorneys' fees to successful plaintiffs only, in suits against insurance companies, Fidelity Mut. L. Assn. v. Mettler (1902) 185 U. S. 308, 46 L. ed. 922; Farmers &c. Ins. Co. v. Dobney (1903) 189 U. S. 301, 47 L. ed. 821.

It is admitted that Johnson grass is a menace to crops, that it is propagated only by seed, and that a general regulation of it for the protection of farming would be valid. It is admitted also that legislation may be directed against a class when any fair ground for discrimination exists. But it is said that this particular subjection of railroad companies to a liability not imposed on other owners of land on which Johnson grass may grow is so arbitrary as to amount to a denial of the equal protection of the laws. There is no dispute about general principles. The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in degree. With regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination. The principle is similar to that which is established with regard to a decision of Congress that certain means are necessary and proper to carry out one of its express powers. McCulloch v. Maryland, 4 Wheat. 316. When a state legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.

Approaching the question in this way, we feel unable to say that the law before us may not have been justified by local conditions. It would have been more obviously fair to extend the regulation at least to highways. But it may have been found, for all that we know, that the seed of Johnson grass is dropped from the cars in such quantities as to cause special trouble. It may be that the neglected strips occupied by railroads afford a ground where noxious weeds especially flourish, and that whereas self-interest leads the owners of farms to keep down pests, the railroad companies have done nothing in a matter which concerns their neighbors only. Other reasons may be imagined. Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guarantors of the liberties and welfare of the people in quite as great a degree as the courts.

[Brewer, J., concurred in the judgment. Brown, J., delivered a dissenting opinion. White and McKenna, JJ., also dissented.]

LINDSLEY v. NATURAL CARBONIC GAS CO.

1911. Supreme Court of the United States. 220 U. S. 61.

[In the Circuit Court of the United States plaintiff, a shareholder in the defendant corporation, sought an injunction to restrain the corporation from obeying, and New York officials from enforcing, a New York statute, entitled an act for the protection of natural mineral springs. The statute as interpreted in other cases by the New York Court of Appeals prohibited forced pumping of carbonic acid gas from any well made by boring into rock, for the purpose of selling the gas otherwise than in connection with the mineral water, unless the forced pumping did not draw unreasonably or wastefully upon gas lying beneath the land of others. From a decree dismissing plaintiff's bill this appeal was taken.]

Mr. Justice Van Devanter delivered the opinion of the court.

[After deciding that the statute did not violate the due process limitation, because its definition or restriction of the interests of any surface owner was justified as reasonable protection to adjoining surface owners having equal rights to draw from a common source of gas, citing Ohio Oil Co. v. Indiana, 177 U. S. 190, the opinion continues:]

Because the statute is directed against pumping from wells bored or drilled into the rock, but not against pumping from wells not penetrating the rock, and because it is directed against pumping for the purpose of collecting the gas and vending it apart from the waters, but not against pumping for other purposes, the contention is made that it is arbitrary in its classification, and consequently denies the equal protection of the laws to those whom it affects.

The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Bachtel v. Wilson, 204 U. S. 36, 41; Louisville & Nashville R. R. Co. v. Melton, 218 U. S. 36; Ozan Lumber Co. v. Union County Bank, 207 U. S. 251, 256; Munn v. Illinois, 94 U. S. 113, 132; Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 615.

Unfortunately, the allegations of the bill shed but little light upon the classification in question. They do not indicate that pumping from wells not penetrating the rock appreciably affects the common supply therein, or is calculated to result in injury to the rights of others, and neither do they indicate that such pumping as is done for purposes other than collecting and vending the gas apart from the waters is excessive or wasteful, or otherwise operates to impair the rights of others. In other words, for aught that appears in the bill, the classification may rest upon some substantial difference between pumping from wells penetrating the rock and pumping from those not penetrating it, and between pumping for the purpose of collecting and vending the gas apart from the waters and pumping for other purposes, and this difference may afford a reasonable basis for the classification.

In thus criticising the bill, we do not mean that its allegations are alone to be considered, for due regard also must be had for what is within the range of common knowledge and what is otherwise plainly subject to judicial notice. Brown v. Piper, 91 U. S. 37, 43; Brown v. Spilman, 155 U. S. 665, 670; McLean v. Denver & Rio Grande R. R. Co., 203 U. S. 38, 51; McNichols v. Pease, 207 U. S. 100, 111. But we rest our criticism upon the fact that the bill is silent in respect of some matters which, although essential to the success of the present contention, are neither within the range of common knowledge nor otherwise plainly subject to judicial notice. So, applying the rule that one who assails the classification in such a law must carry the burden of showing that it is arbitrary, we properly might dismiss the contention without saying more. But it may be well to mention other considerations which make for the same result.

From statements made in the briefs of counsel and in oral argument, we infer that wells not penetrating the rock reach such waters only as escape naturally therefrom through breaks or fissures; and if this be so, it well may be doubted that pumping from such wells has anything like the same effect—if, indeed, it has any—upon the common supply or upon the rights of others, as does pumping from wells which take the waters from within the rock, where they exist under great hydrostatic pressure.

As respects the discrimination made between pumping for the purpose of collecting and vending the gas apart from the waters, and pumping for other purposes, this is to be said: The greater demand for the gas alone, and the value which attaches to it in consequence of this demand, furnish a greater incentive for exercising the common right excessively and wastefully when the pumping is for the purpose proscribed than when it is for other purposes; and this suggestion becomes stronger when it is reflected that the proportion of gas in the commingled fluids as they exist in the rock is so small that to obtain a given quantity of gas involves the taking of an enormously greater quantity of water, and to satisfy appreciably the demand for the gas alone involves a great waste of the water from which it is collected. Thus, it well may be that in actual practice the pumping is not excessive or wasteful save when it is done for the purpose proscribed.

These considerations point with more or less persuasive force to a substantial difference, in point of harmful results, between pumping from wells penetrating the rock, and pumping from those not penetrating it, and between pumping for the purpose of collecting and vending the gas apart from the waters, and pumping for other purposes. If there be such a difference, it justifies the classification, for plainly a police law may be confined to the occasion for its existence. As is said in Carroll v. Greenwich Insurance Co., 199 U. S. 401, 411: "If an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms." * * *

Decree affirmed.

RADICE v. PEOPLE OF THE STATE OF NEW YORK.

1924. Supreme Court of the United States. 264 U. S. 292.

[Plaintiff in error ~~was convicted~~ in the City Court of Buffalo upon the charge of having violated the provisions of a statute of the State of New York, prohibiting the employment of women in restaurants in cities of the first and second class, between the hours of 10 o'clock at night and 6 o'clock in the morning. Plaintiff contended that because of the express exemptions made in the statute, which are stated in the opinion, the statute violated the equality requirement. The New York Court of Appeals having sustained the conviction this writ of error was taken.]

MR. JUSTICE SUTHERLAND delivered the opinion of the court.

* * *

Nor is the statute vulnerable to the objection that it constitutes a denial of the equal protection of the laws. The points urged under this head are (a) that the act discriminates between cities of the first and second class and other cities and communities; and (b) excludes from its operation women employed in restaurants as singers and performers, attendants in ladies' cloak rooms and parlors, as well as those employed in dining rooms and kitchens of hotels and in lunch rooms or restaurants conducted by employers solely for the benefit of their employees.

The limitation of the legislative prohibition to cities of the first and second class does not bring about an unreasonable and arbitrary classification. Packard v. Banton, 264 U. S. 140; Hayes v. Missouri, 120 ~~U. S.~~ 68. Nor is there substance in the contention that the exclusion of restaurant employees of a special kind, and of hotels and employees' lunch rooms, renders the statute obnoxious to the Constitution. The statute does not present a case where some persons of a class are selected for special restraint from which others of the same class are left free (Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 564); but a case where all in the same class of work, are included in the restraint. Of course, the mere fact of classification is not enough to put a statute beyond the reach of the equality provision of the Fourteenth Amendment. Such classification must not be "purely arbitrary, oppressive or capricious." American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 92. But the mere production of inequality is not enough. Every selection of persons for regulation so results, in some degree. The inequality produced, in order to encounter the challenge of the Constitution, must be "actually and palpably unreasonable and arbitrary." Arkansas Natural Gas Co. v. Railroad Commission, 261 U. S. 379, 384, and cases cited. Thus classifications have been sustained which are based upon differences between fire insurance and other kinds of insurance, Orient Insurance Co. v. Daggs, 172 U. S. 557, 562; between railroads and other corporations, Tullis v. Lake Erie & Western R. R. Co., 175 U. S. 348, 351; between barber shop employment and other kinds of labor, Petit v. Minnesota, 177 U. S. 164, 168; between "immigrant agents" engaged in hiring laborers to be employed beyond the limits of a state and persons engaged in the business of hiring for labor within the state, Williams v. Fears, 179 U. S. 270, 275; between sugar refiners who produce the sugar and those who purchase it, American Sugar Refining Co. v. Louisiana, supra. More directly applicable are recent decisions of this Court, sustaining hours of labor for women in hotels but omitting women employees of boarding houses, lodging houses, etc., Miller v. Wilson, 236 U. S. 373, 382; and limiting the hours of labor of women pharmacists and student nurses in hospitals but excepting graduate nurses. Bosley v. McLaughlin, 236 U. S. 385, 394-396. The opinion in the first of these cases was delivered by Mr. Justice Hughes, who, after pointing out that in hotels women employees are for the most part chambermaids and waitresses; that it cannot be said that the conditions of work are the same as those which obtain in the other establishments; and that it is not beyond the power of the legislature to recognize the differences, said (pp. 383-384):

"The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. Patsone v. Pennsylvania, 232 U. S. 138, 144. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibition 'should be couched in all-embracing terms.' Carroll v. Greenwich Insurance Co., 199 U. S. 401, 411. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. Keokee Coke Co. v. Taylor, 234 U. S. 224, 227. Upon this principle which has had abundant illustration in the decisions cited below, it cannot be concluded that the failure to extend the act to other and distinct lines of business, having their own circumstances and conditions, or to domestic service, created an arbitrary discrimination as against the proprietors of hotels."

The judgment below is affirmed.[7]

PLESSY v. FERGUSON.

1896. Supreme Court of the United States. 163 U. S. 537.

[A statute of Louisiana, Acts of 1890, No. 111, required railways carrying passengers in the state to provide "equal but separate accommodations for the white and colored races," making it an offense punishable by fine for any person to insist upon going into space assigned to persons of the other race. Plessy being charged before Ferguson, judge of the Criminal Court for the parish of Orleans, for violation of the statute, petitioned the state Supreme Court for a writ of prohibition to restrain Ferguson from proceeding to fine him. The petition recited that the charge was that the petitioner had insisted upon riding in a coach assigned to the white race, that the petitioner was "a citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the proportion of seven-eighths Caucasian and one-eighth African blood." The state Supreme Court denied the petition and this writ of error was taken.]

Mr. Justice Brown delivered the opinion of the court. * * *

The object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.

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[7] In Dominion Hotel Co. v. Arizona (1919) 249 U. S. 265, 63 L. ed. 597, a statute was sustained which prescribed a maximum of eight hours per day for women workers in hotels and restaurants and required further that the eight hours per day must fall within a period of twelve consecutive hours, but this last requirement not to apply to railroad restaurants or eating houses located upon railroad rights of way and operated by or under contract with any railroad company. Contra: State v. Le Barron (1917) 24 Wyo. 519, 162 Pac. 265.

One of the earliest of these cases is that of Roberts v. City of Boston, 5 Cush. 198, in which the supreme judicial court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. * * * Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia, Rev. Stat. D. C. §§ 281, 282, 283, 310, 319, as well as by the legislatures of many of the states, and have been generally, if not uniformly, sustained by the courts.[8] State v. McCann,

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[8] "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black. Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution. Roberts v. City of Boston, 5 Cush. (Mass.) 198, 206, 208, 209; State ex rel. Garnes v. McCann, 21 Oh. St. 198, 210; People ex rel. King v. Gallagher, 93 N. Y. 438; People ex rel. Cisco v. School Board, 161 N. Y. 598; Ward v. Flood, 48 Cal. 36; Wysinger v. Crookshank, 82 Cal. 588, 590; Reynolds v. Board of Education, 66 Kans. 672; McMillan v. School Committee, 107 N. C. 609; Cory v. Carter, 48 Ind. 327; Lehew v. Brummell, 103 Mo. 546; Dameron v. Bayless, 14 Ariz. 180; State ex rel. Stoutmeyer v. Duffy, 7 Nev. 372, 348, 355; Bertonneau v. Board, 3 Woods 177, s. c. 3 Fed. Cases, 294, Case No. 1,361; United States v. Buntin, 10 Fed. 730, 735; Wong Him v. Callahan, 119 Fed. 381. * * * Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we can not think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment." Taft, C. J., for the court in Gong Lum v. Rice (1927) 275 U. S. 78, 72 L. ed. 172. The legislation sustained in Wysinger v. Crookshank, 82 Cal. 588, 23 Pac. 54, separated children of Mongolian or Chinese descent from all others, but not negroes from whites. See Wong Him v. Callahan, 119 Fed. 381 (children of Chinese descent segregated). The legislation sustained in Reynolds v. Board of Education, 66 Kans. 672, 72 Pac. 274, separated whites and negroes, except in the high schools.

The constitution of North Carolina requires separate schools for whites and negroes and "no discrimination in favor of, or to the prejudice of, either race." It also forbids marriage between persons of whom one has more than one-eighth of negro blood. A North Carolina statute provides, "no child with negro blood in his veins, however remote the strain, shall attend a school for the white race." Under this legislation it has been held that a child having less than one-sixteenth of "negro blood" (father "pure" white and mother less than one-eighth of "negro

21 Ohio St. 198; Lehew v. Brummell, 103 Mo. 546; Ward v. Flood, 48 California 36; Bertonneau v. School Directors, 3 Woods, 177; People v. Gallagher, 93 N. Y. 438; Cory v. Carter, 48 Indiana 337; Dawson v. Lee, 83 Kentucky 49.

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state. State v. Gibson, 36 Indiana 389. * * *

In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. * * *

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blood") is ineligible to attend a school for whites. Johnson v. Board of Education (1914) 166 N. Car. 468, 82 S. E. 832, L. R. A. 1915A, 828. See also Tucker v. Blease (1913) 97 S. Car. 303, 81 S. E. 668, Ann. Cas. 1916C, 796 (annotation), and note in 72 L. ed. 174.

A state statute declared it unlawful for any person or corporation to maintain a college or school in which "persons of the white and negro races are both received as pupils for instruction," provided that separate branches might be maintained for each race not less than twenty-five miles apart. The court said that to give effect to the implication of the proviso would cause the statute to exceed the police power, and sustained the statute on a construction that it only forbade instructing members of the two races at the same time in the same place, saying, however, separate teaching "in different rooms of the same building or in different buildings so near to each other as to be practically one would violate the statute." Berea College v. Commonwealth (1906) 123 Ky. 209, 94 S. W. 623, 124 Am. St. 344, 13 Ann. Cas. 337. The conviction of Berea College for violation of the statute as thus construed was affirmed in (1908) 211 U. S. 45, 53 L. ed. 81, only on the ground that the statute was valid as to Berea College, incorporated under the laws of the state, as an exercise of power reserved to amend corporate charters, and its validity was doubted as to institutions operated by unincorporated persons.

For decisions under statutes which prohibit separation of children in public schools on the basis of race or color, see People v. Board of Education (1882) 101 Ill. 308, 40 Am. Rep. 196; People v. Board of Education (1889) 127 Ill. 613, 21 N. E. 187; People v. Alton (1899) 179 Ill. 615, 54 N. E. 421; Kaine v. Commonwealth (1882) 101 Pa. 490. The provision of the Colorado constitution, "nor shall any distinction or classification of pupils be made on account of race or color," was held to be violated by an order of a school superintendent which denied to negro pupils participation in common with white pupils in officially conducted school social functions and in use of the school swimming pool. Jones v. Newlon (1927) 81 Colo. 25, 253 Pac. 386, 50 A. L. R. 1263.

So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. * * * The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. * * * Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

* * *

Judgment affirmed.[9]

Mr. Justice Harlan dissenting. * * * The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race. * * *

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[9] A state statute which requires railway companies to provide separate and equal accommodations, except that they may provide dining and sleeping cars for whites and negroes separately or for one and not the other is invalid as to this latter clause; the contention that there are not enough patrons of one of the races to warrant the outlay is of no avail. McCabe v. Atchison, T. &c. R. Co. (1914) 235 U. S. 151, 59 L. ed. 169. In the absence of statute a railway company may separate its white and negro passengers by virtue of its power to make "reasonable regulations" of its service, the court saying: "Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate, can not be said to be unreasonable." Chiles v. Chesapeake &c. R. Co. (1910) 218 U. S. 71, 54 L. ed. 936, 20 Ann. Cas. 980.

[MR. JUSTICE BREWER did not participate in the decision.]

TRUSTEES OF GRADED FREE COLORED COMMON SCHOOLS v. TRUSTEES OF GRADED FREE WHITE COMMON SCHOOLS.

1918. Court of Appeals of Kentucky. 180 Ky. 574.

OPINION OF THE COURT BY JUDGE SAMPSON—Reversing.

Mayfield is a city of the fourth class. As such it maintains a free graded school for white children, and a separate free graded school for colored pupils. This action was instituted by the trustees of the colored graded school against the trustees of the white graded school of Mayfield to recover of the latter $2,797.43, alleged to be due the colored grade school as its pro rata part of $14,226.77, the total ad valorem tax collected and appropriated by the white graded school trustees from all corporations liable to taxation in the city of Mayfield. The white board of trustees collected from the corporations of the city of Mayfield taxes amounting to $14,846.56 for certain years named in the petition. Of this sum the plaintiffs, the colored board, claim they are entitled to the 2,778/14,513's part thereof, or $2,659.25, there being for the said years 2,778 colored pupil children and 14,513 white pupil children in the district (the aggregate enumeration for the six years named).

The trial court sustained a general demurrer to all paragraphs in plaintiff's petition except the one alleging that the Young Men's Building Association, a corporation owning property in the district, some of the stockholders of which were white and others black, and which corporation had been assessed by and had paid to the white school board taxes in the sum of $71.55, and of which sum the colored board claimed its pro rata share, or $13.65. The school based its claim upon the ratio of colored pupil children in the district to the whole number of pupil children therein, but the court did not accede to this claim but proceeded upon the theory that the colored board of education was entitled to recover that proportion only of $71.65 taxes paid by the corporation which the colored stockholders in said company bore to the whole stock issued and outstanding.

* * *

The principal question presented is: Can the white graded school trustees of said city appropriate the entire revenue arising from taxes on all corporations of the city to the use of the white graded schools, and thus exclude the colored graded school and its board of trustees from the benefits of such revenue? * * *

It will be observed that the statute prohibits the use of taxes raised from the property of white persons or *corporations* being applied to the maintenance of colored schools, and a like provision is made with reference to the property of colored persons and schools except the property of *corporations* is not included, for in this respect the statute provides, "Nor shall any tax raised from the property or poll of any colored person be used for the support of said graded free white schools of said city," thus omitting the word *corporation.* In other words the statute attempts to appropriate all of the funds arising from tax on the property of all *corporations* to the use and benefit exclusively of the white schools, and this, too, although the limits and boundaries of the white school district and that of the colored school district are identical and coincide in every particular. Proceeding under this statute the board of trustees of the white graded school of Mayfield has collected and now withholds from the board of the colored graded school all revenue arising from taxes on corporations of all kinds.

It must be conceded that the property of a corporation is subjected to taxation in the same manner as that of natural persons. A corporation can not be said to have color; it is neither white nor black. * * * There appears to be no more reason to assert that a corporation belongs to the white or Caucasian race than to declare it to be of the African or negro race. It may be that most of the stockholders, or perhaps all the the stockholders, of a given corporation are white, yet these individual stockholders are separate and distinct from the corporation itself. The artificial person has a separate entity recognized in law distinct and apart from the stockholders or directors who organize and conduct the company or own stock in it.

Some of the corporations taxed in this case are foreign to the State of Kentucky. Whether their stockholders are white or black is unknown, or if part be white and part black, what proportion is white and what black is of no concern.

The Statutes, section 4101, with reference to taxation for school purposes, specifically provide that the tax arising from railroads and bridges shall be apportioned between the white and colored schools in the ratio of their numerical pupilage, but no such provision is contained in the charters of fourth-class cities. A large part of the school tax raised for maintaining graded schools in fourth-class cities comes from the corporations, and if the white schools have exclusive right to appropriate not only the tax from the property owned by all white citizens and taxpayers but likewise all taxes arising from corporations included in the boundary, the colored schools must suffer grievously because the revenue arising from the assessment of property owned by colored taxpayers is less than that of the white, not to mention the greater amount derived from corporations by the white schools. * * *

Colored children are the wards of the state in the same sense and to the same extent as are white children, and are equally entitled to care, protection and training, and this is vouchsafed not only by our form of government but by the express terms and provisions of our federal and state Constitutions. The prime object and fundamental principle of our free school system is to educate all citizens of the state to the end that they may become more efficient. The well being of every community in the state and of the state at large is best subserved by affording every child in the commonwealth an opportunity to acquire an education.

Illiteracy is the bane of society; its greatest burden and most dangerous enemy. The white race being predominant and holding most of the taxable property, under the rule already well established in this jurisdiction of sequestering all revenue from the property of white people to the support of white schools only, has decidedly the best of the situation, and it would amount to an open invasion of the Bill of Rights to hold that revenue arising from property held by legal entities, corporations, shall also be applied solely to the same end, to everlasting ruin of the colored schools. Such a rule would amount to a nullification of the underlying principles of our public school system and render the poorest and most helpless of our citizenship, those who are and have always been the state's special object of protection and care, a hopeless burden and menacing danger instead of an efficient and helpful contingent. To take away from the colored schools the entire benefit of revenue arising from corporations would reduce that race to the necessity of levying a tax on what little property it owns at so high a rate as to amount to confiscation and eventually lead to obliteration.

* * *

That part of the Statutes, section 3588a, which attempts to appropriate the whole of the moneys arising from tax on corporations to white schools is violative of the equal protection clause of the

Constitution, and therefore without force, and the money thus arising must be apportioned between the two schools in the ratio of the pupil children of each race to the whole number in the district. This must follow because the property of corporations can not be subjected to double taxation; it must not be subjected to taxation by both schools because that would amount to double taxation, and the amount levied and collected by the white board must, therefore, be apportioned between the two schools in the ratio of the pupil children of each to the whole. This rule must obtain because the property of corporations can only be taxed in the same manner and to the same extent as individuals and since the property of individuals, belonging to each race, can only be subjected to taxation by one of the schools it follows that the property of corporations must be treated in like manner.

Judgment reversed with directions to overrule each of the demurrers, and for proceedings consistent herewith.

Whole court sitting.[10]

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[10] A state statute which directs the taxes paid by whites to be used only for schools for whites and those paid by negroes to be used for schools for negroes is contrary to the no-discrimination requirement of the North Carolina constitution. Puitt v. Comrs. (1885) 94 N. Car. 709, 55 Am. Rep. 638. Such a statute also violates the Fourteenth Amendment. Davenport v. Cloverport (1896) 72 Fed. 689. A state statute which levies a tax upon all taxable property to establish an agricultural high school for whites but none for negroes violates the Fourteenth Amendment. McFarland v. Goins (1909) 96 Miss. 67, 50 So. 493. Cf. Cumming v. Board of Education (1899) 175 U. S. 528, 44 L. ed. 262 (rested chiefly upon the erroneous manner in which the issue was attempted to be made).

"The board shall not discriminate against either race, but shall afford each equal facilities. It is not intended by this that the taxes are to be apportioned between the races *per capita*, but that the school term shall be of the same length during the school year, and that a sufficient number of teachers, competent to teach the children in each section or building, shall be employed at such prices as the board may deem proper." Lowery v. Board of Graded School Trustees (1905) 140 N. Car. 33, 52 S. E. 267.

It is held that equality is not violated by the fact that a child of one race has to go a greater distance to school than do those of the other race residing in the same neighborhood. Dameron v. Bayless (1912) 14 Ariz. 180, 126 Pac. 273, where the court said: "The law will not measure with a yardstick these distances, but it will and does require that, after children arrive at the school building, it be as good a building and as well equipped and furnished and presided over by as efficient a corps of teachers as the schools provided for the children of other races." Accord: As to distance, People v. Gallagher (1882) 93 N. Y. 438, 451, 45 Am. Rep. 232; Lehew v. Brummell (1890) 103 Mo. 546, 15 S. W. 765, 23 Am. St. 895, 11 L. R. A. 828.

Though the officers of a school district are validly authorized by state statute to establish a separate school for American Indians, an Indian child can not be excluded from a school for whites if no separate school for Indians is established by the district, and the existence of an Indian school maintained in the district by the United States Government, which the child may attend, is not an excuse, nor is it an excuse that operation of a separate school will be a heavy burden to the district. Piper v. Big Pine School Dist. (1924) 193 Cal. 664, 226 Pac. 926.

BUCHANAN v. WARLEY.

1917. Supreme Court of the United States. 245 U. S. 60.

[This was a suit for specific performance of a contract for the sale of real estate in Louisville, Kentucky, brought by the seller. The defendant answered that the seller had expressly stipulated that the buyer should not be required to accept a deed if he could not legally occupy the premises as his residence; that defendant was a negro; that there were ten residences in the block of which the lot in question was a part, eight of them occupied by whites, two by negroes, and that he could not lawfully occupy the premises because of a city ordinance which forbade any white or black person to move into and occupy as a residence any house upon any block in which more than half the houses were already occupied by persons of the other color. The plaintiff replied that the ordinance was invalid because violative of the Fourteenth Amendment. The Court of Appeals of Kentucky, 165 Ky. 559, held the ordinance valid and a complete defense to the action. Now on writ of error:]

MR. JUSTICE DAY delivered the opinion of the court. * * *

This ordinance prevents the occupancy of a lot in the City of Louisville by a person of color in a block where the greater number of residences are occupied by white persons; where such a majority exists colored persons are excluded. This interdiction is based wholly upon color; simply that and nothing more. In effect, premises situated as are those in question in the so-called white block are effectively debarred from sale to persons of color, because if sold they cannot be occupied by the purchaser nor by him sold to another of the same color.

This drastic measure is sought to be justified under the authority of the state in the exercise of the police power. It is said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color.

The authority of the state to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare is very broad as has been affirmed in numerous and recent decisions of this court. * * *

The Fourteenth Amendment protects life, liberty, and property from invasion by the states without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden v. Hardy, 169 U. S. 366, 391. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Commentaries (Cooley's Ed.) 127.

True it is that dominion over property springing from ownership is not absolute and unqualified. The disposition and use of property may be controlled in the exercise of the police power in the interest of the public health, convenience, or welfare. * * *

The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded. The question now presented makes it pertinent to enquire into the constitutional right of the white man to sell his property to a colored man, having in view the legal status of the purchaser and occupant. * * *

The defendant in error insists that Plessy v. Ferguson, 163 U. S. 537, is controlling in principle in favor of the judgment of the court below. * * * It is to be observed that in that case there was no attempt to deprive persons of color of transportation in the coaches of the public carrier, and the express requirements were for equal though separate accommodations for the white and colored races. In Plessy v. Ferguson, classification of accommodation was permitted upon the basis of equality for both races. * * *

That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges. * * *

It is the purpose of such enactments, and, it is frankly avowed it will be their ultimate effect, to require by law, at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races, although it is to be noted in the ordinance under consideration that the employment of colored servants in white families is permitted, and nearby residences of colored persons not coming within the blocks, as defined in the ordinance, are not prohibited.

The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.

It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution.

It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results.

We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the state, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case the ordinance cannot stand. Booth v. Illinois, 184 U. S. 425, 429; Otis v. Parker, 187 U. S. 606, 609.

Reaching this conclusion it follows that the judgment of the Kentucky Court of Appeals must be reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

OHIO EX REL. CLARKE v. DECKEBACH, AUDITOR.

1927. Supreme Court of the United States. 274 U. S. 392.

MR. JUSTICE STONE delivered the opinion of the Court.

An ordinance, No. 76-1918, of the City of Cincinnati, requires the licensing of pool and billiard rooms, and prohibits the issue of licenses to aliens. Plaintiff in error petitioned the Supreme Court of Ohio for a writ of mandamus commanding defendant in error, the auditor of Cincinnati, to grant him a license to conduct a billiard and pool room in that city. The petition alleged that plaintiff was a subject of the King of England and that he had been refused a license solely because he was not a citizen. It drew in question the validity of the ordinance as violating Art. I of the treaty between Great Britain and the United States of July 3, 1815, 8 Stat. 228; August 6, 1927, 8 Stat. 361; 1 Malloy, Treaties, 624 645, and as denying the equal protection of the laws guaranteed by the Fourteenth Amendment.

Defendant answered, traversing the allegation of citizenship, and asserting that billiard and pool rooms in the City of Cincinnati are meeting places of idle and vicious persons; that they are frequented by lawbreakers and other undesirable persons, and contribute to juvenile delinquency; that numerous crimes and offenses have been committed in them and consequently they require strict police surveillance; that non-citizens as a class are less familiar with the laws and customs of this country than native born and naturalized citizens; that the maintenance of billiard and pool rooms by them is a menace to society and to the public welfare, and that the ordinance is a reasonable police regulation passed in the interest of and for the benefit of the public.

On plaintiff's motion, the Supreme Court of Ohio gave judgment on the pleadings, dismissing the petition. * * *

The objections to the constitutionality of the ordinance are not persuasive. Although the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens, Yick Wo v. Hopkins, 118 U. S. 356; Truax v. Raich, 239 U. S. 33; In re Tiburcio Parrott, 1 Fed. 481; In re Ah Chong, 2 Fed. 733; Ho Ah Kow v. Nunan, 5 Sawy. 552, 12 Fed. Cases, No. 6546; Wong Wai v. Williamson, 103 Fed. 1; Fraser v. McConway & Torley Co., 82 Fed. 257, it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification. Patsone v. Pennsylvania, 232 U. S. 138; Crane v. New York, 239 U. S. 195, 198; Terrace v. Thompson, 263 U. S. 197; Porterfield v. Webb, 263 U. S. 225; Webb v. O'Brien, 263 U. S. 313; Frick v. Webb, 263 U. S. 326; Cockrill v. California, 268 U. S. 258; cf. McCready v. Virginia, 94 U. S. 391.

The admitted allegations of the answer set up the harmful and vicious tendencies of public billiard and pool rooms, of which this Court took judicial notice in Murphy v. California, 225 U. S. 623. The regulation or even prohibition of the business is not forbidden. Murphy v. California, supra. The present regulation presupposes that aliens in Cincinnati are not as well qualified as citizens to engage in this business. It is not necessary that we be satisfied that this premise is well founded in experience. We cannot say that the city council gave unreasonable weight to the view admitted by the pleadings that the associations, experiences and interests of members of the class disqualified the class as a whole from conducting a business of dangerous tendencies.

It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong. Fort Smith Light & Traction Co. v. Board of Improvement, 274 U. S. 387.

Some latitude must be allowed for the legislative appraisement of local conditions, Patsone v. Pennsylvania, supra, 144; Adams v. Milwaukee, 228 U. S. 572, 583, and for the legislative choice of methods for controlling an apprehended evil. It was competent for the city to make such a choice, not shown to be irrational, by excluding from the conduct of a dubious business an entire class rather than its objectionable members selected by more empirical methods. See Westfall v. United States, 274 U. S. 256.

Judgment affirmed.[11]

TRUAX ET AL. v. CORRIGAN ET AL.

1921. Supreme Court of the United States. 257 U. S. 312.

[The plaintiffs in error, owners of a restaurant in Bisbee, Arizona, sought an injunction in an Arizona court to restrain the defendants, former employees and their labor union, from alleged illegal picketing by which they were inflicting irreparable injury to plaintiffs' business. The petition alleged that defendants were relying upon Paragraph 1464 of the Revised Statutes of Arizona, 1913, and that recognition of this statute as a defense would deprive plaintiffs of property and deny them equal protection in violation of the Fourteenth Amendment. Paragraph 1464 forbade granting an injunction "in any case between an employer and employees or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment." From a judgment of the Supreme Court of Arizona, 20 Ariz. 7, affirming a dismissal of the plaintiffs' bill this writ of error was taken.]

Mr. Chief Justice Taft delivered the opinion of the court.

* * *

Plaintiffs' business is a property right (Duplex Printing Press Co. v. Deering, 254 U. S. 443, 465) and free access for employees, owner and customers, to his place of business, is incident to such right. Intentional injury caused to either right or both by a conspiracy is a tort. Concert of action is a conspiracy if its object is unlawful or if the means used are unlawful. Pettibone v. United States, 148 U. S. 197, 203; Duplex Printing Press Co. v. Deering, supra. Intention to inflict the loss and the actual loss caused are clear. The real question here is, Were the means used illegal? The above recital of what the defendants did can leave no doubt of that. The libelous attacks upon the plaintiffs, their business, their employees, and their customers, and the abusive epithets applied to them, were palpable wrongs. They were uttered in aid of the plan to induce plaintiffs' customers and would-be customers to refrain from patronizing the plaintiffs. The patrolling of defendants immediately in front of the restaurant on the main street and within five feet of plaintiffs' premises continuously during business hours, with the banners announcing plaintiffs' unfairness; the attendance by the picketers at the entrance to the restaurant, and their insistent and loud appeals all day long, the constant circulation by them of the libels and epithets applied to employees, plaintiffs, and customers, and the threats of injurious consequences to future customers, all linked together in a campaign, were an unlawful annoyance and a hurtful nuisance in respect of the free access to the plaintiffs' place of business. It was not lawful persuasion or inducing. It was not a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage. It was compelling every customer or would-be customer to run the gauntlet of most uncomfortable publicity, aggressive and annoying importunity, libelous attacks, and fear of injurious consequences, illegally inflicted, to his reputation and standing in the community. No wonder that a business of $50,000 was reduced to only one-fourth of its former extent. Violence could not have been more effective. It was moral coercion by illegal annoyance and obstruction, and it thus was plainly a conspiracy. * * *

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[11] A statute violates the equality requirement, which debars an alien parent solely because he is an alien from appointment as property guardian as to agricultural land belonging to his minor child (a citizen). In re Tetsubumi Yano's Estate (1922) 188 Cal. 645, 206 Pac. 995. Contra: In re Fujimoto's Guardianship (1924) 130 Wash. 188, 226 Pac. 505, 39 A. L. R. 937.

A provision of a state workmen's compensation statute has been held valid by which the dependents of a killed employee get only half compensation if they are aliens not residing in the United States, one ground of decision being that nonresidents are not "within the jurisdiction" of the state. Maryland Casualty Co. v. Chamos (1924) 203 Ky. 820, 263 S. W. 370 (citing cases). See also Liberato v. Royer (1926) 270 U. S. 535, 70 L. ed. 719 (denial of compensation to nonresident alien Italian parents held not to violate treaty with Italy).

For a full collection of the decisions on the appropriateness to various purposes, of the classification of persons into the two classes, aliens and citizens, see ante, pp. 422-434 and notes.

A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, and cannot be held valid under the Fourteenth Amendment.

The opinion of the state supreme court in this case, if taken alone, seems to show that the statute grants complete immunity from any civil or criminal action to the defendants, for it pronounces their acts lawful. If, however, we are to assume that the criminal laws of Arizona do provide prosecution for such libels against the plaintiffs, though committed by this particular class of tort-feasors (Truax v. Bisbee Local, No. 380, 19 Ariz. 379), still the tort here committed was not a mere libel of plaintiffs. That would not have had any such serious consequences. The libel of the plaintiffs here was not the cause of the injury; it was only one step or link in a conspiracy unlawfully to influence customers.

It is argued that while the right to conduct a lawful business is property, the conditions surrounding that business, such as regulations of the state for maintaining peace, good order, and protection against disorder, are matters in which no person has a vested right. The conclusion to which this inevitably leads in this case is that the state may withdraw all protection to a property right by civil or criminal action for its wrongful injury, if the injury is not caused by violence. * * * It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power, whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles. * * *

If, however, contrary to the construction which we put on the opinion of the supreme court of Arizona, it does not withhold from the plaintiffs all remedy for the wrongs they suffered, but only the equitable relief of injunction, there still remains the question whether they are thus denied the equal protection of the laws.

[Here are omitted other provisions of the statutes of Arizona which give the courts of the state usual equity powers.]

The necessary effect of these provisions and of Paragraph 1464 is that the plaintiffs in error would have had the right to an injunction against such a campaign as that conducted by the defendants in error, if it had been directed against the plaintiffs' business and property in any kind of a controversy which was not a dispute between employer and former employees. If the competing restaurant keepers in Bisbee had inaugurated such a campaign against the plaintiffs in error and conducted it with banners and handbills of a similar character, an injunction would necessarily have issued to protect the plaintiffs in the enjoyment of their property and business.

This brings us to consider the effect in this case of that provision of the Fourteenth Amendment which forbids any state to deny to any person the equal protection of the laws. The clause is associated in the Amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The due process clause * * * tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. "All men are equal before the law," "This is a government of laws and not of men," "No man is above the law," are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. Mr. Justice Field, delivering the opinion of this court in Barbier v. Connolly, 113 U. S. 27, 32, of the equality clause, said—"Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment." In Hayes v. Missouri, 120 U. S. 68, the court speaking through the same Justice said the Fourteenth Amendment "does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Thus the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class.

Mr. Justice Matthews, in Yick Wo v. Hopkins, 118 U. S. 356, 369, speaking for the court of both the due process and the equality clause of the Fourteenth Amendment, said:

"These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

The accuracy and comprehensive felicity of this description of the effect of the equality clause are shown by the frequency with which it has been quoted in the decisions of this court. It emphasizes the additional guaranty of a right which the clause has conferred beyond the requirement of due process.

With these views of the meaning of the equality clause, it does not seem possible to escape the conclusion that by the clauses of

Paragraph 1464 of the Revised Statutes of Arizona, here relied on by the defendants, as construed by its Supreme Court, the plaintiffs have been deprived of the equal protection of the law.

It is beside the point to say that plaintiffs had no vested right in equity relief and that taking it away does not deprive them of due process of law. If, as is asserted, the granting of equitable remedies falls within the police power and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause which forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction. * * *

If, as claimed, the legislature has full discretion to grant or withhold equitable relief in any class of cases, indeed, to take away from its courts all equity jurisdiction, and leave those who are wronged to suits at law or to protection by the criminal law, the legislature has the same power in respect to the declaration of crimes. Suppose the legislature of the state were to provide that such acts as were here committed by defendants, to wit, the picketing or patrolling of the sidewalk and street in front of the store or business house of any person, and the use of handbills of an abusive and libelous character against the owner and present and future customers, with intent to injure the business of the owner, should be a public nuisance and be punishable by fine and imprisonment, and were to except ex-employees from its penal provisions. Is it not clear that any defendant could escape punishment under it on the ground that the statute violated the equality clause of the Fourteenth Amendment? That is the necessary effect of Connolly v. Union Sewer Pipe Co., 184 U. S. 540, where an anti-trust act was held invalid under this same clause because it contained the excepting provision "that it should not apply to agricultural products or live stock while in the hands of the producer or raiser." That was a stronger case than this because there the whole statute was one dealing with economic policy, and was a declaration of mala prohibita that had theretofore been lawful, from which it was strongly argued that the exception was justified in the interest of agriculture, and was a proper exception by permissible classification. Here is a direct invasion of the ordinary business and property rights of a person, unlawful when committed by anyone, and remediable because of its otherwise irreparable character by equitable process, except when committed by ex-employees of the injured person. If this is not a denial of the equal protection of the laws, then it is hard to conceive what would be. To hold it not to be, would be, to use the expression of Mr. Justice Brewer in Gulf, Colorado & Sante Fe Ry. Co. v. Ellis, 165 U. S. 150, 154, to make the guaranty of the equality clause "a rope of sand." * * *

To sustain the distinction here between the ex-employees and other tort-feasors in the matter of remedies against them, it is contended that the legislature may establish a class of such ex-employees for special legislative treatment. In adjusting legislation to the need of the people of a state, the legislature has a wide discretion, and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary, and that questions of proper classification are not free from difficulty. * * *

Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand. Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual. We said through Mr. Justice Brewer, in Muller v. Oregon, 208 U. S. 412, that "It is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking."

It is urged that this court has frequently recognized the special classification of the relations of employees and employers as proper and necessary for the welfare of the community and requiring special treatment. This is undoubtedly true, but those cases, the Second Employers' Liability Cases, 223 U. S. 1; New York Central R. R. Co. v. White, 243 U. S. 188; Hawkins v. Bleakly, 243 U. S. 210; Mountain Timber Co. v. Washington, 243 U. S. 219; Middleton v. Texas Power & Light Co., 249 U. S. 152, and Arizona Employers' Liability Cases, 250 U. S. 400, * * * were cases of the responsibility of the employer for injuries sustained by employees in the course of their employment. The general end of such legislation is that the employer shall become the insurer of the employee against injuries from the employment without regard to the negligence, if any, through which it occurred, leaving to the employer to protect himself by insurance and to compensate himself for the additional cost of production by adding to the prices he charges for his products. It seems a far cry from classification on the basis of the relation of employer and employee in respect of injuries received in course of employment to classification based on the relation of an employer, not to an employee, but to one who has ceased to be so, in respect of torts thereafter committed by such ex-employee on the business and property right of the employer. It is really a little difficult to say, if such classification can be sustained, why special legislative treatment of assaults upon an employer or his employees by ex-employees may not be sustained with equal reason. It is said the state may deal separately with such disputes because such controversies are a frequent and characteristic outgrowth of disputes over terms and conditions of employment. Violence of ex-employees toward present employees is also a characteristic of such disputes. Would this justify a legislature in excepting ex-employees from criminal prosecution for such assaults and leaving the assaulted persons to suits for damages at common law? * * *

The judgment of the Supreme Court of Arizona is reversed and the case remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE HOLMES, dissenting.

The dangers of a delusive exactness in the application of the Fourteenth Amendment have been adverted to before now. Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co., 197 U. S. 430, 434. Delusive exactness is a source of fallacy throughout the law. By calling a business "property" you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed. An established business no doubt may have pecuniary value and commonly is protected by law against various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct and like other conduct is subject to substantial modification according to time and circumstances both in itself and in regard to what shall justify doing it a harm. I cannot understand the notion that it would be unconstitutional to authorize boycotts and the like in aid of the employees' or the employers' interest by statute when the same result has been reached constitutionally without statute by courts with whom I agree. See The Hamilton, 207 U. S. 398, 404. In this case it does not even appear that the business was not created under the laws as they now are. Denny v. Bennett, 128 U. S. 489.

I think further that the selection of the class of employers and employees for special treatment, dealing with both sides alike, is beyond criticism on principles often asserted by this court. And especially I think that without legalizing the conduct complained of the extraordinary relief by injunction may be denied to the class. Legislation may begin where an evil begins. If, as many intelligent people believe, there is more danger that the injunction will be abused in labor cases than elsewhere I can feel no doubt of the power of the legislature to deny it in such cases. I refer to two decisions in which I have stated what I understand to be the law sanctioned by many other decisions. Carroll v. Greenwich Insurance Co., 199 U. S. 401, 411. Quong Wing v. Kirkendall, 223 U. S. 59. * * *

I must add one general consideration. There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect. I agree with the more elaborate expositions of my brothers Pitney and Brandeis and in their conclusion that the judgment should be affirmed.

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE CLARKE, dissenting. * * *

Secondly, it is said that Paragraph 1464, Arizona Civil Code, denies to plaintiffs in error the "equal protection of the laws;" but it seems to me evident that it does not offend in this regard. Examination shows that it does not discriminate against the class to which plaintiffs belong in favor of any other. It applies not only to cases between employers and employees, irrespective of who is plaintiff and who defendant, but to cases between employees, and between persons employed and those seeking employment. And it applies equally to all persons coming within its reach.

It is said that because, under other provisions of the Arizona statute law, plaintiffs would have been entitled to an injunction against such a campaign as that conducted by defendants, had it been in a controversy other than a dispute between employer and former employees—for instance, had competing restaurant-keepers been the offenders—refusal of relief in the particular case by force of Paragraph 1464 is undue favoritism to the class of which defendants are members. But I submit with deference that this is not a matter of which plaintiffs are entitled to complain under the "equal protection" clause. There is no discrimination *as against them*; others situated like them are accorded no greater right to an injunction than is accorded to them. Whatever complaint the competing restaurant-keepers might have, if in the case supposed they were subject to be stopped by an injunction where former employees were not, it would not be a denial of equal protection to plaintiffs. Cases arising under this clause of the Fourteenth Amendment, pre-eminently, call for the application of the settled rule that before one may be heard to oppose state legislation upon the ground of its repugnance to the federal Constitution he must bring himself within the class affected by the alleged unconstitutional feature. * * *

A disregard of the rule in the present case has resulted, as it seems to me, in treating as a discrimination what, so far as plaintiffs are concerned, is no more than a failure to include in the statute a case which in consistency ought, it is said, to have been covered—an omission immaterial to plaintiffs. This is to transform the provision of the Fourteenth Amendment from a guaranty of the "protection of equal laws" into an insistence upon laws complete, perfect, symmetrical.

The guaranty of "equal protection" entitles plaintiffs to treatment not less favorable than that given to others similarly circumstanced. This the present statute gives them. The provision does not entitle them, as against their present opponents under present circumstances, to protection as adequate as they might have against opponents of another class under like circumstances. I find no authority for the proposition that the guaranty was intended to secure equality of protection "not only for all but against all similarly situated," except as between persons who properly belong in the same class. The familiar expression, in Barbier v. Connolly, 113 U. S. 27, 32, "Class legislation, discriminating against some and favoring others," refers to a discrimination which at the same time favors others similarly situated. The same is true of what was said in Hayes v. Missouri, 120 U. S. 68, 71-72, to the effect that the Amendment "merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Other decisions are to the same effect. Nothing in the Arizona statute under consideration, either as written or as construed and applied, operates to discriminate against plaintiffs in favor of others similarly circumstanced and conditioned. Neither class of supposed offenders—those exempt from or those subject to injunction—stands in like case with plaintiffs who seek an injunction.

But, assuming plaintiffs were entitled to assert, as a denial of equal protection, the alleged discrimination arising from a denial of equitable relief in one class of cases which would be granted in another, I am unable to see that the statute creates an arbitrary and unreasonable discrimination in this regard.

It is going far—too far, I submit—to assume that there is any discrimination in fact. Such a campaign as that conducted by defendants, the legislature foresaw, was likely to be resorted to by employees or former employees, in the case of a dispute with the employer concerning terms or conditions of employment. In such a case, for reasons deemed sufficient, the legislature declared there should be no injunction. That such picketing or boycotting ever was conducted in Arizona, or that the legislature had reason to anticipate that it would be undertaken in the future, by competitors in business or any others than participants in a labor dispute, does not appear and cannot be assumed. Without this, the supposed discrimination is but theoretical, not practical. * * *

Mr. Justice Brandeis dissenting. * * *

Nor is a state obliged to protect all property rights by injunction merely because it protects some, even if the attending circumstances are in some respects similar. The restraining power of equity might conceivably be applied to every intended violation of a legal right. On grounds of expediency its application is commonly denied in cases where there is a remedy at law which is deemed legally adequate. But an injunction has been denied on grounds of expediency in many cases where the remedy at law is confessedly not adequate. This occurs whenever a dominant public interest is deemed to require that the preventive remedy, otherwise available for the protection of private rights, be refused and the injured party left to such remedy as courts of law may afford. Thus, courts ordinarily refuse, perhaps in the interest of free speech, to restrain actionable libels. Boston Diatite Co. v. Florence Manufacturing Co., 114 Mass. 69; Prudential Assurance Co. v. Knott, L. R. 10 Ch. App. 142. In the interest of personal liberty they ordinarily refuse to enforce specifically, by mandatory injunction or otherwise, obligations involving personal service. Arthur v. Oakes, 63 Fed. 310, 318; Davis v. Foreman, [1894] 3 Ch. 654, 657; Gossard v. Crosby, 132 Ia. 155, 163, 164. In the desire to preserve the separation of governmental powers they have declined to protect by injunction mere political rights, Giles v. Harris, 189 U. S. 475; and have refused to interfere with the operations of the police department. Davis v. American Society for the Prevention of Cruelty to Animals, 75 N. Y. 362; Delaney v. Flood, 183 N. Y. 323; compare Bisbee v. Arizona Insurance Agency, 14 Ariz. 313. Instances are numerous where protection to property by way of injunction has been refused solely on the ground that serious public inconvenience would result from restraining the act complained of. Such, for example, was the case where a neighboring land-owner sought to restrain a smelter from polluting the air, but that relief, if granted, would have necessitated shutting down the plant, and this would have destroyed the business and impaired the means of livelihood of a large community. There are also numerous instances where the circumstances would, according to general equity practice, have justified the issue of an injunction, but it was refused solely because the right sought to be enforced was created by statute, and the courts, applying a familiar rule, held that the remedy provided by the statute was exclusive.

Such limitations upon the use of the injunction for the protection of private rights have ordinarily been imposed in the interest of the public by the court acting in the exercise of its broad discretion. But, in some instances, the denial of the preventive remedy because of a public interest deemed paramount, has been expressly commanded by statute. Thus, the courts of the United States have been prohibited from staying proceedings in any court of a state, Judicial Code, § 265; and also from enjoining the illegal assessment and collection of taxes, Revised Statutes, § 3224; Snyder v. Marks, 109 U. S. 189; Dodge v. Osborn, 240 U. S. 118. What Congress can do in curtailing the equity power of the federal courts, state legislatures may do in curtailing equity powers of the state courts; unless prevented by the Constitution of the state. In other words, states are free since the adoption of the Fourteenth Amendment, as they were before, either to expand or to contract their equity jurisdiction. The denial of the more adequate equitable remedy for private wrongs is in essence an exercise of the police power, by which, in the interest of the public and in order to preserve the liberty and the property of the great majority of the citizens of a state, rights of property and the liberty of the individual must be remolded, from time to time, to meet the changing needs of society. * * *[12]

LOUISVILLE GAS & ELECTRIC CO. v. COLEMAN, AUDITOR.

1928. Supreme Court of the United States. 277 U. S. 32.

Mr. Justice Sutherland delivered the opinion of the Court.

The plaintiff in error, a Kentucky corporation, executed a deed of trust of property in that State to secure bonds amounting in the aggregate to $150,000,000, of which $18,805,000 were issued, bearing date November 1, 1922, and maturing November 1, 1952. The deed was presented to the clerk of the Jefferson county court for record and payment made of the lawful recording fee required by the state statute, but the clerk refused to record the deed unless plaintiff in error paid to him a tax of 20c on each $100 of the $18,805,000, as required by § 4019a-9 of the Kentucky statutes, Carroll's Edition, 1922, the pertinent portions of which follow:

"A tax of twenty cents (20c) is hereby imposed upon each one hundred dollars ($100.00) or fraction thereof of indebtedness which is, or may be, in any contingency secured by any mortgage of property in this state, which mortgage shall be lodged for record after this act goes into effect where the indebtedness does not mature within five years. * * *

" * * * provided, however, the provisions of this section shall not apply to mortgages executed to building and loan associations."

It is provided by another Kentucky statute that no deed or deed of trust or mortgage shall be valid against a purchaser for a valuable consideration without notice thereof or against creditors until such deed or mortgage shall be lodged for record. Ky. Stats., § 496. In view of this statute, plaintiff in error concluded that it was absolutely necessary to place the deed of trust of record, and thereupon, unwillingly and under protest, paid the amount demanded in addition to the lawful recording fee.

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[12] In the omitted parts of the dissenting opinion of Justice Brandeis there is a learned, compact and exhaustive review of the law governing labor disputes in England, the British Dominions and in the several states of the United States showing the diversities of judicial decisions and statutes, with very full citations.

Subsequently, plaintiff in error brought this action in the proper state court to recover the amount of the tax so paid upon the ground that the quoted provisions of § 4019a-9 were contrary to the Kentucky constitution requiring uniformity of taxes upon all property of the same class, and upon the further ground that these provisions denied the equal protection of the law and deprived plaintiff in error of its property without due process of law in contravention of the Fourteenth Amendment of the federal Constitution. A demurrer to the petition was sustained by the court of first instance and the petition dismissed. Upon appeal to the state court of appeals, the judgment was affirmed, sub nom. Louisville Gas & Electric Co. v. Shanks, Auditor, 213 Ky. 762, upon the authority of Middendorf v. Goodale, 202 Ky. 118.

The state court of appeals, in disposing of the contention that the statute violated the state constitution, held that the tax imposed was not a property tax but a privilege tax, that is, a tax imposed upon the privilege of recording mortgages, etc., the payment of which, it was said, was entirely optional with the owners or holders thereof. This determination of the state court, in so far as it affects the challenge under the state constitution, we accept as conclusive, in accordance with the well-settled rule. Merchants' Bank v. Pennsylvania, 167 U. S. 461, 462. But the state court further held that the statute was not in conflict with the equal protection clause of the Fourteenth Amendment, and this presents a different question calling for our independent consideration and decision.

The contention on behalf of plaintiff in error is that the equal protection clause is contravened by the provisions exempting from the operation of the tax, first, indebtedness which does not mature within five years, and, second, mortgages executed to building and loan associations.

The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, Kentucky Railroad Tax Cases, 115 U. S. 321, 337; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 293, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. County of Santa Clara v. Southern Pac. R. Co., 18 Fed. 385, 388-399; The Railroad Tax Cases, 13 Fed. 722, 733. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U. S. 412, 415; Air-way Corp. v. Day, 266 U. S. 71, 85; Schlesinger v. Wisconsin, 270 U. S. 230, 240. That is to say, mere difference is not enough: the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. Compare Martin v. District of Columbia, 205 U. S. 135, 139; Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, 237.

While, for the purpose of determining whether the statute assailed violates the federal Constitution, we are not bound by the characterization of the tax by the state court, St. Louis Compress Co. v. Arkansas, 260 U. S. 346, 348, the matter is here of little importance. The application of the equal protection clause does not depend upon what name is given to the tax. Whether the tax now in question be called a privilege tax or a property tax, it falls in effect upon one indebtedness and not upon another where the sum of each is the same; where both are incurred by corporations or both by natural persons; where the percentage of interest to be paid is the same; where the mortgage security is identical in all respects; where, in short, the only difference well may be that one is payable in 60 months and the other in 59 months. No doubt the state may take into consideration as an element in fixing the *amount* of the tax the time within which the indebtedness is to be paid; for, since the tax is a flat sum covering the entire life of the lien, the privilege of recording the short-time lien and that of recording the long-time lien have different taxable values. But classification good for one purpose may be bad for another; and it does not follow that because the state may classify for the purpose of proportioning the tax, it may adopt the same classification to the end that some shall bear a burden of taxation from which others under circumstances identical in all respects save in respect of the matter of value, are entirely exempt.

Here it seems clear that a circumstance which affects only taxable values has been made the basis of a classification under which one is compelled to pay a tax for the enjoyment of a necessary privilege which, aside from the amount of the recording fee which is paid by each, is furnished to another as a pure gratuity. Such a classification is arbitrary. It bears no reasonable or just relation to the intended result of the legislation. The difference relied upon is no more substantial, as the sole basis for the present classification, than a difference in value between two similar pieces of land would be if invoked as the sole basis for a like classification in respect of such property. Certainly one who is secured by the state in the priority of his lien for a period less than five years enjoys a privilege which in kind and character fairly cannot be distinguished from a like privilege enjoyed by another for a longer period of time. The former reasonably may be required to pay proportionately less than the latter; but to exact, as the price of a privilege which, for obvious reasons, neither safely can forego, a tax from the latter not imposed in any degree upon the former produces an obvious and gross inequality. If the state, upon the same classification, had reversed the process and taxed indebtedness maturing within a shorter period than five years, and exempted such as matured in a longer period, the inequality probably would be readily conceded, but the constitutional infirmity, though more strikingly apparent, would have been the same.

We are not dealing with a charge made for services rendered or a fee for regulation, but a tax in the strict sense of the term. It is said that it is a tax upon a privilege which the owner or holder of the instrument creating a lien is free to accept or reject. But for practical purposes there is no such option, for, as this Court recently held, there is a practical necessity to record such instruments because, if not recorded, the statute overrides them in favor of purchasers without notice and creditors; and the choice is like one made under duress. "The State is not bound to furnish a registry, but if it sees fit to do so it cannot use its control as a means to impose a liability that it cannot impose directly, any more than it can escape its constitutional obligations by denying jurisdiction to its Courts in cases which those Courts are otherwise competent to entertain. Kenney v. Supreme Lodge of the World, 252 U. S. 411, 415." Federal Land Bank v. Crosland, 261 U. S. 374, 378.

The exemption of building and loan associations from the operation of the tax is a different matter. The equal protection clause of the Fourteenth Amendment does not preclude a state in imposing taxes from making exemptions, provided the power is not exercised arbitrarily. It may exempt the property of churches, charitable institutions, and the like; and it does not admit of fair doubt that, under the circumstances disclosed by the opinion of the court below in the Middendorf case, it has lawfully exempted building and loan associations. That court points out that a building and loan association under the Kentucky statutes must receive payments from members only and make loans to members only, in pursuance of a plan set forth. Money accumulated is to be loaned to members according to a rule of priority. The essential principle of such an association is mutuality. The purpose of the statute, the court below says, was to provide the members of the associations with the means of borrowing money for the acquisition of homes, in recognition of the duty of the state to encourage the acquisition of homes by its citizens. Such associations are also placed by the state statute in a separate class for purposes of *ad valorem* taxation. It is made clear by the lower court that the purpose of the exemption was to enable these associations, by relieving them of a burden, more completely to carry out the quasi-public purpose which the legislature designed in providing for their creation. This exemption, therefore, must be upheld; but, since the effect of the exemption first considered is to deny plaintiff in error the equal protection of the law in violation of the equality provision of the Fourteenth Amendment, the court below erred in sustaining the validity of the tax and affirming the action of the trial court in dismissing the petition.

Judgment reversed.

MR. JUSTICE HOLMES.

When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

There is a plain distinction between large loans secured by negotiable bonds and mortgages that easily escape taxation, and small ones to needy borrowers for which they give their personal note for a short term and a mortgage of their house. I hardly think it would be denied that the large transactions of the money market reasonably may be subjected to a tax from which small ones for private need are exempted. The Legislature of Kentucky after careful consideration has decided that the distinction is clearly marked when the loan is for so long a term as five years. Whatever doubt I may feel, I certainly cannot say that it is wrong. If it is right as to the run of cases a possible exception here and there would not make the law bad. All taxes have to be laid by general rules.

I think that the judgment should be affirmed.

MR. JUSTICE BRANDEIS, MR. JUSTICE SANFORD and MR. JUSTICE STONE concur in this opinion.

MR. JUSTICE BRANDEIS, dissenting. * * *

Classifications based solely on factual differences no greater than that between a loan maturing in 59 months or less and one maturing in 60 months or more, have been sustained in many fields of legislation.[13] In Citizens Telephone Co. v. Fuller, 229 U. S. 322, 329, it was said that in taxation there is a broader power of classification than in some other exercises of legislation. The cases dealing specifically with classification for purpose of taxation on a basis similar to that here employed, are not discussed in the opinion of the Court; and only one of them is cited. It seems desirable to call attention to some of them, as the rule which they declare is embodied in the tax systems of the Nation and of many States.

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[13] A statute which fixed the maximum rate of fare on railroads more than 75 miles long, at 3 cents, but on railroads in all other respects similarly situated, at 5 cents if the line was between 15 and 75 miles long, and at 8 cents if the line was 15 miles or less in length. Dow v. Beidelman, 125 U. S. 680, 690, 691. Compare Chesapeake & Ohio Ry. Co. v. Conley, 230 U. S. 513, 522. A statute which permitted railroads less than 50 miles in length to heat passenger cars by stove or furnace, but denied such permission to lines of 50 miles or more. New York, New Haven & Hartford R. R. Co. v. New York, 165 U. S. 628, 633. A statute which permitted railroads of less than 50 miles in length to be operated without a complete crew, but denied such permission to lines of 50 miles or more. Chicago, Rock Island & Pacific Ry. Co. v. Arkansas, 219 U. S. 453; St. Louis, Iron Mountain and Southern Ry. Co. v. Arkansas, 240 U. S. 518, 520. An inspection law which applied to mines employing 6 or more men, but not to those employing 5 or less. St. Louis Consolidated Coal Co. v. Illinois, 185 U. S. 203, 207. A screen law which applied to mines employing 10 or more men, but not to those employing 9 or less. McLean v. Arkansas, 211 U. S. 539, 551. A statute requiring a washroom at mines where there was a request by 20 employees, but not at mines where by only 19. Booth v. Indiana, 237 U. S. 391, 397. Workmen's compensation laws which apply to employers of 4 or 5 men, but not to employers of less. Jeffrey Manufacturing Co. v. Blagg, 235 U. S. 571, 576; Middleton v. Texas Power & Light Co., 249 U. S. 152, 159; Ward & Gow v. Krinsky, 259 U. S. 503, 516. A fire inspection law which applied to hotels with 50 or more rooms, but not to hotels with 49 or less. Miller v. Strahl, 239 U. S. 426, 434. A law which required the licensing of physicians who during the preceding year had treated 11 or less persons, but not those who had treated 12 or more. Watson v. Maryland, 218 U. S. 173. An ordinance which prohibited the keeping of a private market within 6 squares of a public one but not within 7. Natal v. Louisiana, 139 U. S. 621. A statute which prohibited the herding of sheep within 2 miles of a dwelling house, but not if a yard or more beyond. Bacon v. Walker, 204 U. S. 311. A law which prohibited the establishment of a carbon black factory within 10 miles of an incorporated town, but not if a rod more remote. Walls v. Midland Carbon Co., 254 U. S. 300, 324. A statute permitting, in a suit against a corporation, a change of venue where it had more than 50 stockholders, but not if it had 50 or less. Cincinnati Street Ry. Co. v. Snell, 193 U. S. 30. Statutes exempting from certain requirements banks whose transactions average $500 or more. Engel v. O'Malley, 219 U. S. 128; Dillingham v. McLaughlin, 264 U. S. 370. A tax law providing for the forfeit of tracts of 1,000 acres or more, but which does not provide for forfeiting, under like circumstances, tracts of 999 acres or less. King v. Mullins, 171 U. S. 404, 435. A statute which fixed the number of peremptory challenges to jurors at 8, but allowed 15 in cities having a population of over 100,000 inhabitants. Hayes v. Missouri, 120 U. S. 68. Many other statutes involving the classification of cities according to population, under which a single resident more or less may affect vitally not only the power and duties of the municipality, but the rights and liabilities of persons resident therein. Missouri v. Lewis, 101 U. S. 22; Budd v. New York, 143 U. S. 517, 548; Moeschen v. Tenement House Department, 203 U. S. 583; Northwestern Laundry Co. v. Des Moines, 239 U. S. 486, 495; Marcus Brown Co. v. Feldman, 256 U. S. 170, 198; Packard v. Banton, 264 U. S. 140, 143; Radice v. New York, 264 U. S. 292, 296. Note by Brandeis, J.

In Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 300, 301, the inheritance tax, in the case of strangers to the blood, exempted estates of $500, but did not allow that exemption to larger estates. Moreover, it prescribed progressive rates, rising in steps with the amount of the gift and applying to the entire gift and not merely to the excess. Under the law a legatee of $10,000, being subject to a 3 per cent. tax, would receive net $9,700, whereas a legatee of $10,001, being subject to a 4 per cent. tax on the entire legacy would receive net only $9,600.96. The Court held the classification reasonable, saying:

"The condition is not arbitrary because it is determined by that value [of the inheritance]; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat 'all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them elements of inequality, nevertheless they are universally imposed and their legality has never been questioned."

The Court has likewise sustained a statute which imposed an *ad valorem* tax upon telephone companies with annual earnings of $500 or more, while exempting others similarly situated whose earnings were less than $500, Citizens Telephone Co. v. Fuller, 229 U. S. 322, 329; a statute which imposed a license fee upon "all persons" engaged in the laundry business but exempted concerns employing not more than two women, and steam laundries, Quong Wing v. Kirkendall, 223 U. S. 59, 62; an ordinance under which a $5 tax was laid upon merchants whose gross sales were $1,000, and a tax of $10 upon those similarly situated whose sales were $1,001, Clark v. Titusville, 184 U. S. 329, 331; an ordinance which laid a tax of $1,000 upon theatres whose admission was $1 or more, but only $400 upon those similarly situated whose admission prices were less than $1 and more than 50 cents, Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 69-70.

In the light of these decisions, I should have supposed the validity of the classification made by the Legislature of Kentucky to be clear. * * *

MR. JUSTICE HOLMES and MR. JUSTICE STONE join in this opinion.

CHAPTER VII.

ADMINISTRATIVE BOARDS AND OFFICERS.

Section 1.—Administrative Legislation.

BOARD OF HARBOR COMMISSIONERS v. EXCELSIOR REDWOOD CO.

1891. Supreme Court of California. 88 Cal. 491.

Garoutte, J.—This is an action to recover a penalty of five hundred dollars imposed by the plaintiff upon the defendant, for the violation of certain rules and regulations made by plaintiff.

Section 2568 of the Political Code provides that "the board of harbor commissioners of the port of Eureka are authorized and empowered to make such rules and regulations, and take such action, as may be necessary for the protection of navigation in Humboldt Bay."

Section 2569, subdivision 6, provides: "Impose penalties for violation of such rules and regulations, not exceeding, for any one violation, the sum of five hundred dollars, to be recovered by action."

Section 5 of the rules and regulations made by plaintiff, in pursuance of the above sections of the code, imposes a penalty in the sum of five hundred dollars for the violation of certain of these rules.

We do not believe the plaintiff has the power to impose a penalty as provided in the rule just mentioned.

The imposition of a penalty is in the nature of a *quasi* criminal proceeding, as it only follows from the violation of some law. * * * The board of harbor commissioners is a creature of the statute, and purely an executive body, and the fixing and imposing of penalties are matters of which the legislature alone has cognizance. An act providing that if a person does or does not do a certain thing he shall pay a penalty of five hundred dollars is legislation. And it is a cardinal principle of representative government that the legislature cannot delegate the power to make laws to any other authority or body. (Cooley's Constitutional Limitations, 116, 139.)

Conceding that the legislature could delegate to the plaintiff the authority to make rules and regulations with reference to the navigation of Humboldt Bay, the penalty for the violation of such rules and regulations is a matter purely in the hands of the legislature.

The act of the legislature in fixing the maximum of such penalty is of no avail; the vice of the whole matter is in not itself fixing the penalty, and in delegating such legislative power to the plaintiff. * * *[1]

J. W. HAMPTON, JR., & COMPANY v. UNITED STATES.

1928. Supreme Court of the United States. 276 U. S. 394.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

J. W. Hampton, Jr., & Company made an importation into New York of barium dioxide, which the collector of customs assessed at the dutiable rate of six cents per pound. This was two cents per pound more than that fixed by statute, par. 12, ch. 356, 42 Stat. 858, 860. The rate was raised by the collector by virtue of the proclamation of the President, 45 Treas. Dec. 669, T. D. 40216, issued under, and by authority of, § 315 of Title III of the Tariff Act of September 21, 1922, ch. 356, 42 Stat. 858, 941, which is the so-called flexible tariff provision. Protest was made and an appeal was taken under § 514, Part 3, Title IV, ch. 356, 42 Stat. 969-70. The case came on for hearing before the United States Customs Court, 49 Treas. Dec. 593. A majority held the Act constitutional. Thereafter the case was appealed to the United States Court of Customs Appeals. On the 16th day of October, 1926, the Attorney General certified that in his opinion the case was of such importance as to render expedient its review by this Court. Thereafter the judgment of the United States Customs Court was affirmed. 14 Ct. Cust. App. 350. On a petition to this Court for certiorari, filed May 10, 1927, the writ was granted, 274 U. S. 735. The pertinent parts of § 315 of Title III of the Tariff Act, ch. 356, 42 Stat. 858, 941, U. S. C., Tit. 19, §§ 154, 156, are as follows:

"Section 315(a). That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations, such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): Provided, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

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[1] Accord: Davis v. State (1916) 126 Ark. 260, 190 S. W. 436.

"(c). That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

"Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

"The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified."

The President issued his proclamation May 19, 1924. After reciting part of the foregoing from § 315, the proclamation continued as follows:

"Whereas, under and by virtue of said section of said act, the United States Tariff Commission has made an investigation to assist the President in ascertaining the differences in costs of production of and of all other facts and conditions enumerated in said section with respect to * * * barium dioxide, * * *

"Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence, and to be heard;

"And whereas the President upon said investigation * * * has thereby found that the principal competing country is Germany, and that the duty fixed in said title and act does not equalize the differences in costs of production in the United States and in * * * Germany, and has ascertained and determined the increased rate of duty necessary to equalize the same.

"Now, therefore, I, Calvin Coolidge, President of the United States of America, do hereby determine and proclaim that the increase in the rate of duty provided in said act shown by said ascertained differences in said costs of production necessary to equalize the same is as follows:

" 'An increase in said duty on barium dioxide (within the limit of total increase provided for in said act) from 4 cents per pound to 6 cents per pound.

" 'In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

" 'Done at the City of Washington this nineteenth day of May in the year of our Lord one thousand nine hundred and twenty-four, and of the Independence of the United States of America the one hundred and forty-eighth.

" 'CALVIN COOLIDGE.' "

" 'By the President: Charles E. Hughes, Secretary of State.' "

The issue here is as to the constitutionality of § 315, upon which depends the authority for the proclamation of the President and for two of the six cents per pound duty collected from the petitioner. The contention of the taxpayers is two-fold—first, they argue that the section is invalid in that it is a delegation to the President of the legislative power, which by Article I, § 1 of the Constitution, is vested in Congress, the power being that declared in § 8 of Article I, that the Congress shall have power to lay and collect taxes, duties, imposts and excises. The second objection is that, as § 315 was enacted with the avowed intent and for the purpose of protecting the industries of the United States, it is invalid because the Constitution gives power to lay such taxes only for revenue.

First. It seems clear what Congress intended by § 315. Its plan was to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States, so that the duties not only secure revenue but at the same time enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States. It may be that it is difficult to fix with exactness this difference, but the difference which is sought in the statute is perfectly clear and perfectly intelligible. Because of the difficulty in practically determining what that difference is, Congress seems to have doubted that the information in its possession was such as to enable it to make the adjustment accurately, and also to have apprehended that with changing conditions the difference might vary in such a way that some readjustments would be necessary to give effect to the principle on which the statute proceeds. To avoid such difficulties, Congress adopted in § 315 the method of describing with clearness what its policy and plan was and then authorizing a member of the executive branch to carry out this policy and plan, and to find the changing difference from time to time, and to make the adjustments necessary to conform the duties to the standard underlying that policy and plan. As it was a matter of great importance, it concluded to give by statute to the President, the chief of the executive branch, the function of determining the difference as it might vary. He was provided with a body of investigators who were to assist him in obtaining needed data and ascertaining the facts justifying readjustments. There was no specific provision by which action by the President might be invoked under this Act, but it was presumed that the President would through this body of advisers keep himself advised of the necessity for investigation or change, and then would proceed to pursue his duties under the Act and reach such conclusion as he might find justified by the investigation, and proclaim the same if necessary.

The Tariff Commission does not itself fix duties, but before the President reaches a conclusion on the subject of investigation, the Tariff Commission must make an investigation and in doing so must give notice to all parties interested and an opportunity to adduce evidence and to be heard.

The well-known maxim *"Delegata potestas non potest delegari,"* applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private law. The Federal Constitution and State Constitutions of this country divide the governmental power into three branches. The first is the legislative, the second is the executive, and the third is the judicial, and the rule is that in the actual administration of the government

Congress or the Legislature should exercise the legislative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.

The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations. United States v. Grimaud, 220 U. S. 506, 518; Union Bridge Co. v. United States, 204 U. S. 364; Buttfield v. Stranahan, 192 U. S. 470; In re Kollock, 165 U. S. 526; Oceanic Navigation Co. v. Stranahan, 214 U. S. 320.

Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be effected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district. As Judge Ranney of the Ohio Supreme Court in Cincinnati, Wilmington and Zanesville Railroad Co. v. Commissioners, 1 Ohio St. 77, 88, said in such a case:

"The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

See also Moers v. Reading, 21 Penn. St. 188, 202; Locke's Appeal, 72 Penn. St. 491, 498.

Again, one of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a Commission, to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down, that rates shall be just and reasonable considering the service given, and not discriminatory. As said by this Court in Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 214, "The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."

The principle upon which such a power is upheld in state legislation as to fixing railway rates is admirably stated by Judge Mitchell, in the case of State v. Chicago, Milwaukee & St. Paul Railway Company, 38 Minn. 281, 298 to 302. The learned Judge says on page 301:

"If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject, and who, after investigation of the facts, can fix rates with reference to the peculiar circumstances of each road, and each particular kind of business, and who can change or modify these rates to suit the ever-varying conditions of traffic. * * * Our legislature has gone a step further than most others, and vested our commission with full power to determine what rates are equal and reasonable in each particular case. Whether this was wise or not is not for us to say; but in doing so we can not see that they have transcended their constitutional authority. They have not delegated to the commission any authority or discretion as to what the law shall be,—which would not be allowable,—but have merely conferred upon it an authority and discretion, to be exercised in the execution of the law, and under and in pursuance of it, which is entirely permissible. The legislature itself has passed upon the expediency of the law, and what it shall be. The commission is intrusted with no authority or discretion upon these questions." See also the language of Justices Miller and Bradley in the same case in this Court. 134 U. S. 418, 459, 461, 464.

It is conceded by counsel that Congress may use executive officers in the application and enforcement of a policy declared in law by

Congress, and authorize such officers in the application of the Congressional declaration to enforce it by regulation equivalent to law. But it is said that this never has been permitted to be done where Congress has exercised the power to levy taxes and fix customs duties. The authorities make no such distinction. The same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise. If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under Congressional authority. This conclusion is amply sustained by a case in which there was no advisory commission furnished the President—a case to which this Court gave the fullest consideration nearly forty years ago. In Field v. Clark, 143 U. S. 649, 680, the third section of the Act of October 1, 1890, contained this provision:

"That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever, and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea and hides, the product of or exported from such designated country as follows, namely:"

Then followed certain rates of duty to be imposed. It was contended that this section delegated to the President both legislative and treaty-making powers and was unconstitutional. After an examination of all the authorities, the Court said that while Congress could not delegate legislative power to the President, this Act did not in any real sense invest the President with the power of legislation, because nothing involving the expediency or just operation of such legislation was left to the determination of the President;[2] that the legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was merely in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. * * * The judgment of the Court of Customs Appeals is affirmed.[3]

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[2] In the cited case Fuller, C. J. and Lamar, J., dissented from the view above expressed, saying: "But the purpose and effect of the section now under consideration are radically different. It does not, as was provided in the statutes of 1809 and 1810 [sustained in Cargo of Brig Aurora v. United States (1813) 7 Cranch 382, 3 L. ed. 378] entrust the President with the ascertainment of a fact therein defined upon which the law is to go into operation. It goes farther than that, and deputes to the President the power to suspend another section in the same act whenever 'he may deem' the action of any foreign nation producing and exporting the articles named in that section to be 'reciprocally unequal and unreasonable;' and it further deputes to him the power to continue that suspension and to impose revenue duties on the articles named 'for such time as he may deem just.' This certainly extends to the executive the exercise of those discretionary powers which the Constitution has vested in the law-making department. It unquestionably vests in the President the power to regulate our commerce with all foreign nations which produce sugar, tea, coffee, molasses, hides or any of such articles; and to impose revenue duties upon them for a length of time limited solely by his discretion, whenever he deems the revenue system or policy of any nation in which those articles are produced reciprocally unequal and unreasonable, in its operation upon the products of this country."

The statutes sustained in Cargo of Brig Aurora v. United States, 7 Cranch 382, 3 L. ed. 378, enacted during the war between Great Britain and France, prescribed restrictions upon importation into the United States of the products of Great Britain and France, provided however that the restrictions should not go into effect against the products of either country should it before a named date so revoke or modify its edicts "as that they shall cease to violate the neutral commerce of the United States, which fact the President of the United States shall declare by proclamation."

[3] An act of Congress is valid which while not making it the duty of the Secretary of Labor to order the deportation of every alien who has violated specifically designated statutes of the United States permits him to exercise discrimination by deporting any individual of this class whom he finds to be an "undesirable resident of the United States." Mahler v. Eby (1924) 264 U. S. 32, 68 L. ed. 549. The court said: "Congress can not exercise it [the power to expel aliens] effectively save through the executive. It can not, in the nature of things, designate all the persons to be excluded. It must accomplish its purpose by classification and by conferring power of selection within classes upon an executive agency. Tiaco v. Forbes, 228 U. S. 549, 557. That is what it has done here. It has established classes of persons who in its judgment constitute an eligible list for deportation, of whom the Secretary is directed to deport those he finds to be undesirable residents of this country. With the background of a declared policy of Congress to exclude aliens classified in great detail by their undesirable qualities in the Immigration Act of 1917, and in previous legislation of a similar character, we think the expression 'undesirable residents of the United States' is sufficiently definite to make the delegation quite within the power of Congress. As far back as 1802 the naturalization statute of that year, c. 28, 2 Stat. 153, prescribed that no alien should be naturalized who did not appear to the court to have behaved during his residence in this country 'as a man of good moral character, attached to the Constitution of the United States, and well disposed to the good order and happiness of the same.' Our history has

BUTTFIELD v. STRANAHAN.

1904. Supreme Court of the United States. 192 U. S. 470.

[Appeal from a judgment for the defendant in an action in a circuit court of the United States by an importer against the collector of the port of New York for the latter's refusal to admit a shipment of tea. The refusal was based upon a finding that the tea was inferior to standards fixed in accordance with the Act of Congress of March 2, 1897, 29 Stat. 604. The Act prohibited importation into the United States of any tea "which is inferior in purity, quality and fitness for consumption to the standards" adopted in accordance with Section 3. That section provided that the Secretary of the Treasury, upon the recommendation of seven tea experts, should fix "standards of purity, quality and fitness for consumption." The plaintiff's tea was rejected because inferior to a standard of "quality," prescribed by the Secretary, this having been interpreted to mean "cup quality," that is, "taste and flavor."]

MR. JUSTICE WHITE delivered the opinion of the court. * * *

As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution. * * *

The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. The case is within the principle of

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created a common understanding of the words 'undesirable residents' which gives them the quality of a recognized standard.

"We do not think that the discretion vested in the Secretary under such circumstances is any more vague or uncertain or any less defined than that exercised in deciding whether aliens are likely to become a public charge, a discretion vested in the immigration executives for half a century and never questioned." See Intermountain Rate Cases (United States v. Atchison, T., &c., R. Co.,) (1914) 234 U. S. 476, 58 L. ed. 1408, for vaguer groping through a statute and its history for a standard limiting a grant of apparently unlimited discretion.

Field v. Clark, 143 U. S. 649, where it was decided that the third section of the tariff act of October 1, 1890, was not repugnant to the Constitution as conferring legislative and treaty-making power on the President, because it authorized him to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea and hides. We may say of the legislation in this case, as was said of the legislation considered in Field v. Clark, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

Whether or not the Secretary of the Treasury failed to carry into effect the expressed purpose of Congress and establish standards which operated to exclude teas which would have been entitled to admission had proper standards been adopted, is a question we are not called upon to consider. The sufficiency of the standards adopted by the Secretary of the Treasury was committed to his judgment, to be honestly exercised, and if that were important there is no assertion here of bad faith or malice on the part of that officer in fixing the standards, or on the part of the defendant in the performance of the duties resting on him. * * *

Affirmed.[4]

UNITED STATES v. GRIMAUD.

1911. Supreme Court of the United States. 220 U. S. 506.

[Acting upon the authority of the statutes referred to in the opinion, the Secretary of Agriculture, in 1906, promulgated a body of rules to regulate the use and occupancy of the federal forest reservations, among them Regulation 45, "All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers and travelers and milch or work animals, not exceeding a total of six head, owned by bona fide settlers residing in or near a forest reserve."]

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[4] Sustaining the Indiana pure food statute which delegated to the state board of health the making of "rules and ordinances where and when necessary regulating minimum standards of foods and drugs, defining specific adulterations * * *," the court said: "The obvious purpose of the provision last quoted was to commit to a body of learned and scientific experts the duty of preparing such rules, and prescribing such tests as may from time to time, in the enforcement of the law, be found necessary in determining what combination of substances are injurious to health, and to what extent, if at all, admixtures, or deteriorations of foods and drugs, may go, without injuriously affecting the health of the consumer. That which is required of the State Board of Health has no semblance to legislation. It merely relates to a procedure in the law's execution for a reliable and uniform ascertainment of the subjects upon which the law is intended to operate."—Isenhour v. State (1901) 157 Ind. 517, 521-522, 62 N. E. 40, 87 Am. St. 228.

Mr. Justice Lamar delivered the opinion of the court.

The defendants were indicted for grazing sheep on the Sierra Forest Reserve without having obtained the permission required by the regulations adopted by the Secretary of Agriculture. They demurred on the ground that the Forest Reserve Act of 1891 was unconstitutional, in so far as it delegated to the Secretary of Agriculture power to make rules and regulations and made a violation thereof a penal offense. Their several demurrers were sustained. The Government brought the case here under that clause of the Criminal Appeals Act (March 2, 1907, c. 2564, 34 Stat. 1246) which allows a writ of error where the "decision complained of was based upon the invalidity of the statute."

The federal courts have been divided on the question as to whether violations of those regulations of the Secretary of Agriculture constitute a crime. * * *

From the various acts relating to the establishment and management of forest reservations it appears that they were intended "to improve and protect the forest and to secure favorable conditions of water flows." It was declared that the acts should not be "construed to prohibit the egress and ingress of actual settlers" residing therein nor "to prohibit any person from entering the reservation for all proper and lawful purposes, including that of prospecting, and locating and developing mineral resources; provided that such persons comply with the rules and regulations covering such forest reservation." (Act of 1897, c. 2, 30 Stat. 36.) It was also declared that the Secretary "may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; *and any violation of the provisions of this act or such rules and regulations shall be punished"* as is provided in § 5388, c. 3, p. 1044 of the Revised Statutes, as amended.

Under these acts, therefore, any use of the reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. To pasture sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute. The determination of such questions, however, was a matter of administrative detail. What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another.

In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. * * *

It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations. This difficulty has often been recognized, and was referred to by Chief Justice Marshall in Wayman v. Southard, 10 Wheat. 1, 42, where he was considering the authority of courts to make rules. He there said: "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself." What were these non-legislative powers which Congress *could* exercise but which might also be delegated to others was not determined, for he said: "The line has not been exactly drawn which separates those important subjects, which *must* be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." * * *

In Brodbine v. Revere, 182 Massachusetts, 598, a boulevard and park board was given authority to make rules and regulations for the control and government of the roadways under its care. It was there held that the provision in the act that breaches of the rules thus made should be breaches of the peace, punishable in any court having jurisdiction, was not a delegation of legislative power which was unconstitutional. The court called attention to the fact that the punishment was not fixed by the board, saying that the making of the rules was administrative, while the substantive legislation was in the statute which provided that they should be punished as breaches of the peace. * * *

It is true that there is no act of Congress which, in express terms, declares that it shall be unlawful to graze sheep on a forest reserve. But the statutes, from which we have quoted, declare, that the privilege of using reserves for "all proper and lawful purposes" is subject to the proviso that the person so using them shall comply "with the rules and regulations covering such forest reservation." The same act makes it an offense to violate those regulations, that is, to use them otherwise than in accordance with the rules established by the Secretary. Thus the implied license under which the United

States had suffered its public domain to be used as a pasture for sheep and cattle, mentioned in Buford v. Houtz, 133 U. S. 326, was curtailed and qualified by Congress, to the extent that such privilege should not be exercised in contravention of the rules and regulations. Wilcox v. Jackson, 13 Pet. 498, 513.

If, after the passage of the act and the promulgation of the rule, the defendants drove and grazed their sheep upon the reserve, in violation of the regulations, they were making an unlawful use of the Government's property. In doing so they thereby made themselves liable to the penalty imposed by Congress. * * *

The Secretary of Agriculture could not make rules and regulations for any and every purpose. Williamson v. United States, 207 U. S. 462. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized "to regulate the occupancy and use and to preserve the forests from destruction." A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty. * * *

Reversed.[5]

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[5] Compare Port Royal Mining Co. v. Hagood (1889) 30 S. Car. 519, 9 S. E. 686, 3 L. R. A. 841, where a state statute gave the state board of agriculture power to grant or refuse licenses to mine for phosphate rock in land belonging to the state, "as the said board may, in its discretion, deem best for the interests of the state."

"A liberality of delegation of power which is appropriate in regulating the use of the government's own resources may be inappropriate in regulating private rights. This rather obvious fact should invite caution in using such a case as that of United States v. Grimaud (220 U. S. 506), a case relating to the public lands, as an authority of general validity. The relevancy of this distinction does not seem always to have been borne in mind."—Freund, Administrative Powers over Persons and Property (1928) p. 213.

And see Vail v. Seaborg (1922) 120 Wash. 126, 207 Pac. 15. A delegation of extensive power to a state fisheries board to make regulations of fishing in the public waters of the state was there sustained. The statute declared prior statutes which contained regulations of fishing to be "repealed as statutes" but "to remain in force as the rules and regulations of the state fisheries board, until such time as they or any of them are amended, modified, or revoked by the state fisheries board." In a separate concurring opinion Holcomb, J., said: "I concur in the result solely upon the ground which I wish to make clear and positive, and which is all-sufficient, that the legislation in question is not of the character of that involved in Spokane Hotel Co. v. Younger, 113 Wash. 359, 194 Pac. 595, but is merely regulation of dealing with property belonging wholly to the people of the state. The details of such regulations are merely committed to administrative officers. Otherwise such delegation of powers could never be logically and constitutionally sustained."

DOWLING v. LANCASHIRE INSURANCE CO.

1896. Supreme Court of Wisconsin. 92 Wis. 63.

Pinney, J.—1. The action is upon a "Wisconsin standard policy of fire insurance," prepared, approved, and adopted by the insurance commissioner under ch. 195, Laws of 1891, which contains the condition that the policy shall be void "if the subject of insurance be personal property and be or become incumbered by a chattel mortgage," and also the stipulation that "no officer, agent, or other representative of the company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto." The only waiver relied on in respect to the chattel mortgage to Ann Dowling was by parol, and the question was whether, under such policy and the act under which it was adopted, such waiver was ineffectual, so that by the breach of the condition in relation to chattel mortgages the policy was rendered void. The circuit court having ruled that the parol waiver relied on was valid, the plaintiffs obtained a verdict; and it is contended in support of it that ch. 195, Laws of 1891, is unconstitutional and void, as a delegation to the insurance commissioner of legislative power, which the constitution (art. IV, sec. 1) declares "shall be vested in a senate and assembly," and that such parol waiver was effectual and valid under the law as it existed before the passage of said act. * * *

In considering the true test as to whether a power is strictly legislative, or whether it is administrative and merely relates to the execution of the law, Ranney, J., in Cincinnati, W. & Z. R. Co. v. Clinton Co. Comm'rs, 1 Ohio St. 88, said: "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." * * *

The application of the distinction so well established and clearly pointed out in these cases is, we think, decisive of the validity of the act in question. Its object was to provide for a uniform policy of fire insurance, to be made and issued by all companies taking such risks, so that no other than the standard policy, prepared, approved, and adopted by the insurance commissioner, could be lawfully issued or used within the state. Indeed, to issue or deliver any other than the standard policy was made a misdemeanor and punishable by a fine. Bourgeois v. N. W. Nat. Ins. Co., 86 Wis. 609. Although the act provided for "a printed *form* in blank of a contract or policy of fire insurance, together with such provisions," etc., it provides also that they were to form a part of such contract or policy, so that the essential substance of the contract required to be embraced in such form should have the sanction, force, and effect of a legal enactment; and, as applicable to the present case, the stipulations of such policy would operate, under the act, to change the law as it had previously existed in relation to parol waiver of forfeitures by the conditions of fire insurance policies. The act, in our judgment, wholly fails to provide definitely and clearly what the standard policy should contain, so that it could be put in use as a uniform policy required to take the place of all others, without the determination of the insurance commissioner in respect to matters involving the exercise of a legislative discretion that could not be delegated, and without which the act could not possibly be put in use as an act in conformity to which all fire insurance policies were required to be issued. Giving full effect to all the language of the act, as we must do, it provides that the insurance commissioner shall, within sixty days of the passage of this act, "prepare, approve, and adopt a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements or conditions as may be indorsed thereon or added thereto and form a part of such contract or policy; and such form shall, as near as the same can be made applicable, conform to the type and form of the New York standard fire insurance policy, so called and known; provided, however, that five days' notice of cancellation by the company shall be given, and provided, that proof of loss shall be made within sixty days after a fire." The insurance commissioner was authorized to call upon the attorney general "for such assistance as shall seem necessary in the preparation" of such policy, and it was the duty of the attorney general to perform such service. * * *

It was impossible to adopt the New York standard policy without repealing certain statutes of this state on the subject of fire insurance, directly contravening the provisions of such policy, viz., the valued policy law and the insurance agency law. R. S. secs. 1943, 1947. The act did not contain any repealing clause, but its evident intention was that the various statutory provisions existing upon the subject of cancellation of policies, and under the by-laws, rules, and regulations of companies made pursuant to their charters, and in respect to proof of loss, should be repealed; for it was provided that five days' notice of cancellation should be given, and proof of loss should be furnished within sixty days after the fire. The New York standard policy provides that proof of loss shall be furnished within sixty days after the fire, "unless such time is extended in writing by the company,"—a provision omitted from the Wisconsin policy, as approved and adopted, as well as the provision of the New

York policy that "no suit or action on this policy shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, or unless commenced within twelve months next after the fire," to avoid, it is said, conflict with secs. 4219, 4222, R. S., of the general statutes of limitation.

As the legislature could not, for reasons thus indicated, adopt the New York standard policy, the power was so delegated by the act to the insurance commissioner, to prepare, approve, and adopt a printed form in blank of a contract or policy of fire insurance, etc., which would, "*as near as the same can be made applicable,* conform to the type and form of the New York standard fire insurance policy." The result was that, until the discretion vested in the commissioner could be exercised and such form was so approved and adopted, no business of insurance could be transacted under the act. Until then the act was ineffectual, for want of certainty. Evidently, the conformity to "type and form" of the New York standard policy had reference to the form of that policy as embracing the substance of the provisions of the contract, and as to the size and kind of type to be used in printing the policy to be adopted. Had the commissioner wholly declined to prepare, approve, and adopt any form whatever, it would not have been possible to have carried into effect so imperfect or uncertain an enactment, or to transact business under it. Within the lines indicated, a discretion was reposed in the commissioner as to the form of the policy which embodied the substance of the contract, and which was to have the sanction and force of law. The effect, clearly, was to transfer to him bodily the legislative power of the state on that subject. Within the limits prescribed, he was to prepare just such a policy or contract as, in his judgment and discretion, would meet the *legal* exigencies of the case, and no one could certainly predict what the result of his action might be. It was not to be published, as laws are required to be, or to be approved by the governor. It was to be filed in the office of the insurance commissioner, instead of being deposited in the office of the secretary of state, and its use was to be enforced by the penal sanction of the act. He was not required by the act to perform any mere administrative or executive duty, or to determine any matter of fact for the purpose of executing or carrying the act into effect.

The result of all the cases on this subject is that a law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointee or delegate of the legislature, so that, in form and substance, it is a law in all its details *in praesenti,* but which may be left to take effect *in futuro,* if necessary, upon the ascertainment of any prescribed fact or event. Instead of preparing a form of standard policy and adjusting it to the existing legislation, or modifying such legislation, if necessary, by virtue of its constitutional functions, the legislature delivered over this task wholly to the insurance commissioner, to accomplish it as nearly as might be; and this depended wholly upon his discretion and judgment as to what the law should be in this respect, for the act had not specifically declared it. Conceding that the legislature might have adopted the New York form as an entirety by the use of general language, it is evident that the proposed form, to conform "as near as can be to the form adopted in New York," involved a duty equivalent to that of revision, which it cannot be contended could be delegated, except subject to legislative approval. While the commissioner, within the discretion intrusted to him, might have approximated in a great degree to the policy which the legislature may have intended, the objection, in view of the consideration stated, that it has not received the legislative sanction, is necessarily fatal to it. * * *

By the Court.—The judgment of the circuit court is affirmed.[6]

Section 2.—Administrative Licensing.

YICK WO v. HOPKINS, SHERIFF.

1886. Supreme Court of the United States. 118 U. S. 356.

[The city and county of San Francisco enacted an ordinance as follows: "It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." Violation of the ordinance was made a misdemeanor punishable by fine or imprisonment. Yick Wo was convicted thereunder and committed for non-payment of a fine imposed. He applied to the Supreme Court of California for a writ of habeas corpus, contending that he was being held in violation of the equal protection clause of the Fourteenth Amendment. The following allegations of fact were admitted: that Yick Wo was an alien of Chinese descent; that he had conducted a laundry in the same building for 22 years; that he had applied for and had been refused a renewal of his license; that his building had been inspected by the fire warden and approved; that his laundry had been inspected by the sanitary inspectors and approved; that of the 320 laundries in the city 240 were owned by Chinese aliens and that 310 were constructed of wood, as was Yick Wo's; that 200 Chinese who had applied for laundry licenses had been denied them, while all applications by persons who were not Chinese had been granted, with a single exception. The Supreme Court of California denied the petition and this writ of error was taken. Wo Lee, another Chinese alien, convicted upon like facts, petitioned a Circuit Court of the United States for a writ of habeas corpus. The petition was denied and his appeal to the United States Supreme Court was considered along with Yick Wo's writ of error.]

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[6] Accord: O'Neil v. American Fire Ins. Co. (1895) 166 Pa. 72, 30 Atl. 943; Anderson v. Manchester Fire Assur. Co. (1895) 59 Minn. 182, 194-195, 60 N. W. 1095, 63 N. W. 241, where the court said: "There was no reason why the legislature could not pass this act as well as the commissioner. There may be necessity for police regulation in the insurance business, for the protection of the insured and the insurer; and the regulation of many matters of detail, exceptional matters, and matters which cannot well be regulated by the general provisions of law, may perhaps be delegated to such a commissioner. But this is not such a matter. There is no necessity for changing from time to time, between legislative sessions, the provisions which should be put in such a standard form, so as to meet changing conditions. See State v. Chicago M. & St. P. Ry. Co., 38 Minn. 301, (37 N. W. 782,) and no such power was given to the Commissioner. He was to prepare and adopt a standard form, once for all, and, when so adopted, it was to remain irrevocable until changed by subsequent legislation."

MR. JUSTICE MATTHEWS delivered the opinion of the court. * * *

The ordinance drawn in question in the present case * * * does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.

The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China. * * *

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, or color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws. * * *

It is contended on the part of the petitioners, that the ordinances for violations of which they are severally sentenced to imprisonment, are void on their face, as being within the prohibitions of the Fourteenth Amendment; and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances—an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth "may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. * * *

In the case of the City of Baltimore v. Radecke, 49 Maryland, 217 * * * the defendant had erected and used a steam engine, in the prosecution of his business as a carpenter and box-maker in the city of Baltimore, under a permit from the mayor and city council, which contained a condition that the engine was "to be removed after six months' notice to that effect from the mayor." After such notice and refusal to conform to it, a suit was instituted to recover the penalty provided by the ordinance, to restrain the prosecution of which a bill in equity was filed. The court * * * proceeds to speak, with regard to the ordinance in question, in relation to the use of steam engines, as follows: "It does not profess to prescribe *regulations* for their construction, location, or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box factories and other similar establishments within certain defined limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the city of Baltimore, to cease to do so, and, by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no *rules* by which its *impartial execution* can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others, from whom they are withheld, may be actually benefited by what is thus done to their neighbors; and, when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being brought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the *domain of law,* and we are constrained to pronounce it inoperative and void."

This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. * * *

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged.[1]

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[1] "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Sunday Lake Iron Co. v. Wakefield (1918) 247 U. S. 350, 62 L. ed. 1154.

"The state board of equalization is one of the instrumentalities provided by the state for the purpose of raising the public revenue by way of taxation. * * * Acting under the constitution and laws of the state, the board therefore represents the state, and its action is the action of the state. The provisions of the Fourteenth Amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that, whoever by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of

PEOPLE EX REL. LIEBERMAN v. VAN DE CARR.

1905. Supreme Court of the United States. 199 U. S. 552.

MR. JUSTICE DAY delivered the opinion of the court.

Simon Lieberman was arrested and held for trial by a magistrate of the city of New York, charged with violating section 66 of the sanitary code of New York City. After being committed to the custody of the warden of the city prison, plaintiff in error sued out a writ of *habeas corpus.*

At the hearing before a justice of the Supreme Court at special term the writ was dismissed and the prisoner remanded to the custody of the warden. Upon appeal to the Appellate Division of the Supreme Court the order of the special term was affirmed. This judgment was affirmed by the Court of Appeals of the State of New York, 175 N. Y. 440, and the case remitted to the Supreme Court, where judgment was entered on the remittitur. The case was then brought here by writ of error.

The section of the sanitary code complained of is as follows:

"Sec. 66. No milk shall be received, held, kept, either for sale or delivered in the city of New York, without a permit in writing from the board of health, and subject to the conditions thereof."

The violation of the sanitary code is made a misdemeanor. That the board of health had power to pass the sanitary code, which includes this section, is not open to question here, as it has been affirmatively decided in the state court. The objections on federal grounds for our consideration are twofold; first, that the section under consideration devolves upon the board of health absolute and despotic power to grant or withhold permits to milk dealers, and is, therefore, not due process of law; second, that singling out the milk business for regulation is a denial of the equal protection of the laws to people engaged therein.

The record discloses that the plaintiff in error, engaged in selling milk in the city of New York before his arrest, had a permit, which was revoked by the board of health. He was thereafter found engaged through an agent in selling milk without a permit. In the testimony it appears in a conversation between the plaintiff in error and an inspector in the department of health, the latter admitted that Lieberman's milk "stood well." * * *

The contention of counsel for appellant is not that a business so directly affecting the health of the inhabitants of the city as the furnishing of milk may not be the subject of regulation under the

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the state and for the state, and is clothed with the state's powers, his act is that of the state." Peckham, J., in Raymond v. Chicago Union Traction Co. (1907) 207 U. S. 20, 35-36, 52 L. ed. 78. And consider the doctrine of Home Tel. & T. Co. v. City of Los Angeles, 227 U. S. 278, 57 L. ed. 510, ante, p. 550.

authority of the state, but that the Court of Appeals of New York has sustained this right of regulation to the extent of authorizing the board of health to exercise arbitrary power in the selection of those it may see fit to permit to sell milk under the section quoted; and thus construed it works the deprivation of the plaintiff in error's liberty and property without due process of law. We do not so understand the decision of the highest court of New York. * * * It leaves no doubt that it sustained the statute as authorizing the exercise of a reasonable discretion While that court held that the discretion to grant or withhold permits might be vested in a board of health with opportunities to know and investigate local conditions and surroundings, it further said: * * *

"In the argument of this case several questions have been discussed that are not presented by the appeal. It is, for instance, argued that even conceding a permit to be necessary, the provision that the holder is to be 'subject to the conditions thereof,' cannot be sustained for a variety of reasons suggested.

"It is a complete answer that the form of the permit is not in the record; it does not appear that it has, attached to it, conditions reasonable or otherwise. We consequently express no opinion on the subject.

"What we have already said applies with equal force to the argument that the permit might be loaded with conditions, the nature of which is not limited or stated; that it may be used to build up monopoly, to help a favored few as opposed to the many; that there is no other statute which presents such possibilities for blackmail and oppression. These and many other like criticisms are indulged in by appellant.

"If the question was before us, the well-settled canon of construction permits of no such argument.

"It is presumed that public officials will discharge their duties honestly and in accordance with the rules of law."

We do not think that this language leaves any question as to disposition of the highest court of New York to prevent the oppression of the citizen, or the deprivation of his rights, by an arbitrary and oppressive exercise of the power conferred. That this court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of its people there can be no doubt. In Davis v. Massachusetts 167 U. S. 43, an ordinance of the city of Boston providing that no person shall make any public address in or upon the public grounds, except in accordance with a permit from the mayor, was held not in conflict with the Fourteenth Amendment to the Constitution of the United States. In

Wilson v. Eureka City, 173 U. S. 32, an ordinance requiring persons to obtain written permission from the mayor or president of the city council, or in their absence a councilor, before moving a building upon any of the public streets of the city, was sustained as not violative of the federal Constitution. In the opinion of the court a number of instances were given in which acts were prohibited except with the consent of an administrative board, and which were sustained as proper exercises of the police power. In Gundling v. Chicago, 177 U. S. 183, an ordinance was sustained permitting the mayor to license persons to deal in cigarettes when he was satisfied that the person applying for the license was of good character and reputation and a suitable person to be intrusted with their sale. And in the recent case of Jacobson v. Massachusetts, 197 U. S. 11, this court sustained a compulsory vaccination law which delegated to the boards of health of cities or towns the determination of the necessity of requiring the inhabitants to submit to compulsory vaccination. And in Fischer v. St. Louis, 194 U. S. 361, an ordinance of the city of St. Louis providing that no dairy or cow stable should thereafter be built or established within the limits of the city, and no such stable not in existence at the time of the passage of the ordinance should be maintained on any premises, unless permission should have been first obtained from the municipal assembly by ordinance, was sustained as a proper exercise of the police power. After sustaining the right to vest in a board of men acquainted with the local conditions of the business to be carried on, power to grant or withhold permits, this court said:

"It has been held in some of the state courts to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual, Chicago v. Trotter, 136 Illinois, 430; Matter of Frazee, 63 Michigan, 396; State v. Fisk, 9 R. I. 94; Baltimore v. Radecke, 49 Maryland, 217; Sioux Falls v. Kirby, 6 S. Dak. 62, and in others that such authority cannot be delegated to the adjoining lot owners. St. Louis v. Russell, 116 Missouri, 248; Ex parte Sing Lee, 96 California, 354. But the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority, Quincy v. Kennard, 151 Massachusetts, 563; Commonwealth v. Davis, 162 Massachusetts, 510, and by this court the delegation of such power, even to a single individual, was sustained in Wilson v. Eureka City, 173 U. S. 32 and Gundling v. Chicago, 177 U. S. 183."

These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a federal court. Yick Wo v. Hopkins, 118 U. S. 356. In the case of Jacobson v. Massachusetts, supra, it was insisted that the compulsory vaccination ordinance was broad enough to require a person to submit to compulsory vaccination when his physical condition might be such as to render such treatment dangerous to life and even cruelly oppressive. But it was held that the case presented no such situation; that the person complaining of the enforcement of the ordinance was, for aught that appeared, an adult in good health and a proper subject for vaccination; that the Supreme Court of Massachusetts had not sustained the authority of the board in the extreme case supposed, and that the individual complaining made no case wherein the operation of the statute deprived him of his constitutional right of protection. So, in the present case, there is nothing in this record to show why the permit which had been granted to the plaintiff in error was revoked or the conditions upon which, in the exercise of the power conferred by section 66, a permit to carry on the business was granted or withheld. It is true that a conversation was proved in which the milk inspector said to Lieberman that the milk sold by him "stood well;" but there is nothing to show upon what ground the action of the board was taken. For aught that appears he may have been conducting his business in such wise, or with such surroundings and means, as to render it dangerous to the health of the community, or his manner of selling or delivering the milk may have been objectionable. There is nothing in the record to show that the action against him was arbitrary or oppressive and without a fair and reasonable exercise of that discretion which the law reposed in the board of health. We have, then, an ordinance which, as construed in the highest court of the state, authorizes the exercise of a legal discretion in the granting or withholding of permits to transact a business, which, unless controlled, may be highly dangerous to the health of the community, and no affirmative showing that the power has been exerted in so arbitrary and oppressive a manner as to deprive the appellant of his property or liberty without due process of law.

In such cases it is the settled doctrine of this court that no federal right is invaded, * * *.

We find no error in the judgment of the Supreme Court of New York, and the same is Affirmed.[2]

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[2] An Ohio statute penalized the exhibition of motion pictures not approved by a board of censors and directed the board to approve only such films as were in its "judgment and discretion * * * of a moral, educational or amusing and harmless character." Sustaining the statute the court said: "The objection to the statute is that it furnishes no standard of what is educational, moral, amus-

STATE v. COLEMAN.

1921. Connecticut Supreme Court of Errors. 96 Conn. 190.

Information for using a public square in Meriden for the purpose of making a speech without having first obtained a permit from the chief of police of said city, brought to the Criminal Court of Common Pleas in New Haven County where a demurrer to the information was overruled and, upon the refusal of the accused to plead over, the court, Simpson, J., sentenced him to pay a fine of $25 and the costs of prosecution, and from this judgment the accused appealed.

Beach, J.—The charter of the city of Meriden empowers the court of common council to make and enforce ordinances to keep open and safe for public use and travel, and free from encroachment or obstruction, the streets, highways, public grounds, and public places in the city; to prohibit or regulate shows, parades, rendezvous, and assemblies in streets and public places; to keep the streets and all public places quiet from undue noise, and to impose fines not exceeding $100 for violation of such ordinances. In the exercise of these powers the common council enacted the following ordinance:—

"Resolved—that no person or persons shall use the streets, sidewalks, parks or public squares for the purposes of delivering orations, or making speeches, or any other public demonstrations, without first obtaining a permit from the chief of police. Any person

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ing or harmless, and hence leaves decision to arbitrary judgment, whim and caprice; or, aside from those extremes, leaving it to the different views which might be entertained of the effect of the pictures, permitting the 'personal equation' to enter, resulting 'in unjust discrimination against some propagandist film,' while others might be approved without question. But the statute by its provisions guards against such variant judgments, and its terms, like other general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies. * * * If this were not so, the many administrative agencies created by the state and national governments would be denuded of their utility and government in some of its most important exercises become impossible. * * *

"In conclusion we may observe that the Ohio statute gives a review by the courts of the state of the decision of the board of censors." Mutual Film Corp. v. Industrial Commission (1915) 236 U. S. 230, 59 L. ed. 552.

See also Hall v. Geiger-Jones Co. (1917) 242 U. S. 539, 61 L. ed. 480 (licensing dealers in securities, the statutory standard being "good repute in business"); Lehmann v. State Board of Public Accountancy (1923) 263 U. S. 394, 68 L. ed. 354 (board authorized to cancel certificates of public accountants "for any unprofessional conduct * * * or for other sufficient cause.") Cf. Hewitt v. State Board of Medical Examiners (1906) 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. 315 (a state statute which authorized a board to revoke the license of any physician for "unprofessional conduct," specifying as one form of such conduct "all advertizing of medical business in which grossly improbable statements are made" was held invalid because "no definite standard is furnished * * * whereby a physician with any safety can advertize his medical business.")

or corporation violating * * * this ordinance shall, upon conviction thereof, be fined not more than $100." * * *

The appellant's contention is that the Meriden ordinance is violative of §§ 1 and 5 of our Bill of Rights, which guarantee equality in rights and freedom of speech, and also of the Fourteenth Amendment to the federal Constitution.

It does not appear whether the appellant has been deprived of the right of free speech or not. He has been fined for making a speech in a public park without a permit, but it does not follow that his speech was delivered at such a time or place that he had a constitutional right to deliver it. The ordinance purports to regulate the use of streets and parks, and it does not absolutely forbid, but by implication recognizes, some qualified right, or at least some qualified privilege, of public speaking at some time and under some restrictions in the streets and parks of Meriden. Such an ordinance is not necessarily violative of § 5 of the Bill of Rights; and, if it is, it can only be so because it attempts to confer on the chief of police the right to arbitrarily determine in advance who may exercise that qualified privilege, or what subjects may be publicly discussed, or what sentiments publicly expressed, on the streets and in the parks of Meriden.

This latter objection is based on § 1 of the Bill of Rights. If the qualified right or privilege of public speaking which the ordinance recognizes is one which all citizens have an equal right to exercise, and if the true construction and effect of the ordinance be such as to confer on the chief of police a personal and arbitrary power to determine who may and who may not exercise it, then the ordinance is void, and its prohibition cannot be lawfully enforced by fine. State v. Conlon, 65 Conn. 478, 33 Atl. 519; State v. Porter, 94 Conn. 639, 110 Atl. 59; Ingham v. Brooks, 95 Conn. 317, 111 Atl. 209.

We take these two questions in order. The public right in streets and parks is paramount, and it is therefore admitted that in the exercise of its delegated authority the city of Meriden may make reasonable ordinances to keep the streets and parks open and safe for public travel and free from encroachment or obstruction. Whether it might have unqualifiedly forbidden the delivery of any oration or the making of any speech in such places we need not inquire, for it has not attempted to do so. A qualified right or privilege of public speaking, after obtaining a permit, is recognized, and the particular question is whether that residuum of right or privilege is of such a character that all citizens have a constitutional right to enjoy it upon equal terms. Section 5 of the Bill of Rights answers that question by declaring that "every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." It is assumed by the ordinance that some citizens will be permitted by the chief of police to use the streets and parks of Meriden for the purpose of exercising their constitutional right. That being so, it is certain that the chief of police may not, by any arbitrary process of selection, determine in advance who may and who may not exercise it. If the permit is to be granted in some instances and withheld in others, it must be in accordance with some uniform rule which is not expressed in the ordinance.

Turning, now, to the construction of the ordinance, to see whether such a uniform rule can be read into it, we find the ordinance hopelessly indefinite. It does not even expressly confer on the chief of police the power to issue permits. It simply assumes that he has the power to grant or refuse them. No rule is laid down to guide or restrain that power, or to inform applicants on what terms a permit will be granted.

In People ex rel. Lieberman v. Van De Carr, 175 N. Y. 440, 67 N. E. 913, a section of the sanitary code of New York forbidding the sale of milk in New York City without a permit from the board of health, was upheld by reading into it the presumption that a public officer will exercise his powers impartially and according to law; and this decision was approved by the United States Supreme Court in Lieberman v. Van De Carr, 199 U. S. 552, 26 Sup. Ct. 144. Assuming this to be the law of the United States Supreme Court, this ordinance does not violate the Fourteenth Amendment of the federal Constitution.

But in determining whether it violates the constitution of Connecticut, we must be guided by our own public policy and our own precedents. So guided, we can reach but one conclusion. In the first place, the presumption that a public officer will discharge his duties according to law assumes that the law tells him what his duties are. This ordinance does not do so. It must be supposed that a subordinate officer desirous of obeying the law will look to his written instructions for guidance, and, if the limitations on his authority are indefinite, that he will consider not only what is said, but, when the omission is significant, what is not said. There can be no reasonable presumption that an unlimited discretion will not be exercised when the ordinance itself reposes an unlimited discretion.

As the Massachusetts court has said, in holding a similar grant of discretion unconstitutional: "Doubtless it is to be expected that a subordinate officer entrusted with unlimited power will use it wisely and with a view only to the public good; but, as in Winthrop v. New England Chocolate Co., 180 Mass. 464, 466, there is nothing in the ordinance to guide him in passing upon the applications which may be made to him. * * * It is left entirely to his untrammeled discretion whether the business of keeping or sorting rags shall be carried on at all in Chelsea, or whether, if carried on, it shall be confined to persons of one nationality or of one way of thinking in religion or politics." Commonwealth v. Maletsky, 203 Mass. 241, 246, 82 N. E. 245. These last-quoted remarks apply with far greater force to the regulation of public speaking than they do to the regulation of the sorting of rags.

Even in the absence of Connecticut precedent, we should be unwilling to leave the constitutional liberties of a citizen to be defined and protected by the good impulses of a subordinate official entrusted with unlimited discretion; if for no other reason than that the exercise of discretion cannot be controlled by mandamus. American Casualty Ins. Co. v. Fyler, 60 Conn. 448, 22 Atl. 494; State ex rel. Metropolitan Life Ins. Co. v. Upson, 79 Conn. 154, 64 Atl. 2. Nor should the constitutionality of a statute be made to depend upon the way in which it is finally administered by those who are charged with its execution. Cummings v. National Bank, 101 U. S. 153, 161. The only effective way of protecting the citizen against the abuse of an unlimited discretion is to declare void any grant of an unlimited discretion to control the exercise of privileges which all citizens have a common right to enjoy on equal terms. * * *

The overwhelming weight of authorities in the state courts is that statutes and ordinances which purport to give to administrative officials an absolute and uncontrolled discretion to grant or refuse permission to do something which all citizens similarly situated have an equal right to do are unconstitutional. * * *[3]

The ordinance in question is violative of §§ 1 and 5 of the Bill of Rights, and is void. There is error, the judgment is set aside and the cause remanded with direction to the Court of Common Pleas in New Haven County to sustain the demurrer to the information and to enter judgment for the defendant.

In this opinion the other judges concurred, except Gager and Burpee, Js., who dissented.

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[3] The court cited as so holding: State v. Porter, 94 Conn. 639, 110 Atl. 59; Ingham v. Brooks, 95 Conn. 317, 111 Atl. 209; Commonwealth v. Maletsky, 203 Mass. 241, 89 N. E. 245; People ex rel. Gamber v. Sholem, 294 Ill. 204, 128 N. E. 377; Cicero Lumber Co. v. Cicero, 176 Ill. 9, 51 N. E. 758; Sullivan v. Cloe, 277 Ill. 56, 115 N. E. 135; Sheldon v. Hoyne, 261 Ill. 222, 103 N. E. 1021; Bessonies v. City of Indianapolis, 71 Ind. 189; City of Richmond v. Dudley, 129 Ind. 112, 28 N. E. 312; Bills v. City of Goshen, 117 Ind. 221, 20 N. E. 115; City of Plymouth v. Schultheis, 135 Ind. 339, 35 N. E. 12; Anderson v. City of Wellington, 40 Kans. 173, 19 Pac. 719; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; In re Frazee, 63 Mich. 396, 30 N. W. 72; City of Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359; State ex rel. Garrabad v. Dering, 84 Wis. 585, 54 N. W. 1104; State v. Tenant, 110 N. Car. 609, 14 S. E. 387; Town of State Center v. Barenstein, 66 Iowa 249, 23 N. W. 652; City of Jacksonville v. Ledwith, 26 Fla. 163, 7 So. 885; Anderson v. Tedford, 80 Fla. 376, 85 So. 673, 10 A. L. R. 1481; Welch v. Maryland Casualty Co., 47 Okla. 293, 147 Pac. 1046.

DOUGLAS ET AL. v. NOBLE.

1923. Supreme Court of the United States. 261 U. S. 165.

Mr. Justice Brandeis delivered the opinion of the court.

In 1893 the Legislature of Washington provided that only licensed persons should practice dentistry. It vested the authority to license in a board of examiners, consisting of five practicing dentists, and it required that persons desiring to practice should apply to that board and undergo examination before it. Every person of good moral character with a diploma from a reputable dental college was declared eligible, and, if he or she passed the examination, became entitled to a license. Laws of Washington 1893, c. 55. That statute, with amendments not here material, Laws of 1901, c. 152, has since been continuously in force. It is now embodied in Remington's 1915 Codes and Statutes of Washington, §§ 8412-8425. The validity of the statute has been attacked on various grounds; and it has been repeatedly upheld by the highest court of the state.

In 1921 Noble brought this suit in the federal court for the Western District of Washington to enjoin the King county prosecuting attorney from proceeding criminally against him for practicing dentistry without a license. Jurisdiction of that court was invoked solely on the ground that rights guaranteed plaintiff by the federal Constitution were being invaded. The bill charged that these were violated, both because the licensing statute was void and because the board in administering it had exercised its power arbitrarily. The case was heard by three judges upon application for an interlocutory injunction under § 266 of the Judicial Code. It was admitted that plaintiff was of good moral character; that he had a diploma from a reputable dental college; that he had submitted himself to the dental board for examination; that he had been examined, but had not passed the examination; and that, although refused a license, he had persisted in practicing dentistry. The board denied, by its answer, that it had acted arbitrarily in refusing a license; and this charge does not appear to have been further insisted upon.

Plaintiff rested his case solely on the claim that the statute violated the federal Constitution. It was conceded that a state may, consistently with the Fourteenth Amendment, prescribe that only persons possessing the reasonably necessary qualifications shall practice dentistry, Dent v. West Virginia, 129 U. S. 114; and that the Legislature may, if consistent with the state constitution, confer upon an administrative board the power to determine whether an applicant possesses the qualifications which the Legislature has declared to be necessary. The contention is that the statute purports to confer upon the board arbitrary power to exclude applicants from the practice of dentistry, and thus violates the due process clause of the Fourteenth Amendment. The District Court held the act void on that ground, and issued a permanent injunction. 274 Fed. 672. Whether it erred in so holding is the only question presented for our consideration on this appeal.

The argument is that, since the act does not state in terms what the scope and character of the examination shall be, arbitrary power is conferred upon the board to grant or withhold licenses. It is pointed out that the statute does not in terms direct that the examination shall relate to the applicant's qualifications to practice dentistry; that it does not prescribe the subjects upon which applicants shall be examined, or whether proficiency shall be determined by knowledge of theory or by requiring applicants to demonstrate skill with the tools and materials of the profession; that it does not provide whether the examination shall be oral or written, or what percentages of correct answers shall be required to pass the examination; and that it does not require the keeping of records of the proceedings which could be used for purposes of review.

What authority the statute purports to confer upon the board is a question of construction. If it purported to confer arbitrary discretion to withhold a license, or to impose conditions which have no relation to the applicant's qualifications to practice dentistry, the statute would, of course, violate the due process clause of the Fourteenth Amendment. Its construction is a question of state law. Since the case is here on appeal from a federal court, we must consider it. Davis v. Wallace, 257 U. S. 478. But in passing upon such questions we follow applicable decisions of the highest court of the state. Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 154. The statutory provisions involved in the present case were construed twenty years ago by the Supreme Court of Washington in In re Thompson, 36 Wash. 377, 379. It was insisted there that the grant of the power to hold examinations was a delegation of arbitrary legislative power to the dental examiners. The court assumed that to delegate power to make such rules was consistent with the constitution of the state, and that the statute had conferred upon the board power to make rules. It declared that the board must have adopted rules "in order to properly determine the good character of the applicant and the good standing of the college issuing his diploma, and to conduct the examinations upon subjects reasonably required in that profession." And it held that, if there was an abuse of authority, the remedy is to review, by some appropriate proceeding, the conduct of the board, not to attack the validity of the act. Thus, the highest court of the state has construed this statute as not conferring arbitrary power upon the board in respect to the scope and character of the examination. The statute has been in force for thirty years. The correctness of the views expressed in

In re Thompson does not appear to have been questioned by that court since. Under such circumstances, we should, even in the absence of controlling decision, decline to give the statute a construction which would render it void, unless compelled to do so by unequivocal language in the act. Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U. S. 197, 205. Obviously there is none of that character.

The statute provides that the examination shall be before a board of practicing dentists, that the applicant must be a graduate of a reputable dental school, and that he must be of good moral character. Thus, the general standard of fitness and the character and scope of the examination are clearly indicated. Whether the applicant possesses the qualifications inherent in that standard is a question of fact. Compare Red "C" Oil Mfg. Co. v. North Carolina, 222 U. S. 380, 394. The decision of that fact involves ordinarily the determination of two subsidiary questions of fact. The first, what the knowledge and skill is which fits one to practice the profession. The second, whether the applicant possesses that knowledge and skill. The latter finding is necessarily an individual one. The former is ordinarily one of general application. Hence it can be embodied in rules. The legislature itself may make this finding of the facts of general application, and by embodying it in the statute make it law. When it does so, the function of the examining board is limited to determining whether the applicant complies with the requirements so declared. But the legislature need not make this general finding. To determine the subjects of which one must have knowledge in order to be fit to practice dentistry; the extent of knowledge in each subject; the degree of skill requisite; and the procedure to be followed in conducting the examination—these are matters appropriately committed to an administrative board. Mutual Film Corporation v. Ohio Industrial Commission, 236 U. S. 230, 245-246. And a legislature may, consistently with the federal Constitution, delegate to such board the function of determining these things, as well as the functions of determining whether the applicant complies with the detailed standard of fitness. Reetz v. Michigan, 188 U. S. 505. That the scope of the discretion here granted to the examining board was well within the limits allowed by the federal Constitution, and that it is not to be presumed that powers conferred upon the administrative boards will be exercised arbitrarily, is settled by Lieberman v. Van De Carr, 199 U. S. 552.

Appellee relied upon Yick Wo v. Hopkins, 118 U. S. 356. There the licensing board habitually exercised its power arbitrarily, and discrimination was practiced. Seattle v. Gibson, 96 Wash. 425, and State ex rel. Makris v. Superior Court for Pierce County, 113 Wash. 296, strongly relied upon by appellee, are not inconsistent with In re Thompson. The ordinances involved in these later cases were construed by the state court to vest in the city officials an arbitrary discretion to grant or withhold, and to revoke, licenses. Whether the constitution of the state permits delegation to the examining board of the power to ascertain and fix the essentials of fitness is wholly a state question. Welch v. Swasey, 214 U. S. 91, 104; Bradley v. Richmond, 227 U. S. 477, 482. It is not contended that the statute violates the state constitution in this respect.

Reversed.[4]

Section 3.—Administrative Adjudication and Enforcement.

DEN d. MURRAY ET AL. v. THE HOBOKEN LAND, ETC., COMPANY.

1885. Supreme Court of the United States. 18 How. 272.
[Printed ante, p. 537.]

UNION BRIDGE CO. v. UNITED STATES.

1907. Supreme Court of the United States. 204 U. S. 364.

[The bridge company was prosecuted in the United States District Court for the criminal offense of disobeying a "lawful order of the Secretary of War," under the Act of March 3, 1899, found guilty and sentenced to pay a fine of $5,000, and brought this writ

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[4] The legislature of Oregon has been held not to have infringed the state constitution by a statute which required persons before engaging in the occupation of a barber to satisfy the state barber board that they were qualified, the statute not prescribing the qualifications but delegating to the board a power to prescribe the qualifications. State v. Briggs (1904) 45 Ore. 366, 77 Pac. 750, 78 Pac. 361. The court said: "The nature and character of the profession, trade, or calling intended to be licensed or regulated often demands technical knowledge and learning in order to designate accurately the qualifications which should be possessed by those designing to follow it. In the nature of things, this is a matter outside the ordinary scope of legislative wisdom. The prescribing of the proper qualifications of applicants for licenses by some agent of the state, learned in such profession or calling, is not legislation, but rather the exercise of a mere administrative power. A law, when it comes from the legislature, must be complete. * * * The board is required to exercise the power conferred by prescribing fair and reasonable qualifications appropriate to the calling intended to be regulated, operating generally and impartially upon all in like situations."

Cullen, C. J., in Village of Saratoga Springs v. Saratoga Gas & Power Co. (1908) 191 N. Y. 123, 146-147, 83 N. E. 693, 18 L. R. A. (N. S.) 713, 14 Ann. Cas. 606:

"It is now necessary to consider the objections to some special features of the particular act before us. It is contended that conceding that the legislature may commit to an administrative board the power to determine a tariff of rates, the statute must prescribe some standard by which the action of the board is to of error. The statute provided: "Whenever the Secretary of War shall have reason to believe that any * * * bridge * * * over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise * * *" it shall be his duty, after giving the owners an opportunity to be heard, to order them "so to alter the same as to render navigation * * * reasonably free, easy and unobstructed; and to specify to them "the changes, recommended by the Chief of Engineers, that are required to be made." Wilful failure or refusal to comply with "the lawful order of the Secretary of War" was declared a misdemeanor, punishable by fine, not exceeding $5000, and each month's delay a new offense.]

Mr. Justice Harlan delivered the opinion of the court. * * *

The first principal question raised by the defendant is whether the 18th section of the River and Harbor Act of March 3d, 1899, is in violation of the Constitution of the United States as delegating legislative and judicial powers to the head of an executive Department of the Government. This question, the Government contends, has been determined in its favor by the principles heretofore announced by this court, and need not be discussed as if now presented for the first time. In its judicial as well as legal aspects the question is of such importance as to justify a full reference to prior decisions. [Here a resumé is given of Cargo of Brig Aurora v. United States, ante, p. 928, note 2, Field v. Clark, ante, p. 927, and Buttfield v. Stranahan, ante, p. 929.]

It would seem too clear to admit of serious doubt that the statute under which the Secretary of War proceeded is in entire harmony with the principles announced in former cases. In no substantial, just sense does it confer upon that officer as the head of an Executive Department powers strictly legislative or judicial in their nature, or which must be exclusively exercised by Congress or by the courts. It has long been the policy of the Government to remove such unreasonable obstructions to the free navigation of the waterways of the United States as were caused by bridges maintained

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be governed; that otherwise the whole plenary power of the legislature is intrusted to the board, whose action may be arbitrary, and it is urged that the statute before us provides no such standard. We think otherwise. The statute provides that the commission shall fix the rates within the limits prescribed by law. This includes both statute law and common law. * * * The common law prescribes the rule that the rate shall be reasonable and, I think, even without special mention the statute would necessarily imply the same limitation. But it is said that granting this, 'reasonable' is really no standard but a mere generality. Again, we are of a different opinion. Indeed, if the statute assumed to fix any other standard for rates than that they should be reasonable, we think it would be much more open to attack than in its present form. A lawmaker might exhaust reflection and ingenuity in the attempt to state all the elements which affect the reasonableness of a rate only to find that in a particular case he had omitted the factor which controlled the disposition of that case."

over them. That such an object was of common interest and within the competency of Congress, under its power to regulate commerce, everyone must admit; for commerce comprehends navigation, and therefore to free navigation from unreasonable obstructions is a legitimate exertion of that power. Gibbons v. Ogden, 9 Wheat. 1, 189, 190. As appropriate to the object to be accomplished, as a means to an end within the power of the National Government, Congress, in execution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the waterways of the United States, were unreasonable obstructions to free navigation. Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interests which require national legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power. He could not be said to exercise strictly legislative or judicial power any more, for instance, than it could be said that executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under the general rules prescribed by Congress, are entitled to pensions. If the principle for which the defendant contends received our approval the conclusion could not be avoided that executive officers, in all the Departments, in carrying out the will of Congress, as expressed in statutes enacted by it, have, from the foundation of the National Government, exercised and are now exercising powers, as to mere details, that are strictly legislative or judicial in their nature. This will be apparent upon an examination of the various statutes that confer authority upon executive Departments in respect of the enforcement of the laws of the United States. Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.

To this may be added the consideration that Congress, by the act of 1899, did not invest the Secretary of War with any power in these matters that could reasonably be characterized as arbitrary. He cannot act in reference to any bridge alleged to be an unreasonable obstruction to free navigation without first giving the parties an opportunity to be heard. He cannot require any bridge of that character to be altered, even for the purpose of rendering navigation through or under it reasonably free, easy and unobstructed, without giving previous notice to the persons or corporations owning or controlling the bridge, specifying the changes recommended by the Chief of Engineers, and allowing a reasonable time in which to make them. If, at the end of such time, the required alterations have not been made, then the Secretary is required to bring the matter to the attention of the United States District Attorney in order that criminal proceedings may be instituted to enforce the act of Congress. In the present case all the provisions of the statute were complied with. The parties concerned were duly notified and were fully heard. Nor is there any reason to say that the Secretary of War was not entirely justified, if not compelled, by the evidence in finding that the bridge in question was an unreasonable obstruction to commerce and navigation as now conducted.

We are of opinion that the act in question is not unconstitutional as conferring upon the Secretary of War powers of such nature that they could not be delegated to him by Congress. * * *

OCEANIC STEAM NAVIGATION COMPANY v. STRANAHAN.

1909. Supreme Court of the United States. 214 U. S. 320.

Mr. Justice White delivered the opinion of the court.

The steamship company sought the recovery of money paid to the collector of customs of the port of New York which was exacted by that official under an order of the Secretary of Commerce and Labor. * * *

Both the Secretary and the collector were expressly authorized by law, the one to impose and the other to collect the exactions which were made. The only question, therefore, is whether the power conferred upon the named officials was consistent with the Constitution. The provision under which the officials acted is § 9 of the act of March 3, 1903, entitled, "An Act to regulate the immigration of aliens into the United States." c. 1012, 32 Stat. 1213. * * *

Section 9, * * * is as follows:

"That it shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel, to bring to the United States any alien afflicted with a loathsome or with a dangerous contagious disease; and if it shall appear to the satisfaction of the Secretary of the Treasury (Secretary of Commerce and Labor) that any alien so brought to the United States was afflicted with such a disease at the time of foreign embarkation, and that the existence of such disease might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of one hundred dollars for each and every violation of the provisions of this section; and no vessel shall be granted clearance papers while any such fine imposed upon it remains unpaid, nor shall such fine be remitted." * * *

We think it is also certain that the power thus lodged in the Secretary of Commerce and Labor was intended to be exclusive, and that its exertion was authorized as the result of the probative force attributed to the official medical examination for which the statute provides, and that the power to refuse clearance to vessels was lodged for the express purpose of causing both the imposition of the exaction and its collection to be acts of administrative competency, not requiring a resort to judicial power for their enforcement. * * *

1. It is insisted that, however complete may be the power of Congress to legislate concerning the exclusion of aliens and to entrust the enforcement of legislation of that character to administrative officers, nevertheless the particular legislation here in question is repugnant to the Constitution because it defines a criminal offense and authorizes a purely administrative official to determine whether the defined crime has been committed, and, if so, to inflict punishment. Conclusive support for the legal proposition upon which this contention must rest, it is insisted, results from the ruling in Wong Wing v. United States, 163 U. S. 228. * * *

But in so far as the case of Wong Wing held that the trial and punishment for an infamous offense was not an administrative but a judicial function, it is wholly inapposite to this case, since, on the face of the section which authorizes the Secretary of Commerce and Labor to impose the exaction which is complained of, it is apparent that it does not purport to define and punish an infamous crime, or indeed any criminal offense whatever. * * * The sole purpose of § 9 was to impose a penalty, based upon the medical examination for which the statute provided, thus tending, by the avoidance of controversy and delay, to secure the efficient performance by the steamship company of the duty to examine in the foreign country, before embarkation, and thereby aid in carrying out the policy of Congress to exclude from the United States aliens afflicted with loathsome or dangerous contagious diseases as defined in the act. The contention that because the exaction which the statute authorizes the Secretary of Commerce and Labor to impose is a penalty, therefore its enforcement is necessarily governed by the rules controlling in the prosecution of criminal offenses, is clearly without merit, and is not open to discussion. Hepner v. United States, 213 U. S. 103.

2. But it is argued that even though it be conceded that Congress may in some cases impose penalties for the violation of a statutory duty and provide for their enforcement by civil suit instead of by criminal prosecution, as held in Hepner v. United States, nevertheless that doctrine does not warrant the conclusion that a penalty may be authorized, and its collection committed to an administrative officer without the necessity of resorting to the judicial power. In all cases of penalty or punishment, it is contended, enforcement must depend upon the exertion of judicial power, either by civil or criminal process, since the distinction between judicial and administrative functions cannot be preserved consistently with the recognition of an administrative power to enforce a penalty without resort to judicial authority. But the proposition magnifies the judicial to the detriment of all other departments of the government, disregards many previous adjudications of this court and ignores practices often manifested and hitherto deemed to be free from any possible constitutional question. * * *

3. It is urged that the fines which constituted the exactions were repugnant to the Fifth Amendment, because amounting to a taking of property without due process of law, since, as asserted, the fines were imposed, in some cases, without any previous notice, and in all cases without any adequate notice or opportunity to defend. Stated in the briefest form, the findings below show that on the arrival of a vessel, if the examining medical officers discovered that an immigrant was afflicted with one of the prohibited diseases, the owner of the vessel was notified of the fact, and, indeed, that the steamship company had at the place where the examination was made what is known as a landing agent, whose business it was to keep informed as to the result of medical examinations, and to know when an immigrant was detained by the medical officers because afflicted with a prohibited disease. * * * As

previously pointed out, it is evident that the statute unambiguously excludes the conception that the steamship company was entitled to be heard, in the sense of raising an issue and tendering evidence concerning the condition of the alien immigrant upon arrival at the point of disembarkation, as the plain purpose of the statute was to exclusively commit that subject to the medical officers for which the statute provided. We shall, therefore, test the soundness of the proposition we are considering upon that assumption. * * *

It is not denied that there was full power in Congress to provide for the examination of the alien by medical officers and to attach conclusive effect to the result of that examination for the purposes of exclusion or deportation. But it is said the power to do so does not include the right to make the medical examination conclusive for the purpose of imposing a penalty upon the vessel for the negligent bringing in of an alien. We think the argument rests upon a distinction without a difference. It disregards the purpose which, as we have already pointed out, Congress had in view in the enactment of the provision, that is, the guarding against the danger to arise from the wrongful taking on board of an alien afflicted with a contagious malady, not only to other immigrant passengers, but ultimately it might be to the entire people of the United States, a danger arising from the possible admission of aliens who might contract the contagion during the voyage and yet be entitled to admission because apparently not afflicted with the prohibited disease, owing to the fact that the time had not elapsed for the manifestation of its presence. In effect, all the contentions pressed in argument concerning the repugnancy of the statute to the due process clause really disregarded the complete and absolute power of Congress over the subject with which the statute deals. They mistakenly assume that mere form and not substance may be made by the courts the conclusive test as to the constitutional power of Congress to enact a statute. These conclusions are apparent, we think, since the plenary power of Congress as to the admission of aliens leaves no room for doubt as to its authority to impose the penalty, and its complete administrative control over the granting or refusal of a clearance also leaves no doubt of the right to endow administrative officers with discretion to refuse to perform the administrative act of granting a clearance as a means of enforcing the penalty which there was lawful authority to impose. * * *

We have not considered the questions which would arise for decision if the case presented an attempt to endow administrative officers with the power to enforce a lawful exaction by methods which were not within the competency of administrative duties, because they required the exercise of judicial authority.

Affirmed.

Section 4.—Compulsion of Testimony.

INTERSTATE COMMERCE COMMISSION v. BRIMSON.

1894. Supreme Court of the United States. 154 U. S. 447.

[The Act of February 4, 1887, establishing the Interstate Commerce Commission provided: "* * * for the purposes of this act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

"Such attendance of witnesses and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

"And any of the Circuit Courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Brimson and others having refused to answer questions put to them in an investigation conducted by the Commission, the latter filed in the proper Circuit Court of the United States a bill praying the court to issue an order directing them to answer. The court dismissed the petition and the Commission appealed.]

Mr. Justice Harlan delivered the opinion of the court. * * *
Is the twelfth section of the act unconstitutional and void, so far as it authorizes or requires the Circuit Courts of the United States to use their process in aid of inquiries before the Commission? The court recognizes the importance of this question, and has bestowed upon it the most careful consideration.

As the Constitution extends the judicial power of the United States to all cases in law and equity arising under that instrument or under the laws of the United States, as well as to all controversies to which the United States shall be a party (Art. III, Sec. 2), and as the Circuit Courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by Congress, 25 Stat. 434, c. 866, the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy," within the meaning of the Constitution The Circuit Court, as we have seen, regarded the petition of the Interstate Commerce Commission as nothing more than an application by an administrative body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial nature, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended. * * *

What is a case or controversy to which, under the Constitution, the judicial power of the United States extends? * * *

We have before us an act of congress authorizing the Interstate Commerce Commission to summon witnesses, and to require the production of books, papers, tariffs, contracts, agreements, and documents relating to the matter under investigation. The constitutionality of this provision—assuming it to be applicable to a matter that may be legally intrusted to an administrative body for investigation—is, we repeat, not disputed, and is beyond dispute. * * * Whether the Commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted to Congress, are the distinct issues between that body and the witness. They are issues between the United States and those who dispute the validity of an act of Congress and seek to obstruct its enforcement. And these issues, made in the form prescribed by the act of Congress, are so presented that the judicial power is capable of acting on them. * * *

The duties assigned to the Circuit Courts of the United States by the twelfth section of the Interstate Commerce Act are judicial in their nature. The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession, and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution, and considered in Anderson v. Dunn, 6 Wheat. 204, and in Kilbourn v. Thompson, 103 U. S. 168, 190, of the exercise by either house of Congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses and the production of papers in election and impeachment cases and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises. See Whitcomb's Case, 120 Mass. 118, and authorities there cited.

Without the aid of judicial process of some kind, the regulations that Congress may establish in respect to interstate commerce cannot be adequately or efficiently enforced. One mode, as already suggested,—the validity of which is not questioned,—of compelling a witness to testify before the Interstate Commerce Commission to answer questions propounded to him relating to the matter under investigation, and which the law makes it his duty to answer, and to produce books, papers, etc., is to make his refusal to appear and answer, or to produce the documentary evidence called for, an offense against the United States, punishable by fine or imprisonment.[1] A criminal prosecution of the witness under such a statute, it is conceded, would be a case or controversy, within the meaning of the Constitution, of which a court of the United States could take jurisdiction. Another mode would be to proceed by information to recover any penalty imposed by the statute. A proceeding of that character, it is also conceded, would be a case or controversy of which a court of the United States could take cognizance. If, however, Congress, in its wisdom, authorizes the Commission to bring before a court of the United States for determination the issues between it and a witness, that mode of enforcing the act of Congress, and of compelling the witness to perform his duty, is said not to be judicial, and is beyond the power of Congress to prescribe.

We cannot assent to any view of the Constitution that concedes the power of Congress to accomplish a named result indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result directly, and by a different proceeding judicial in form. * * *

The present proceeding is not merely ancillary and advisory. * * * If it be adjudged that the defendants are, in law, obliged to do what they have refused to do, that determination will not be merely ancillary and advisory, but, in the words of Sanborn's

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[1] This device has been used in an act of Congress making contumacy of a witness called to testify before either house of Congress a statutory crime punishable by fine or imprisonment, prosecutable as other crimes are prosecuted, and has been held valid. In re Chapman (1897) 166 U. S. 661, 41 L. ed. 1154.

Case, will be a "final and indisputable basis of action," as between the Commission and the defendants, and will furnish a precedent in all similar cases. It will be as much a judgment that may be carried into effect by judicial process as one for money, or for the recovery of property, or a judgment in mandamus commanding the performance of an act or duty which the law requires to be performed, or a judgment prohibiting the doing of something which the law will not sanction. It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution. * * *

Judgment reversed.

McGRAIN v. DAUGHERTY.

1927. Supreme Court of the United States. 273 U. S. 135.

[Appeal from the United States District Court for the Southern District of Ohio which had on habeas corpus discharged the witness referred to in the opinion below. The facts are sufficiently stated in the portions of the opinion printed below, except that the investigation which the committee of the Senate was conducting into charges of neglect of duty raised against Harry M. Daugherty, Attorney General of the United States, was ordered by a Senate resolution, the resolution authorizing the committee to subpoena witnesses.]

In the course of the investigation the committee issued and caused to be duly served on Mally S. Daugherty—who was a brother of Harry M. Daugherty and president of the Midland National Bank of Washington Court House, Ohio,—a subpoena commanding him to appear before the committee for the purpose of giving testimony bearing on the subject under investigation, * * *. The witness failed to appear. * * *

The committee then made a report to the Senate stating that the subpoena had been issued, that according to the officer's return—copies of which accompanied the report—the witness was personally served; and that he had failed and refused to appear. After a reading of the report, the Senate adopted a resolution reciting these facts and proceeding as follows:

"Whereas the appearance and testimony of the said M. S. Daugherty is material and necessary in order that the committee may properly execute the functions imposed upon it and may obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper: Therefore be it

"Resolved, That the President of the Senate pro tempore issue his warrant commanding the Sergeant at Arms or his deputy to take into custody the body of the said M. S. Daugherty wherever found, and to bring the said M. S. Daugherty before the bar of the Senate, then and there to answer such questions pertinent to the matter under inquiry as the Senate may order the President of the Senate pro tempore to propound; and to keep the said M. S. Daugherty in custody to await the further order of the Senate." * * *

The warrant was issued agreeably to the resolution and was addressed simply to the Sergeant at Arms. That officer on receiving the warrant endorsed thereon a direction that it be executed by John J. McGrain, already his deputy, and delivered it to him for execution.

The deputy, proceeding under the warrant, took the witness into custody at Cincinnati, Ohio, with the purpose of bringing him before the bar of the Senate as commanded; whereupon the witness petitioned the federal district court in Cincinnati for a writ of habeas corpus. The writ was granted and the deputy made due return setting forth the warrant and the cause of the detention. After a hearing the court held the attachment and detention unlawful and discharged the witness, the decision being put on the ground that the Senate in directing the investigation and in ordering the attachment exceeded its powers under the Constitution, 299 Fed. 620. The deputy prayed and was allowed a direct appeal to this Court under § 238 of the Judicial Code as then existing. * * *

The committee was acting for the Senate and under its authorization; and therefore the subpoenas which the committee issued and the witness refused to obey are to be treated as if issued by the Senate. The warrant was issued as an auxiliary process to compel him to give the testimony sought by the subpoenas; and its nature in this respect is not affected by the direction that his testimony be given at the bar of the Senate instead of before the committee. If the Senate deemed it proper, in view of his contumacy, to give that direction it was at liberty to do so. * * *

The first of the principal questions—the one which the witness particularly presses on our attention—is, as before shown, whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.

The Constitution provides for a Congress consisting of a Senate and House of Representatives and invests it with "all legislative powers" granted to the United States, and with power "to make all laws which shall be necessary and proper" for carrying into execution these powers and "all other powers" vested by the Constitution in the United States or in any department or officer thereof. Art. I, secs. 1, 8. Other provisions show that, while bills can become laws only after being considered and passed by both houses of Congress, each house is to be distinct from the other, to have its own officers and rules, and to exercise its legislative function independently. Art. I, secs. 2, 3, 5, 7. But there is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively. So the question arises whether this power is so far incidental to the legislative function as to be implied.

In actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures. * * *

The state courts quite generally have held that the power to legislate carries with it by necessary implication ample authority to obtain information needed in the rightful exercise of that power, and to employ compulsory process for the purpose. * * *

The latest case is Marshall v. Gordon,[2] 243 U. S. 521. The question there was whether the House of Representatives exceeded its power in punishing, as for a contempt of its authority, a person—not a member—who had written, published and sent to the chairman of one of its committees an ill-tempered and irritating letter respecting the action and purposes of the committee. Power to make inquiries and obtain evidence by compulsory process was not involved. The Court recognized distinctly that the House of Representatives has implied power to punish a person not a member for contempt, as was ruled in Anderson v. Dunn, 6 Wheat. 204, but held that its action in this instance was without constitutional justification. The decision was put on the ground that the letter, while offensive and vexatious, was not calculated or likely to affect the House in any of its proceedings or in the exercise of any of its functions—in short, that the act which was punished as a contempt was not of such a character as to bring it within the rule that an express power draws after it others which are necessary and appropriate to give effect to it.

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[2] In the cited case it was said that the power of either house of Congress extended *inter alia* to imprisonment of a witness who attending refused to answer a proper question in an investigation within the power of the house to conduct; that the pressure which may be exerted by a house of Congress in such a case is "limited to imprisonment and such imprisonment may not be extended beyond the session of the body in which the contempt occurred." "It does not embrace punishment for contempt as punishment, since it rests only on the right of self-preservation, that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed." Ibid. p. 542.

* * *

With this review of the legislative practice, congressional enactments and court decisions, we proceed to a statement of our conclusions on the question.

We are of the opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. * * * A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.

The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in Kilbourn v. Thompson, 103 U. S. 168, and Marshall v. Gordon point to admissible measures of relief. And it is a necessary deduction from the decisions in Kilbourn v. Thompson and In re Chapman, 166 U. S. 661, that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry.

We come now to the question whether it sufficiently appears that the purpose for which the witness's testimony was sought was to obtain information in aid of the legislative function. The court below answered the question in the negative * * *.

We are of opinion that the court's ruling on this question was wrong, and that it sufficiently appears, when the proceedings are rightly interpreted, that the object of the investigation and of the effort to secure the witness's testimony was to obtain information for legislative purposes.

It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable. * * *

We think the resolution and proceedings give no warrant for thinking the Senate was attempting or intending to try the Attorney General at its bar or before its committee for any crime or wrongdoing. Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on his part. * * *

We conclude that the investigation was ordered for a legitimate object; that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; that the Senate is entitled to have him give testimony pertinent to the inquiry, either at its bar or before the committee; and that the district court erred in discharging him from custody under the attachment. * * *

What has been said requires that the final order in the district court discharging the witness from custody be reversed.

Final order reversed.[3]

MR. JUSTICE STONE did not participate in the consideration or decision of the case.

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[3] Power of courts to punish contempts of court—contumacy of witnesses, refusal to obey orders of the court, obstructions of the proceedings of the court, etc.,—was invariably held to be inherent in courts of record at common law. There has been a split of authority as to whether the power is inherent in inferior courts not of record, but no doubt but that the power may be vested by statute in the latter courts. (1920) 8 A. L. R. 1543. On the nature and scope of this power see 13 C. J., Contempt.

The problem presents itself whether the dictum in Interstate Commerce Commission v. Brimson, is sound, that consistently with the requirements of due process of law an administrative board cannot be clothed with power to make arrests on its own order of witnesses who refuse to attend or to impose imprisonment upon witnesses who attending refuse to answer proper questions? Would it make a difference whether it was making inquiries with a view to making regulations (legislating) or with a view to decisions of specific application (adjudication)? Does the administrative stand differently in this respect from the judicial and the legislative organs?

Justices of the peace may be given power to punish recalcitrant witnesses. See 8 A. L. R. 1566, and so notaries in taking depositions, cases collected in 8 A. L. R. 1574, but contra, In re Huron (1897) 58 Kans. 152, 48 Pac. 574, 36 L. R. A. 822, 62 Am. St. 614. That city councils have no inherent power or power by inference themselves to fine or imprison contumacious witnesses but that statutes vesting such power are held valid, by the weight of authority, see 8 A. L. R. 1586.

It has been held that a county board of equalization of tax assessments had power to commit a contumacious witness, without any statute specifically conferring the power, the power being conferred as an incident to a grant of power to call and examine witnesses. The court said that the board was not a court, but that it was "an arm of the legislative department of the state government, and has as much authority to enforce obedience to its lawful orders as if it were an arm of the judicial department;" that the limit of its power to commit was that necessary to coerce obedience,—not inflict punishment as such. In re Sanford (1911) 236 Mo. 665, 139 S. W. 376. Cf. Langenberg v. Decker (1892) 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108, holding an express statutory grant of such power to a like board to be a violation of the separation of powers principle of the Indiana constitution, the court regarding the equalization board as a part of the executive.

It has been held that a board of police commissioners when sitting to try charges against members of the force is a court and may fine a contumacious witness by reason of a statute which authorizes "every court" to punish contempts, (constitutionality not put in issue). Plunkett v. Hamilton (1911) 136 Ga. 72, 70 S. E. 781, 35 L. R. A. (N. S.) 583, Ann. Cas. 1912B, 1259.

In People v. Learned (1875), 5 Hun (N. Y.) 626 it was held that a canal investigating commission might punish contumacious witnesses by reason of express statutory authority to do so, and that such proceeding was not a denial of due process of law.

The more usual method adopted in current legislation, to enforce attendance of witnesses and their testifying before administrative bodies, is the device held valid in Interstate Commerce Commission v. Brimson. See legislation involved in the cases cited in (1920) 8 L. R. A. 1573, Section III. The same device may be used to support an attorney general in gathering information with a view to prosecutions. In re Davies (1901) 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855,

Section 5.—Administration of Alien Immigration and Expulsion Laws.[1]

UNITED STATES v. JU TOY.

1905. Supreme Court of the United States. 198 U. S. 253.

Mr. Justice Holmes delivered the opinion of the court.

This case comes here on a certificate from the Circuit Court of Appeals presenting certain questions of law. It appears that the appellee, being detained by the master of the Steamship Doric for return to China, presented a petition for habeas corpus to the District Court, alleging that he was a native-born citizen of the United States, returning after a temporary departure, and was denied permission to land by the collector of the port of San Francisco. It also appears from the petition that he took an appeal from the denial, and that the decision was affirmed by the Secretary of Commerce and Labor. No further grounds are stated. The writ issued and the United States made return, and answered showing all the proceedings before the Department, which are not denied to have been in regular form, and setting forth all of the evidence and the orders made. The answer also denied the allegations of the petition. Motions to dismiss the writ were made on the grounds that the decision of the Secretary was

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though it has been held unconstitutional to confer upon prosecuting officers power themselves to impose contempt sentences, for the reason that they are executive officers. In re Sims (1894) 54 Kans. 1, 37 Pac. 135, 25 L. R. A. 110, 45 Am. St. 261. Sustaining the view that prosecuting officers are a part of the executive, see In re Neagle (1890) 135 U. S. 1, 63, 34 L. ed. 55, 71.

Constitution of Cal. Art. XII, Sec. 22: "The [railroad] commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints against railroads and other transportation companies; to issue subpoenas and all necessary process and send for persons and papers; and the commission and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record * * *." See also Cal. Public Utilities Act §§ 54, 81 and Van Hoosear v. Railroad Commission of State of California, (1922) 189 Cal. 228, 207 Pac. 903.

[1] What powers it is constitutionally permissible to confer upon administrative officers may be seen more clearly by taking a fairly complete picture of the actual administration by administrative officers of one branch of law, in the light of cases in which courts have reviewed their actions. When a court reviews a particular administrative act it is not always clear that the court is doing so because it interprets the governing statute as not purporting to exclude judicial review or whether the court does so on the ground that to exclude judicial review in the situation in hand would be unconstitutional. Hence it is not yet entirely clear how far administrative action may be made final, that is, not subject to judicial review. The fullness with which the courts have already passed upon the administrative enforcement of the alien immigration and expulsion laws induced the selection of this branch for full discussion. In later sections the administration of other branches of law are dealt with in so far as they present peculiarities. No attempt has been made in this chapter to cover those fields of administrative law that are clearly devoid of constitutional difficulties.

conclusive[2] and that no abuse of authority was shown. These were denied, and the District Court decided seemingly on new evidence, subject to exceptions, that Ju Toy was a native-born citizen of the United States. An appeal was taken to the Circuit Court of Appeals alleging errors the nature of which has been indicated. Thereupon the latter court certified the following questions:

[(1) Should a District Court issue a writ of habeas corpus in an exclusion case where the detention is claimed to be unlawful solely because of alleged error of the administrative officers in deciding the disputed question of birth in and consequent citizenship of the United States? no

(2) If yes, should the District Court give a new or further hearing upon evidence offered? or,

(3) Should the District Court "treat the finding and action of such executive officers upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them or in some other way in hearing and determining the same committed prejudicial error?"] yes

We assume in what we have to say, as the questions assume, that no abuse of authority of any kind is alleged. * * *

The broad question is presented whether or not the decision of ? the Secretary of Commerce and Labor is conclusive. It was held in United States v. Sing Tuck, 194 U. S. 161, 167, that the act of August 18, 1894, c. 301, § 1, 28 Stat. 372, 390, purported to make it so, but whether the statute could have that effect constitutionally was left untouched, except by a reference to cases where an opinion already had been expressed. To quote the latest first, in The Japanese Immigrant Case (Yamataya v. Fisher), 189 U. S.

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[2] The statute then in force, Act of August 18, 1894, 28 Stat. 372, 390 provided: "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

Administration of the alien immigration and alien deportation laws was transferred from the Treasury Department to the Department of Commerce and Labor by the Act of Feb. 14, 1903, 32 Stat. 825, and to the Department of Labor when that was created as a separate department by Act of March 4, 1913, 37 Stat. 736.

"The doctrine is firmly established that the power to exclude or expel aliens is vested in the political departments of the government, to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to such regulations, except so far as the judicial department is authorized by treaty or by statute, or is required by the Constitution, to intervene. Fong Yue Ting v. United States, 149 U. S. 698; Lem Moon Sing v. United States, 158 U. S. 538; Li Sing v. United States, 180 U. S. 486." Fuller, C. J., in Fok Yung Yo v. United States (1902) 185 U. S. 296, 302, 46 L. ed. 917.

86, 97, it was said: "That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court." See also Turner v. Williams, 194 U. S. 279, 290, 291; Chin Bak Kan v. United States, 186 U. S. 193, 200. In Fok Young Yo v. United States, 185 U. S. 296, 304, 305, it was held that the decision of the collector of customs on the right of transit across the territory of the United States was conclusive, and, still more to the point, in Lem Moon Sing v. United States, 158 U. S. 538, where the petitioner for habeas corpus alleged facts which, if true, gave him a right to enter and remain in the country, it was held that the decision of the collector was final as to whether or not he belonged to the privileged class.

It is true that it may be argued that these cases are not directly conclusive of the point now under decision. It may be said that the parties concerned were aliens, and that although they alleged absolute rights, and facts which it was contended went to the jurisdiction of the officer making the decision,[3] still their rights were only treaty or statutory rights, and therefore were subject to the implied qualification imposed by the later statute, which made the decision of the collector with regard to them final. The meaning of the cases and the language which we have quoted is not satisfied by so narrow an interpretation, but we do not delay upon them. They can be read.

It is established, as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed—as well when it is citizenship as when it is domicil and the belonging to a class excepted from the exclusion acts. United States v. Sing Tuck, 194 U. S. 161, 167; Lem Moon Sing v. United States, 158 U. S.

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[3] Distinguish Nishimura Ekiu v. United States (1892) 142 U. S. 651, 35 L. ed. 1146. The governing statute was the Act of March 3, 1891, c. 551, 26 Stat. 1084, § 8: "All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal shall be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury." The statute prohibited the entry of any alien "likely to become a public charge." Alienage being conceded, an inspector decided that the facts brought the applicant alien within this excluded class of aliens. On habeas corpus in the Circuit Court of the United States it was held that the inspector's decision on that question of fact was not reviewable by the court, and that the petitioner not having appealed to the superintendent of immigration and the Secretary of the Treasury, the inspector's decision was final. The Supreme Court affirmed the decision of the Circuit Court, holding that the statute was valid as thus construed.

538, 546, 547. It also is established by the former case and others which it cites that the relevant portion of the act of August 18, 1894, c. 301, is not void as a whole. The statute has been upheld and enforced. But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. * * * It necessarily follows that when such words are sustained they are sustained to their full extent.

In view of the cases which we have cited it seems no longer open to discuss the question propounded as a new one. Therefore we do not analyze the nature of the right of a person presenting himself at the frontier for admission. In re Ross, 140 U. S. 453, 464. But it is not improper to add a few words. The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial. That is the result of the cases which we have cited and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be intrusted to an executive officer and that his decision is due process of law was affirmed and explained in Nishimura Ekiu v. United States, 142 U. S. 651, 660, and in Fong Yue Ting v. United States, 149 U. S. 698, 713, before the authorities to which we already have referred. It is unnecessary to repeat the often quoted remarks of Mr. Justice Curtis, speaking for the whole court in Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 280, to show that the requirement of a judicial trial does not prevail in every case. Lem Moon Sing v. United States, 158 U. S. 538, 546, 547; Japanese Immigrant Case, 189 U. S. 86, 100; Public Clearing House v. Coyne, 194 U. S. 497, 508, 509.

We are of opinion that the first question should be answered, no; that the third question should be answered, yes, with the result that the second question should be answered that the writ should be dismissed, as it should have been dismissed in this case.

It will be so certified.

MR. JUSTICE BREWER, with whom MR. JUSTICE PECKHAM, concurred, dissenting. * * *

It will be borne in mind that the petitioner has been judicially determined to be a free-born American citizen, and the contention of the Government, sustained by the judgment of this court, is that a citizen, guilty of no crime—for it is no crime for a citizen to come back to his native land—must by the action of a ministerial officer be punished by deportation and banishment, without trial by jury and without judicial examination.

Such a decision is to my mind appalling. By all the authorities the banishment of a citizen is punishment, and punishment of the severest kind. * * *

In Gonzales v. Williams, 192 U. S. 1, the petitioner, held in custody by the immigration officers, sued out a habeas corpus on the ground that she was not an alien immigrant. The Circuit Court decided against her, but on appeal we discharged her from custody, saying (p. 7):

"If she was not an alien immigrant within the intent and meaning of the act of Congress entitled 'An act in amendment of the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor,' approved March 3, 1891, 26 Stat. 1084, c. 551, the commissioner had no power to detain or deport her, and the final order of the Circuit Court must be reversed."

It is true, the facts were admitted. So placing that case alongside of this the result is that if the United States admits that the petitioner is not an alien, he is entitled to his discharge. If he proves the fact, he is not entitled, but must be deported. It was not suggested in that case that the immigration officer had been guilty of any abuse of discretion or powers, the only complaint being that he had ordered the deportation of the petitioner, who was not an alien. That same fact is alleged here, but is now adjudged insufficient to prevent the deportation. * * *

Let us see what have been the rulings of this court in other cases, and first in respect to judicial decisions. In Thompson v. Whitman, 18 Wall. 457, Thompson, a sheriff of a county in New Jersey, was sued by Whitman for taking and carrying away a sloop, the property of the plaintiff, and justified his action by the judgment of the court, which had ordered the sloop to be sold for violating a statute of New Jersey in reference to raking and gathering clams. There was thus a judicial determination of the liability of the sloop to seizure and condemnation. Notwithstanding this judicial determination this court held that the plaintiff might show, as a matter of fact, that the sloop was not within the limits of the State of New Jersey, and therefore was not violating its statute. * * *

Rose's "Notes on United States Reports" show that a multitude of cases, both state and federal, rely upon Thompson v. Whitman, as authority. Among them is Scott v. McNeal, 154 U. S. 34, in which it was held that a court of probate, having jurisdiction in the administration of deceased persons, had no jurisdiction to appoint an administrator of one who was alive, although he had been absent and not heard from for seven years, and that a sale made by the administrator appointed in such a case passed no title. It was cited approvingly in Andrews v. Andrews, 188 U. S. 14. There a decree of divorce, rendered by a South Dakota court in a case in which both parties were in court and in which the court found not only that there were sufficient grounds for divorce, but also that the plaintiff had been a bona fide resident of South Dakota for the statutory length of time, and therefore had the requisite status to give that court jurisdiction, could be upset in Massachusetts by proof that the plaintiff was not in fact a bona fide resident of South Dakota. * * *

Turning now to the action of ministerial or administrative officers, and what has been the uniform ruling of this court? Take the Land Department. Questions of fact within the undoubted jurisdiction of that Department are considered as settled by its rulings. But questions of fact upon which its jurisdiction rests are never so regarded. * * *

But it is said that the exclusion acts speak of Chinese persons, and that such term includes citizens as well as aliens, and, therefore, Congress has given power to the immigration officers to banish citizens of the United States if they happen to be of Chinese descent. But obviously the statutes refer to citizens of China and not to citizens of the United States. * * * The statutes of the United States expressly limit the finality of the determination of the immigration officers to the case of aliens. It has been conceded by the Government that these statutes do not apply to citizens, and this court made a most important decision based upon that concession. The rules of the Department declare that the statutes do not apply to citizens, and yet in the face of all this we are told that they may be enforced against citizens, and that Congress so intended. Banishment of a citizen not merely removes him from the limits of his native land, but puts him beyond the reach of any of the protecting clauses of the Constitution. In other words, it strips him of all the rights which are given to a citizen. I cannot believe that Congress intended to provide that a citizen, simply because he belongs to an obnoxious race, can be deprived of all the liberty and protection which the Constitution guarantees, and if it did so intend, I do not believe that it has the power to do so. * * *

MR. JUSTICE DAY also dissented.[4]

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[4] Compare Holmes, J., delivering the opinion of the court in Interstate Commerce Commission v. Northern Pacific R. Co. (1910) 216 U. S. 538, 543-544, 54 L. ed. 608: "The authority of the Commission to establish through routes and joint rates is conditioned by the proviso that 'no reasonable or satisfactory through route exists.' Act of June 29, 1906, c. 3591, § 4, 34 Stat. 584, 589. It

GONZALES v. WILLIAMS.

1904. Supreme Court of the United States. 192 U. S. 1.

[Printed ante, p. 409. Consider here the question of administrative finality therein decided.][5]

GEGIOW v. UHL.

1915. Supreme Court of the United States. 239 U. S. 3.

Mr. Justice Holmes delivered the opinion of the court.

The petitioners are Russians seeking to enter the United States. They have been detained for deportation by the Acting Commissioner of Immigration and have sued out a writ of habeas corpus. The writ was dismissed by the District Court and the Circuit Court of Appeals. 211 Fed. Rep. 236; 215 Fed. Rep. 573; 131 C. C. A. 641. By the return it appears that they are part of a group of illiterate laborers, only one of whom, it seems, Gegiow, speaks even the ordinary Russian tongue, and in view of that fact it was suggested in a letter from the Acting Commissioner to the Commissioner General that their ignorance tended to make them form a clique to the detriment of the community; but that is a trouble

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is urged that this condition is addressed only to the opinion of the Commission and cannot be reexamined by the courts as a jurisdictional fact. The difficulty of distinguishing between a rule of law for the guidance of a court and a limit set to its power is sometimes considerable. Words that might seem to concern jurisdiction may be read as simply imposing a rule of decision, and often will be read in that way when dealing with a court of general powers. Fauntleroy v. Lum, 210 U. S. 230, 235. But even in such a case there may be a difference of opinion, ibid. 245, and when we are dealing with an administrative order that seriously affects property rights, and does so by way rather of fiat than of adjudication, there seems to be no reason for not taking the proviso of the statute in its natural sense. See Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 470.

"We are of opinion then that the Commission had no power to make the order if a reasonable and satisfactory through route already existed, and that the existence of such a route may be inquired into by the courts."

[5] The student may analyze each case to determine whether the issue made before the administrative officers required their decision of (1) existence of a jurisdictional fact, (2) interpretation of the law that delimited their jurisdiction, (3) interpretation of the law to be applied by them in the exercise of their jurisdiction, (4) facts making applicable the law to be applied or enforced by them. Is it held that decisions of every one of these types are beyond judicial review?

How does the question decided by the administrative officers in Wong Kim Ark's case, ante, p. 409, differ from that decided by them in Ju Toy's case? Note that the immigration officers did not contend that their decision in Wong Kim Ark's case was not subject to judicial review.

"Where allegiance depends wholly upon a question of law, the court must review that question and decide upon it." Learned Hand, J., in United States ex rel. Nicola v. Williams (1909) 173 Fed. 626, 628.

incident to the immigration of foreigners generally which it is for legislators not for commissioners to consider, and may be laid on one side. The objection relied upon in the return is that the petitioners were "likely to become public charges for the following, among other reasons: That they arrived here with very little money, [$40 and $25, respectively,] and are bound for Portland, Oregon, where the reports of industrial conditions show that it would be impossible for these aliens to obtain employment; that they have no one legally obligated here to assist them; and upon all the facts, the said aliens were upon the said grounds duly excluded" &c. We assume the report to be candid, and, if so, it shows that the only ground for the order was the state of the labor market at Portland at that time; the amount of money possessed and ignorance of our language being thrown in only as makeweights. It is true that the return says for that 'among other reasons.' But the state of the labor market is the only one disclosed in the evidence or the facts that were noticed at the hearing, and the only one that was before the Secretary of Labor on Appeal; and as the order was general for a group of twenty it cannot fairly be interpreted to stand upon reasons undisclosed. Therefore it is unnecessary to consider whether to have the reasons disclosed is one of the alien's rights. The only matter that we have to deal with is the construction of the statute with reference to the present case.

The courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the act. The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus. The conclusiveness of the decisions of immigration officers under § 25 is conclusiveness upon matters of fact. This was implied in Nishimura Ekiu v. United States, 142 U. S. 651, relied on by the Government. As was said in Gonzales v. Williams, 192 U. S. 1, 15, "as Gonzales did not come within the act of 1891, the Commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary." Such a case stands no better than a decision without a fair hearing, which has been held to be bad. Chin Yow v. United States, 208 U. S. 8. See further Zakonaite v. Wolf, 226 U. S. 272. Lewis v. Frick, 233 U. S. 291, 297.

The single question on this record is whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked. In the act of February 20, 1907, c. 1134, § 2; 34 Stat. 898; as amended by the act of March 26, 1910, c. 128, § 1; 36 Stat. 263, determining who shall be excluded, 'Persons likely to become a public charge' are mentioned between paupers and professional beggars, and along with idiots, persons dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their ability to earn a living, convicted felons, prostitutes and so forth. The persons enumerated in short are to be excluded on the ground of permanent personal objections accompanying them irrespective of local conditions unless the one phrase before us is directed to different considerations than any other of those with which it is associated. Presumably it is to be read as generically similar to the others mentioned before and after.

The statute deals with admission to the United States, not to Portland, and in § 40 contemplates a distribution of immigrants after they arrive. It would be an amazing claim of power if commissioners decided not to admit aliens because the labor market of the United States was overstocked. Yet, as officers of the General Government, they would seem to be more concerned with that than with the conditions of any particular city or state. Detriment to labor conditions is allowed to be considered in § 1, but it is confined to those in the continental territory of the United States and the matter is to be determined by the President. We cannot suppose that so much greater a power was entrusted by implication in the same act to every commissioner of immigration, even though subject to appeal, or that the result was intended to be effected in the guise of a decision that the aliens were likely to become a public charge.

Order reversed.[6]

NG FUNG HO v. WHITE.

1922. Supreme Court of the United States. 259 U. S. 276.

Mr. Justice Brandeis delivered the opinion of the court.

On January 27, 1919, five persons of the Chinese race, of whom four are petitioners herein, joined in an application for a writ of habeas corpus to the judge of the federal court for the Southern Division of the Northern District of California. A writ issued directed to the Commissioner of Immigration for the Port of San

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[6] On habeas corpus the courts will review the decisions of the immigration administrative authorities as to the meaning of the law to be applied by them as, whether, the facts not being disputed, an alien Chinese wife of a domiciled alien Chinese merchant or an alien Chinese wife of a resident Chinese citizen of the United States are admissible classes under the immigration laws. Cheung Sum Shee v. Nagle (1925) 268 U. S. 336, 69 L. ed. 985; Chang Chan v. Nagle (1925) 268 U. S. 346, 69 L. ed. 988; Nagle v. Loi Hoa (1928) 275 U. S. 475, 72 L. ed.

Francisco, who held the petitioners in custody under warrants of deportation of the Secretary of Labor pursuant to § 19 of the General Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, 889.[7] The case was heard upon the original files of the Bureau of Immigration containing the record of the deportation proceedings. Each petitioner had entered the United States before May 1, 1917, the effective date of the General Immigration Act of February 5, 1917, and within five years of the commencement of the deportation proceedings. As to each the warrant of deportation recited that the petitioner was a native of China, was found to have secured his admission by fraud, and was found within the United States in violation of § 6 of the Chinese Exclusion Act of May 5, 1892, c. 60, 27 Stat. 25, as amended by the Act of November 3, 1893, c. 14, 28 Stat. 7, being a Chinese laborer not in possession of a certificate of residence. The District Court entered an order quashing the writ and remanding the prisoners to the custody of the immigration authorities. The judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit, except as to one appellant who was ordered released, 266 Fed. 765. The case is here on writ of certiorari, 254 U. S. 628.

There is a faint contention, which we deem unfounded, that the petitioners were not given a fair hearing and that there is no evidence to sustain the findings of the immigration official.

* * *

Second. As to Gin Sang Get and Gin Sang Mo a constitutional question also is presented. Each claims to be a foreign-born son of a native-born citizen; and, hence, under § 1993 of the Revised Statutes, to be himself a citizen of the United States. They insist

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381. In United States ex rel. Claussen v. Day (1929) 279 U. S. 398, 73 L. ed. — judicial review of an administrative decision in a deportation case was allowed to determine the meaning of "entry" in the statute which declared deportable an alien convicted of certain crimes "committed within five years after entry." (These cases, however, do not decide that constitutionally the final decision of such questions could not be vested in administrative officers.)

[7] U. S. C. Tit. 8, § 155. This statute declares that "any alien" of certain described classes (among others, aliens who at the time of their entry were legally ineligible to admission, aliens who advocate or teach anarchy, aliens sentenced to imprisonment for crime involving moral turpitude committed within five years after entry, aliens practicing prostitution, any alien who has entered other than through a port of entry and after inspection) "shall upon the warrant of the Secretary of Labor be taken into custody and deported. * * * In every case where any person is ordered deported * * * under * * * any law * * * the decision of the Secretary of Labor shall be final."

An example of the form and contents of these warrants is shown in Mahler v. Eby (1924) 264 U. S. 32, 34-35, 68 L. ed. 549.

The procedure under this statute has been described thus: "The act also provides for a hearing before an inspector or commissioner [of immigration] under rules prescribed by the Secretary of Commerce and Labor. The inspector or commissioner reports his conclusions and the testimony on which they are based to the Secretary, who, after examination, may order a release or deportation, as in his judgment the case may warrant." Day, J., in Low Wah Suey v. Backus (1912), 225 U. S. 460, 467, 56 L. ed. 1165.

that, since they claim to be citizens, Congress was without power to authorize their deportation by executive order. If at the time of the arrest they had been in legal contemplation without the borders of the United States, seeking entry, the mere fact that they claimed to be citizens would not have entitled them under the Constitution to a judicial hearing. United States v. Ju Toy, 198 U. S. 253; Tang Tun v. Edsell, 223 U. S. 673. But they were not in the position of persons stopped at the border when seeking to enter this country. Nor are they in the position of persons who entered surreptitiously. See United States v. Wong You, 223 U. S. 67. They arrived at San Francisco, a regularly designated port of entry; were duly taken to the immigration station; and, after a protracted personal examination, supplemented by the hearing of witnesses and the examination of reports of immigration officials, were ordered admitted as citizens. Then they applied for and received their certificates of identity. Fifteen months after the entry of one and six months after the entry of the other, both were arrested, on the warrant of the Secretary of Labor, in Arizona where they were then living. The constitutional question presented as to them is: May a resident of the United States who claims to be a citizen be arrested and deported on executive order? The proceeding is obviously not void ab initio. United States v. Sing Tuck, 194 U. S. 161. But these petitioners did not merely assert a claim of citizenship. They supported the claim by evidence sufficient, if believed, to entitle them to a finding of citizenship. The precise question is: Does the claim of citizenship by a resident, so supported both before the immigration officer and upon petition for a writ of habeas corpus, entitle him to a judicial trial of this claim? * * *

Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service. It is well settled that in such a case a writ of habeas corpus will issue to determine the status. Ex parte Reed, 100 U. S. 13; In re Grimley, 137 U. S. 147; In re Morrissey, 137 U. S. 157; Johnson v. Sayre, 158 U. S. 109. Compare Ex parte Crow Dog, 109 U. S. 556. If the jurisdiction of the Department of Labor may not be tested in the courts by means of the writ of habeas corpus, when the prisoner claims citizenship and makes a showing that his claim is not frivolous, then obviously deportation of a resident may follow upon a purely executive order whatever his race or place of birth. For where there is jurisdiction a finding of fact by the executive department is conclusive, United States v. Ju Toy, 198 U. S. 253; and courts have no power to interfere unless there was either denial of a fair hearing, Chin Yow v. United States, 208 U. S. 8, or the finding was not supported by evidence, American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, or there was an application of an erroneous rule of law, Gegiow v. Uhl, 239 U. S. 3. To deport one who so claims to be a citizen, obviously deprives him of liberty, as was pointed out in Chin Yow v. United States, 208 U. S. 8, 13. It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court. Compare United States v. Woo Jan, 245 U. S. 552, 556; White v. Chin Fong, 253 U. S. 90, 93.

It follows that Gin Sang Get and Gin Sang Mo are entitled to a judicial determination of their claims that they are citizens of the United States; but it does not follow that they should be discharged. The practice indicated in Chin Yow v. United States, supra, and approved in Kwock Jan Fat v. White, 253 U. S. 454, 465, should be pursued. Therefore, as to Gin Sang Get and Gin Sang Mo, the judgment of the Circuit Court of Appeals is reversed and the cause remanded to the District Court for trial in that court of the question of citizenship and for further proceedings in conformity with this opinion.[8]

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[8] Notwithstanding the reasoning in the principal case the decision in United States v. Ju Toy was reaffirmed in Quon Quon Poy v. Johnson (1927) 273 U. S. 352, 71 L. ed. 680, where on a contest as to privilege of entry the issue was, was Quon Quon Poy a son of Quon Mee Sing. The latter was conceded to be a native-born American citizen. The Secretary of Labor decided that the alleged relationship was not established, and the court held this decision not reviewable. The exclusion statute then and now (1929) in force, Act of Feb. 5, 1917, 39 Stat. 874, U. S. C. Title 8, §§ 152, 153, entitled "An Act to regulate the immigration of aliens * * *," provides: "Immigrant inspectors are hereby authorized and empowered to board and search for aliens any vessel, railway car or any other conveyance, or vehicle in which they believe aliens are being brought into the United States. * * * Any commissioner of immigration or inspector in charge shall have power to require by subpoena the attendance and testimony of witnesses. * * * Every alien who may not appear to the examining immigrant inspector * * * to be clearly and beyond a doubt entitled to land shall be detained for examination * * * by a board of special inquiry. In the event of rejection by the board of special inquiry, in all cases where an appeal to the Secretary of Labor is permitted by this Act, the alien shall be so informed and shall have the right to be represented by counsel or other adviser on such appeal. The decision of an immigrant inspector, if favorable to the admission of any alien, shall be subject to challenge by any other immigrant inspector, and such challenge shall operate to take the alien * * * before a board of special inquiry * * *. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner General of Immigration, with the approval of the Secretary of Labor, shall from time to time designate as qualified to serve on such boards. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before such boards shall be separate and apart from the public, but the immigrant may

WONG WING v. UNITED STATES.

1896. Supreme Court of the United States. 163 U. S. 228.

On July 15, 1892, Wong Wing, Lee Poy, Lee Yon Tong and Chan Wah Dong were brought before John Graves, a commissioner of the Circuit Court of the United States for the Eastern District of Michigan, by virtue of a warrant issued upon the complaint of T. E. McDonough, deputy collector of customs, upon a charge of being Chinese persons unlawfully within the United States and not entitled to remain within the same. The commissioner found that said persons were unlawfully within the United States and not entitled to remain within the same, and he adjudged that they be imprisoned at hard labor at and in the Detroit house of correction for a period of sixty days from and including the day of commitment, and that at the expiration of said time they be removed from the United States to China.

A writ of habeas corpus was sued out of the Circuit Court of the United States, directed to Joseph Nicholson, superintendent of the Detroit house of correction, alleging that said persons were by him unlawfully detained; the superintendent made a return setting up the action of the commissioner; and, after argument, the writ of habeas corpus was discharged, and the prisoners were remanded to the custody of said Nicholson, to serve out their original sentence. From this decision an appeal was taken to this court.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court. * * *

The question now presented is whether Congress can promote its policy in respect to Chinese persons by adding to its provisions for their exclusion and expulsion punishment by imprisonment at hard labor, to be inflicted by the judgment of any justice, judge or commissioner of the United States, without a trial by jury. In other words, we have to consider the meaning and validity of the fourth section of the act of May 5, 1892, in the following words: "That any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be and re-

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have one friend or relative present under such regulations as may be prescribed by the Secretary of Labor. Such boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them; and the decisions of any two members of the board shall prevail, but either the alien or any dissenting member of the said board may appeal through the commissioner of immigration at the port of arrival and the Commissioner General of Immigration to the Secretary of Labor * * *. In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Secretary of Labor."

main in the United States, shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States, as hereinbefore provided."

We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation. Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense.

So, too, we think it would be plainly competent for Congress to declare the act of an alien in remaining unlawfully within the United States to be an offence, punishable by fine or imprisonment, if such offence were to be established by a judicial trial.

But the evident meaning of the section in question, and no other is claimed for it by the counsel for the Government, is that the detention provided for is an imprisonment at hard labor, which is to be undergone before the sentence of deportation is to be carried into effect, and that such imprisonment is to be adjudged against the accused by a justice, judge or commissioner, upon a summary hearing. Thus construed, the fourth section comes before this court for the first time for consideration as to its validity. * * *

Our views, upon the question thus specifically pressed upon our attention, may be briefly expressed thus: We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by Congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials.

But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.

No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents. * * *

And in the case of Yick Wo v. Hopkins, 118 U. S. 356, 369, it was said: "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws." Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.

Our conclusion is that the commissioner, in sentencing the appellants to imprisonment at hard labor at and in the Detroit house of correction, acted without jurisdiction, and that the Circuit Court erred in not discharging the prisoners from such imprisonment, without prejudice to their detention according to the law for deportation.

[MR. JUSTICE FIELD concurred in part and dissented in part.]

CHIN YOW v. UNITED STATES.

1908. Supreme Court of the United States. 208 U. S. 8.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for habeas corpus by a Chinese person, alleging that he is detained unlawfully by the General Manager of the Pacific Mail Steamship Company on the ground that he is not entitled to enter the United States. The petition alleges that the petitioner is a resident and citizen of the United States, born in San Francisco of parents domiciled there, but it discloses that the Commissioner of Immigration at the port of San Francisco, after a hearing, denied his right to land, and that the Department of

Commerce and Labor affirmed the decision on appeal. The petitioner thereupon was placed in custody of the steamship company to be sent to China. So far the case is within United States v. Ju Toy, 198 U. S. 253, and the petition was dismissed for want of jurisdiction (presumably on the ground of that decision), as sufficiently appears from the record, the reasons assigned for the appeal and the order allowing the same. But the petition further alleges that the petitioner was prevented by the officials of the Commissioner from obtaining testimony, including that of named witnesses, and that had he been given a proper opportunity he could have produced overwhelming evidence that he was born in the United States and remained there until 1904, when he departed to China on a temporary visit. We do not scrutinize the allegations as if they were contained in a criminal indictment before the court upon a special demurrer, but without further detail read them as importing that the petitioner arbitrarily was denied such a hearing and such an opportunity to prove his right to enter the country as the statute meant that he should have. The question is whether he is entitled to a writ of habeas corpus on such a case as that.

Of course if the writ is granted the first issue to be tried is the truth of the allegations last mentioned. If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not. And, by way of caution, we may add that jurisdiction would not be established simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced. But, supposing that it could be shown to the satisfaction of the District Judge that the petitioner had been allowed nothing but the semblance of a hearing, as we assume to be alleged, the question is, we repeat, whether habeas corpus may not be used to give the petitioner the hearing that he has been denied.

The statutes purport to exclude aliens only. They create or recognize, for present purposes it does not matter which, the right of citizens outside the jurisdiction to return to the United States. If one alleging himself to be a citizen is not allowed a chance to establish his right in the mode provided by those statutes, although that mode is intended to be exclusive, the statutes cannot be taken to require him to be turned back without more. The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation on the one side, and the conclusiveness of the Commission's fiat on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts. In order to decide what we must analyze a little.

If we regard the petitioner, as in Ju Toy's case it was said that he should be regarded, as if he had been stopped and kept at the limit of our jurisdiction, 198 U. S. 263, still it would be difficult to say that he was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China. It is true that the petitioner gains no additional right of entrance by being allowed to pass the frontier in custody for the determination of his case. But on the question whether he is wrongly imprisoned we must look at the actual facts. De facto he is locked up until carried out of the country against his will.

The petitioner then is imprisoned for deportation [exclusion?] without the process of law to which he is given a right. Habeas corpus is the usual remedy for unlawful imprisonment. But on the other hand as yet the petitioner has not established his right to enter the country. He is imprisoned only to prevent his entry and an unconditional release would make the entry complete without the requisite proof. The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship a longer restraint would be illegal. If he fails the order of deportation would remain in force.

We recur in closing to the caution stated at the beginning, and add that while it is not likely, it is possible that the officials misinterpreted Rule 6 as restricting the right to obtain witnesses which the petitioner desired to produce, or Rule 7, commented on in United States v. Sing Tuck, 194 U. S. 161, 169, 170, as giving them some control or choice as to the witnesses to be heard. But unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong.

Order reversed.[9]

Writ of habeas corpus to issue.

MR. JUSTICE BREWER concurs in the result.

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[9] It seems that a district court need not in all cases, after finding such error of procedure or of law as justifies it in trying the alien's claim on the merits, itself try the facts but that in some cases it may remand the case to the administrative officers for retrial. See Tod v. Waldman (1924) 266 U. S. 113, 119, 69

LOW WAH SUEY v. BACKUS, Commissioner of Immigration.

1912. Supreme Court of the United States. 225 U. S. 460.

The facts, which involve the construction of the Alien Immigration Act of February 20, 1907, and the right thereunder of the Government to deport the alien Chinese wife of a Chinese citizen found within three years after entering this country in a house of prostitution, are stated in the opinion.

Mr. Justice Day delivered the opinion of the court.

Li A. Sim, a Chinese woman, wife of Low Wah Suey, was ordered to be deported by the Department of Commerce and Labor, a hearing having been had before an immigration inspector at San Francisco and appeal taken to the Secretary of Commerce and Labor under the provisions of the act of Congress approved February 20, 1907 (34 Stat. 898, c. 1134), the warrant for deportation reciting that she had landed at the port of San Francisco, California, on the fifteenth of April, 1910, and had been found in the United States in violation of the act of February 20, 1907, as amended by the act approved March 26, 1910 (36 Stat. 263, c. 128), namely, that she was an alien, found as an inmate of a house of prostitution within three years subsequent to her entry into the United States. * * *

A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. * * *

In the case now under consideration, the proceedings and order for deportation were attacked by a writ of habeas corpus filed in the District Court of the United States for the Northern District of California. The case was decided upon demurrer, and the

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L. ed. 195 where the Supreme Court said: "In those cases [Chin Yow v. United States and others] the single question was whether the petitioner was a citizen of the United States before he sought admission, a question of frequent judicial inquiry. Here the questions are technical ones involving the educational qualifications of an immigrant in a language foreign to ours, and the medical inquiry as to effect of a physical defect on the probability of a child's being able to earn a living or of becoming a public charge. The court is not as well qualified in such cases to consider and decide the issues as the immigration authorities." See also Mahler v. Eby (1924) 264 U. S. 32, 68 L. ed. 549; Miers v. Brownlow (1927) 21 Fed. (2d) 376.

question, therefore arises whether, upon the allegations well pleaded, a case was made for the discharge of the prisoner.

* * *

It is next averred that the Secretary of Commerce and Labor and the Commissioner of Immigration refused to take the necessary steps to enforce the attendance of witnesses to testify on behalf of the petitioner, although it is said that the immigration officers did use their power to procure witnesses to testify against her; and that had such witnesses as she wished been produced, she says, upon information and belief, that the testimony in the record would have been such as to require a different order by the Secretary of Commerce and Labor, and sufficient to prevent the issuing of the order of deportation. The statute does not give authority to issue process to compel the attendance of witnesses. It does not appear from the record that any witnesses offered on behalf of the petitioner were not heard or that anything was done to prevent the production of such witnesses, and the nature and character of the proposed testimony offered is not set forth. This objection was urged in the Yeung How v. North case, and the lack of power to compel witnesses by the immigration officer was alleged as depriving the appellant of due process of law. This court dismissed the case upon reference to other cases which indicate its view that no constitutional right was thereby taken from the petitioner. The former cases have sustained the right to provide for such hearing, and nothing was done to prevent the production of such witnesses as the petitioner might have seen fit to produce.

It is further alleged that the executive officer acted in bad faith and arbitrarily in receiving a report based on hearsay information, the name of the informer being withheld from Li A. Sim and no opportunity being given her to offset or disprove such hearsay evidence. The nature and character of this testimony is not set forth, and we have no means of knowing it was not such as might properly have been considered in such a hearing.

It is alleged that the rules of the Secretary of Commerce and Labor are arbitrary and illegal, particularly certain sections of Rule 35. From these rules, it appears, that, while provision is made for an examination in the absence of counsel, it is provided that a hearing shall be had at which the alien shall have full opportunity to show cause why he should not be deported, and that, at such stage of the proceedings as the person before whom the hearing is held shall deem proper, the alien shall be apprised that he may thereafter be represented by counsel, who shall be permitted to be present at the further conduct of the hearing, to inspect and make a copy of the record of the hearing so far as it has proceeded and to meet any evidence that theretofore has been or may thereafter be presented by the Government, and it is further provided that all the papers, including the minutes and any written argument submitted by counsel, together with the recommendations, upon the merits, of the examining officer and the officer in charge shall be forwarded to the Department as the record on which to determine whether or not a warrant for deportation shall issue. Considering the summary character of the hearing provided by statute and the rights given to counsel in the rules prescribed, we are not prepared to say that the rules are so arbitrary and so manifestly intended to deprive the alien of a fair, though summary, hearing as to be beyond the power of the Secretary of Commerce and Labor under the authority of the statute.

Judgment affirmed.[10]

UNITED STATES EX REL. TISI v. TOD, COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK.

1924. Supreme Court of the United States. 264 U. S. 131.

Appeal from an order of the District Court dismissing a writ of habeas corpus.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Tisi, an alien, was arrested in deportation proceedings as being within the United States in violation of law. The ground specified was knowingly having in his possession for the purpose of distribution printed matter which advocated the overthrow of the Government of the United States by force. Act of October 16, 1918, c. 186, §§ 1 and 2, 40 Stat. 1012, as amended June 5, 1920,

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[10] In re Osterloh (1929) 34 Fed. (2d) 223 (discharging upon habeas corpus an immigrant from Germany who four months after entry in the regular manner was arrested and was being held for deportation). Hutchison, District Judge: "After reading the warrant the inquisitor said:

" 'Q. Do you understand the warrant charges and the nature of these proceedings as explained to you? A. Yes.

" 'Q. You are advised that it is your right to be represented at this hearing by a lawyer. Do you wish to secure an attorney to represent you in this case? A. I do not know; I have no money to provide an attorney.

" 'Q. Are you ready and willing to proceed with this hearing without the presence of an attorney? A. Yes.'

"Thereafter the hearing proceeded, the witness answering readily and intelligently many questions, and on one of those occasions, to the query, 'Do you understand this charge, and have you any reason to offer why it should not be urged against you?' the witness pathetically answered, 'I understand the charge, but I am looking to you that I receive a fair and impartial hearing.' At no time were the proceedings stopped to give the petitioner a chance to collect her wits, or furnish testimony, or rebut charges. She was not advised of her right to appeal, but with fell and determined haste the hearing proceeded to the apparently foredetermined conclusion. * * *

"Upon the plainest principles then of universal justice, no fair hearing has occurred here; rather has the hearing been stripped of the conditions which

c. 251, 41 Stat. 1008. The warrant of deportation issued after a hearing. Then this petition for a writ of habeas corpus was brought in the federal court, and heard upon the return and a traverse thereto. The order entered, without opinion, dismissed the writ, remanded the relator to the custody of the Commissioner of Immigration at the Port of New York, and granted a stay, pending the appeal to this Court. The case is here under § 238 of the Judicial Code, the claim being that Tisi was denied rights guaranteed by the Federal Constitution.

Tisi's claim to be discharged on habeas corpus rests wholly upon the contention that he has been denied due process of law. There was confessedly due notice of the charge and ample opportunity to be heard. What Tisi urges is that there was no evidence to sustain the finding that he knew the seditious character of the printed matter. Such knowledge is not, like alienage, a jurisdictional fact. Ng Fung Ho v. White, 259 U. S. 276, 284; United States ex rel. Bilokumsky v. Tod, 263 U. S. 149. But it is an essential of the authority to deport. There is no suggestion that the Secretary of Labor failed to recognize this requirement. The contention is that he erred in deciding that there was substantial evidence of such knowledge and in allowing the supposed evidence to convince him of the fact. The printed matter found consisted of leaflets in the English language. Tisi testified that he cannot read English; that he did not know the character of the leaflets; and that his presence in the company of other Italians who were seen folding the leaflets was accidental. The Secretary of Labor was not obliged to believe this testimony. The Government did not introduce any direct evidence to the contrary. But there was much evidence of other facts from which Tisi's knowledge of the character of the leaflets might reasonably have been inferred. We do not discuss the evidence; because the correctness of the judgment of the lower court is not to be determined by enquiring whether the conclusion drawn by the Secretary of Labor from the evidence was correct or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found.

The denial of a fair hearing is not established by proving merely that the decision was wrong. Chin Yow v. United States, 208 U. S. 8, 13. This is equally true whether the error consists in deciding wrongly that evidence introduced constituted legal evi-

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make for justice. If the charges presented against this young woman, a stranger in a strange, though adopted, land, speaking English imperfectly, and relying upon one man as inquisitor, interpreter, prosecutor, and judge, had not involved charges of her mental deficiency, the fell expedition of the proceedings would invalidate the findings; but, when it is considered that the charge brought and claimed to have been established by the inquisitor was that of *mental deficiency*, the gross unfairness of the hearing becomes more clear."

dence of the fact or in drawing a wrong inference from the evidence. The error of an administrative tribunal may, of course, be so flagrant as to convince a court that the hearing had was not a fair one. Compare United States ex rel. Bilokumsky v. Tod, 263 U. S. 149; Kwock Jan Fat v. White, 253 U. S. 454; Zakonaite v. Wolf, 226 U. S. 272; Tang Tun v. Edsell, 223 U. S. 673. But here no hasty, arbitrary or unfair action on the part of any official, or any abuse of discretion is shown. There is no claim that the lack of legal evidence of knowledge was manifest; or that the finding was made in wilful disregard of the evidence to the contrary; or that settled rules of evidence were ignored. The procedure prescribed by the rules of the Department appears to have been followed in every respect; and the legality of that prescribed is not questioned. There is no suggestion that Tisi was not allowed to prepare for the hearing, by prior examination of the written evidence on which the warrant of arrest issued; or that he was otherwise restricted in his preparation of the defense. The hearing was conducted orally. Tisi was present and was represented by counsel. He testified fully; and the many witnesses produced by the Government were cross-examined by his counsel. He was given ample time in which to present the evidence, the argument, and a brief. Under these circumstances mere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law.

Affirmed.

WONG TSICK WYE ET AL. v. NAGLE, COMMISSIONER OF IMMIGRATION.

1929. Circuit Court of Appeals, Ninth Circuit. 33 Fed. (2d) 226.

Appeal from the District Court of the United States for the Southern Division of the Northern District of California; Frank H. Kerrigan, Judge.

Habeas corpus by Wong Tsick Wye and another against John D. Nagle, as Commissioner of Immigration for the Port of San Francisco. Order denying the petition, and petitioners appeal.

Before RUDKIN, DIETRICH, and WILBUR, Circuit Judges.

RUDKIN, Circuit Judge. This is an appeal from an order denying a petition for a writ of habeas corpus in behalf of two Chinese applicants for admission to the United States. It is conceded that the alleged fathers of the two appellants are citizens, so that the only question at issue is one of relationship. The witnesses appearing before the board of special inquiry were the alleged grandfather of one of the appellants, who is also the alleged father of the other appellant; the alleged brother of one of the appellants, who is also the alleged father of the other appellant; the two appellants themselves; and a fifth witness, to whose testimony no particular importance is attached. The several witnesses were examined in great detail as to matters of family history, relatives, persons, and places, and it must be conceded that the relationship was fully established, unless the department was justified in disregarding the testimony and in excluding the appellants because of certain discrepancies in the testimony, to which we will now direct our attention.

[After reviewing the evidence contained in the record of the examination made by the administrative officials, the opinion continues:]

It seems to us that whatever discrepancies are found in this testimony are unimportant, considering the scope of the examination when compared with the innumerable particulars in which the witnesses are in full accord.

This and other courts having to do with immigration cases are constantly called upon to consider the effect of discrepancies of one kind or another in testimony taken before the immigration department. In Go Lun v. Nagle, 22 F. (2d) 246, this court said: "We may say at the outstart that discrepancies in testimony, even as to collateral and immaterial matters, may be such as to raise a doubt as to the credibility of the witnesses and warrant exclusion; but this cannot be said of every discrepancy that may arise. We do not all observe the same things, or recall them in the same way, and an American citizen cannot be excluded, or denied the right of entry, because of immaterial and unimportant discrepancies in testimony covering a multitude of subjects. The purpose of the hearing is to inquire into the citizenship of the applicant, not to develop discrepancies which may support an order of exclusion, regardless of the question of citizenship."

In Nagle v. Wong Ngook Hong, 27 F. (2d) 650, we said: "Owing to the wide range of the examination of the several witnesses, repetition, and minute detail, the records are voluminous. Certain discrepancies are relied upon by the Commissioner, but we agree with the lower court that they are either only apparent or insignificant. No group of witnesses, however intelligent, honest, and disinterested, could submit to the interrogation to which these witnesses were subjected without developing some discrepancies."

Again, in Nagle v. Dong Ming, 26 F. (2d) 438, we said: "But it must be borne in mind that mere" discrepancies do "not necessarily discredit testimony. It is sometimes urged upon us that the testimony is impeached by its discrepancies, and sometimes by its complete accord. Both propositions are valid. But to be so, and to escape the charge of inconsistency, they must be understood in the light of the reason upon which they rest, and applied only within the range of such reason; otherwise, all testimony would be self-impeaching."

In Mason ex rel. Lee Wing You v. Tillinghast (C. C. A.) 27 F. (2d) 580, the court said: "So proceeding, the immigration tribunals succeeded in developing some very slight discrepancies on matters purely collateral, on which they ground their finding that the relationship is not reasonably established. But this euphemistic phrase must not be allowed to disguise the real situation. There is here no room for honest error. The family exists as the three witnesses describe it, unless the record as a whole furnished some basis upon which reasonable, truth-seeking minds can ground a conclusion of fraud and perjury on the part of all three witnesses. There is no conflicting evidence, direct or indirect, on the question of relationship. As noted above, the three witnesses were in absolute agreement on the vital issue of relationship and as to who the family are. We assume that these tribunals are not bound by the rules of evidence applicable in a jury trial. But they are bound by the rules of reason and logic—by what is commonly referred to as common sense." See, also, Fong Tan Jew ex rel. Chin Hong Fun v. Tillinghast (C. C. A.) 24 F. (2d) 632.

The immigration officers found that there was a good family resemblance between the different parties claiming relationship, and, as said by this court in the Go Lun Case, a reading of the entire record leaves not the slightest room for doubt that the relationship was fully established and that the appellants are citizens of the United States. A contrary conclusion is arbitrary and capricious, and without any support in the testimony.

The judgment of the court below is therefore reversed, with directions to issue the writ of habeas corpus as prayed.[11]

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[11] "Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on habeas corpus. Cf. Chin Yow v. United States, 208 U. S. 8; Kwock Jan Fat v. White, 253 U. S. 454. But a want of due process is not established by showing merely that the decision is erroneous, Chin Yow v. United States, supra, 13, or that incompetent evidence was received and considered. See Tisi v. Tod, 264 U. S. 131, 133. Upon a collateral review in habeas corpus proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial. Tisi v. Tod, supra." Stone, J., in United States ex rel. Vajtauer v. Commissioner of Immigration (1927) 273 U. S. 103, 71 L. ed. 560.

"Nor is deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want." Holmes, J., in Bugajewitz v. Adams (1913) 228 U. S. 585, 591, 57 L. ed. 978.

It has been said that an administrative deportation proceeding is not a criminal one; that the person proceeded against may be compelled by legal process to testify, and to answer whether or not he is an alien; that alienage not being an element of a crime, such compulsion would not be compulsory self-incrimination. United States ex rel. Bilokumsky v. Tod (1923) 263 U. S. 149, 153-155, 68 L. ed. 221.

It was a federal crime to import an alien for an immoral purpose and also such act if done by an alien was a ground for the latter's deportation. Upon an indictment for such act an alien was acquitted. Subsequently the ground for deportation was found against him by administrative officers, on the same transaction, and deportation ordered. In sustaining the latter the Supreme Court said: "The verdict and judgment acquitting petitioner under the indictment does not render the present controversy *res judicata.* The issue presented by the traverse of the indictment was not identical with the matter determined by the Secretary of Commerce and Labor And, besides, the acquittal under the indictment was not equivalent to an affirmative finding of innocence, but merely to an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused. The distinction between a criminal prosecution and an administrative inquiry by an Executive Department or subordinate officers thereof has been often pointed out. Zakonaite v. Wolf, 226 U. S. 272, 275, and cases cited; Williams v. United States, 186 Fed Rep. 479." Lewis v. Frick (1914) 233 U. S. 291, 302, 58 L. ed. 967.

In Pearson v. Williams (1906) 202 U. S. 281, 50 L. ed. 1029, it appeared that some British aliens who sought to enter the United States were examined by a board of special inquiry and allowed to enter. More than a month later they were arrested by order of the Secretary of Commerce and Labor and after another hearing before a board of special inquiry were ordered to be returned to England. On habeas corpus the question was whether the Secretary had this power. Holding that he had, the Supreme Court by Holmes, J., said: "The proceedings upon both inquiries * * * appear to have been before the same persons, upon the same question, namely, whether the petitioners came to this country under contract to perform labor contrary to the statutes of the United States." [The immigration statute provided that "the decision of any two members of a board shall prevail and be final" subject to appeal to the Secretary.] "In this case the first decision of the board was unanimous, and the petitioners contend that it was final by the very words of the act. * * * The board is an instrument of the executive power, not a court. It is made up * * * of the immigrant officials in the service, subordinates of the Commissioner of Immigration, whose duties are declared to be administrative by § 23 [Act of March 3, 1903]. Decisions of a similar type long have been recognized as decisions of the executive department and cannot constitute *res adjudicata* in a technical sense. * * * The decisions necessarily are made * * * in a summary way, in order to reach the 'prompt determination' declared by § 25 to be an object. * * * There is a plain and sufficient meaning for the words making their decision final—and that is that it shall be final where it is most likely to be questioned, in the courts."

Where the issue in an exclusion case was whether the person seeking entry was the son of the American citizen who was claimed to be his parent, it was held that the decision of the administrative officers would be final if fairly arrived at, but that it was not fairly arrived at because important evidence taken was omitted from the record kept by the examining inspector and was not presented to the Commissioner who made the decision, and this omission was only imperfectly corrected by addition to the record which went on appeal to the Secretary of Labor, who affirmed the Commissioner's decision. Reversing the Circuit Court of Appeals, the Supreme Court remanded the case to the district court, where a writ of habeas corpus had been applied for, directing the court to give a trial on the merits, saying: "The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, not less of the Commissioner of Immigration and of the Secretary of Labor than of the courts, the judgment in this case must be reversed. It is better that many Chinese im-

Section 6.—May Finality Be Given to Administrative Decisions of Questions of Law?

REETZ v. MICHIGAN.

1903. Supreme Court of the United States. 188 U. S. 505.

Act No. 237 of the public acts of the State of Michigan (1899) directed the appointment of "a board of registration in medicine," to hold two regular meetings at specified times in each year at the state capitol, and additional meetings at such times and places as it might determine; required all persons engaging in the practice of medicine and surgery to obtain from such board a certificate of registration; prescribed the conditions upon which such certificate should be granted, and forbade, under penalty, the practice of medicine or surgery without such certificate. The conditions above referred to were either a satisfactory examination, or the possession of "a diploma from any legally incorporated, regularly established and reputable college of medicine, * * * having at least a three years' course of eight months in each year, or a course of four years of six months in each year, * * * as shall be approved and designated by the board of registration," with a proviso that "the board of registration shall not register any person by reason of a diploma from any college which sells,

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migrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country." Kwock Jan Fat v. White (1920) 253 U. S. 454, 464, 64 L. ed. 1010.

"The doubt about the case arises from the fact that, as stated in the answer, 'said decision (of the board of special inquiry) was based *solely* upon the report and certification of a duly constituted medical board which was then and there convened to rehear and examine the said Nora Joyce.' If this means that the board of special inquiry *chose* to rely 'solely upon the (medical) report and certificate,' no legal error has been made; if it means that the board *felt obliged* to follow the medical report, without considering any other evidence upon the alien's mental condition, an error in law of such fundamental character has been made that the decision based upon it was unfair to the applicant and ought not to stand. An applicant who has been excluded by a board of special inquiry under an erroneous view of the law has not had a fair hearing and may be reheard on habeas corpus proceedings. Gonzales v. Williams, 192 U. S. 1, 24 Sup. Ct. 171, 48 L. ed. 317; U. S. ex rel. Mylius v. Uhl (D. C.) 203 Fed. 152; U. S. ex rel. Castro v. Williams (D. C.) 203 Fed. 155; U. S. ex rel. Rosen v. Williams, 200 Fed. 541, 118 C. C. A. 632.

"Upon the record and evidence here, it is uncertain whether the board of special inquiry excluded the petitioner because it understood the law to be that it must do so on account of the medical certificate, or whether it excluded her because, after considering all the evidence and exercising its own judgment, it concluded that she was feeble-minded. It devolves upon the petitioner to establish that the hearing before the immigration authorities was not a fair one. She has not done so; and the petition must therefore be denied, but without costs and without prejudice to her right to bring a new petition if she expects to establish that the immigration authorities acted under such a mistake of law as has been referred to."—Morton, District Judge, in Ex parte Joyce (1913) 212 Fed. 282, 284-285.

or advertises to sell, diplomas 'without attendance,' nor from any other than a regularly established and reputable college." Another provision was that an applicant should be given a certificate of registration if he should "present sufficient proof within six months after the passage of this act of his having already been legally registered under Act No. 167 of 1883, as amended in 1887, entitled 'An act to promote public health.'" The plaintiff in error was prosecuted and convicted in the Circuit Court for the county of Muskegon of a violation of this statute, which conviction was affirmed by the Supreme Court of the State, 127 Michigan, 87, to reverse which ruling this writ of error was sued out.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

The power of a state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine and punishing those who attempt to engage therein in defiance of such statutory provisions, is not open to question. Dent v. West Virginia, 129 U. S. 114; Hawker v. New York, 170 U. S. 189, and cases cited in the opinion; The State ex rel. Burroughs v. Webster, 150 Indiana, 607, and cases cited.

It is objected in the present case that the board of registration is given authority to exercise judicial powers without any appeal from its decision, inasmuch as it may refuse a certificate of registration if it shall find that no sufficient proof is presented that the applicant had been "legally registered under act No. 167 of 1883." That, it is contended, is the determination of a legal question which no tribunal other than a regularly organized court can be empowered to decide. The decision of the state Supreme Court is conclusive that the act does not conflict with the state constitution, and we know of no provision in the federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. Indeed, it not infrequently happens that a full discharge of their duties compels boards, or officers of a purely ministerial character, to consider and determine questions of a legal nature. Due process is not necessarily judicial process. * * *

Neither is the right of appeal essential to due process of law. In nearly every state are statutes giving, in criminal cases of a minor nature, a single trial, without any right of review. For nearly a century trials under the federal practice for even the gravest offences ended in the trial court, except in cases where two judges were present and certified a question of law to this court. In civil cases a common rule is that the amount in controversy limits the entire litigation to one court, yet there was never any serious question that in these cases due process of law was granted.

* * *

It is further insisted that it is essential to a judicial or quasi-judicial proceeding that it should give a person accused or interested the benefit of a hearing, and that there is in this statute no special provision for notice, or hearing, or authority to summon witnesses or to compel them to testify. The statute provides for semiannual meetings at specified times at the state capitol, but the plaintiff in error did not appear at any of these meetings or there present an application for registration or showing of his right thereto; he simply sent to the secretary of the board a certified copy of his registration under the prior statute, and his diploma from the Independent Medical College of Chicago, Illinois. The latter was returned with a notice from the board that it had denied the application for registration. When a statute fixes the time and place of meeting of any board or tribunal, no special notice to parties interested is required. The statute is itself sufficient notice. If plaintiff in error had applied at any meeting for a hearing the board would have been compelled to grant it, and if on such hearing his offer of or demand for testimony had been refused, the question might have been fairly presented to the state courts to what extent the action of the board had deprived him of his rights.

He seems to assume that the proceedings before the board were in themselves of a criminal nature, and that the state by such proceedings was endeavoring to convict him of an offence in the practice of his profession. But this is a mistake. The state was simply seeking to ascertain who ought to be permitted to practice medicine or surgery, and criminality arises only when one assumes to practice without having his right so to do established by the action of the board. The proceedings of the board to determine his qualifications are no more criminal than examinations of applicants to teach or practice law, and if the provisions for testing such qualifications are reasonable in their nature, a party must comply with them, and has no right to practice his profession in defiance thereof. * * *

Affirmed.

WORK, SECRETARY OF THE INTERIOR v. UNITED STATES EX REL. RIVES.

1925. Supreme Court of the United States. 267 U. S. 175.

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

This is an appeal under section 250 of the Judicial Code, par. 6, from a judgment of the Supreme Court of the District of Columbia, affirmed by the Court of Appeals, granting a mandamus compelling the Secretary of the Interior to consider and allow a claim for net losses suffered by Logan Rives, the relator, in producing and preparing to produce manganese at the instance of the Government for war purposes, under section 5 of the Dent Act (March 2, 1919, ch. 94, 40 Stat. 1272).

Relator's petition shows that he incurred losses aggregating $55,204.15, but that the Secretary awarded him only $23,047.36, refusing to allow him, among other items, $9,600 which he had to expend in obtaining a release from a contract to buy land containing manganese, after the land had lost most of its value because of the armistice. The mandamus asked is to compel consideration and allowance of the claim for this particular item.

The Secretary's answer avers that the relator received and accepted the $23,047.36 awarded March, 1920, but refused to waive any right to further award under any subsequent legislation which might provide for further payment. The answer further denies that the Secretary refused to consider the claim, but avers that he did so fully and rejected it. The relator demurred to the answer and on that demurrer judgment followed and the writ issued.

Mandamus issues to compel an officer to perform a purely ministerial duty. It can not be used to compel or control a duty in the discharge of which by law he is given discretion. The duty may be discretionary within limits. He can not transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them. The power of the court to intervene, if at all, thus depends upon what statutory discretion he has. Under some statutes, the discretion extends to a final construction by the officer of the statute he is executing. No court in such a case can control by mandamus his interpretation, even if it may think it erroneous. The cases range, therefore, from such wide discretion as that just described to cases where the duty is purely ministerial, where the officer can do only one thing, which on refusal he may be compelled to do. They begin on one side with Kendall v. United States, 12 Peters, 524, in which Congress directed the Postmaster General to make some credit entries in an account found to be just by the Solicitor of the Treasury. This Court held that the duty was ministerial with no discretion and required the Postmaster General to make the entries. On the other side, is Decatur v. Paulding, Secretary of the Navy, 14 Peters, 497. Congress there provided for general naval pensions by general Act, and by resolution of the same day granted a special pension for the widow of Commodore Decatur. She received the pension under the general law and then applied for the special pension, which was refused by the Secretary of the Navy, on the ground that she was given an election of one of two funds and she had elected. She sought by mandamus to compel the Secretary, who under the law administered the Naval Pension fund, to allow the special pension.

This court held that Congress intended the Secretary to construe the statutes and to allow the pensions accordingly, and that although the court might, as a matter of legal construction, differ from his conclusion, it could not by mandamus or injunction constrain him in his exercise of his discretion. Between these two early and leading authorities, illustrating the extremes, are decisions in which the discretion is greater than in the Kendall Case and less than in the Decatur Case, and its extent and the scope of judicial action in limiting it depend upon a proper interpretation of the particular statute and the congressional purpose.

The Dent Act was passed by Congress in an effort to do justice and equity to the many persons who could not obtain from the government compensation for supplies or services furnished or losses incurred in helping the government during the war, because of a lack of enforceable contracts or equities. As to supplies and services furnished, there was to be a settlement made by the Secretary of War, and if this did not satisfy the claimant, he was given a right under section 2 to sue in the Court of Claims to recover greater compensation. * * *

By section 5, provision was made, not to pay for supplies or services rendered directly to the government, but to relieve a class of persons who were invited by the government to invest money in the production and preparing for the production of certain metals or materials difficult to obtain, and needed for the war, and who had thereupon incurred expense therein and had suffered losses because of the coming of the armistice and the consequent destruction of the market for such metals.

The said Secretary was to make adjustments and payments in each case as he should determine to be just and equitable; and the decision of the Secretary was to be "conclusive and final." There were five provisos: The first imposed a limit of total expenditure under the Act. The second limited claims to those filed within three months after the passage of the Act.

The third proviso declared: "That no claim shall be allowed or paid by said Secretary unless it shall appear to the satisfaction of the said Secretary that the expenditures so made or obligations so incurred by the claimant were made in good faith for or upon property which contained * * * manganese * * * in sufficient quantities to be of commercial importance." * * *

The last paragraph of the section declared "That nothing in this section shall be construed to confer jurisdiction upon any court to entertain a suit against the United States" * * *.

It is urged that the refusal of the Secretary to allow the loss of $9,600 on the real estate contract is in the teeth of the third proviso, which requires him to allow for expenditures made or obligations incurred "for and upon property" containing manganese in sufficient quantities to be of commercial importance. The Interior Department had held from the beginning that this proviso did not embrace money spent for real estate or mining rights. * * *

We are asked to reject this interpretation as wholly at variance with the natural and necessary meaning of the words and to confirm the courts below in enforcing a view more liberal to the claimant.

The above summary of section 5 clearly shows that Congress was seeking to save the beneficiaries from losses which it would have been under no legal obligation to make good if a private person. It was a gratuity based on equitable and moral considerations. United States v. Realty Company, 163 U. S. 427, 439; Allen v. Smith, 173 U. S. 389, 402. Congress did not wish to create a legal claim. It was not dealing with vested rights. It did not, as it did with the claims for supplies and services directly furnished the Government under the first and second sections of the Act, make the losses recoverable in a court, but expressly provided otherwise. It dealt with the subject with the utmost caution. It hedged the granting of the equitable gratuity with limitations to prevent the use of the Statute for the recovery of doubtful or fraudulent claims or merely speculative losses. It vested the Secretary with power to reject all losses except as he was satisfied that they were just and equitable and it made his decision conclusive and final. Final against whom? Against the claimant. He could not resort to court to review the Secretary's decision. This was expressly forbidden. * * *

Congress was occupying toward the proposed beneficiaries of section 5 the attitude rather of a benefactor, than of a debtor at law. Congress intended the Secretary to act for it, and to construe the meaning of the words used to describe the elements of the net losses to be ascertained and to give effect to his interpretation without the intervention of the courts. This statute presents a case of as wide discretion as was held to have been vested in the Secretary of the Navy in the Decatur Case. * * *

Two cases upon which the relator relies, do not aid him. They depend on the construction of the particular statute. In Work v. Mosier, 261 U. S. 352, we held that the statutory direction that certain income due minors of the Osage Indians be paid was clear and positive and it was not left to the Secretary of the Interior to vary it, i. e., he was not given discretion finally to construe it. In Work v. McAlester, 262 U. S. 200, it was held that by virtue of the statute a lessee had a vested right to buy the land at an original appraisement and that the Secretary had no authority to affect that right by ordering another appraisement.

Ness v. Fisher, 223 U. S. 683; Riverside Oil Company v. Hitchcock, 190 U. S. 316; Alaska Smokeless Company v. Lane, 250 U. S.

549; and Hall v. Payne, 254 U. S. 343, were all cases in which it was sought to control and reverse rulings of the Secretary of the Interior, on the ground that he had in the administration of the land laws made a ruling contrary to law against an applicant for action by him. In each case it was held that as the statute intended to vest in the Secretary the discretion to construe the land laws and make such rulings, no court could reverse or control them by mandamus in the absence of anything to show that they were capricious or arbitrary. It was pointed out that a mandamus could not be made to serve the function of a writ of error, and the mere fact that the court might deem the ruling erroneous in law gave it no power to intervene. These cases are supported by earlier authorities to the same effect. United States ex rel. Tucker v. Seaman, 17 How. 225; Gaines v. Thompson, 7 Wall. 347; Litchfield v. Register and Receiver, 9 Wall. 575; United States ex rel. Dunlap v. Black, 128 U. S. 40. All rest upon the Decatur Case. Compare United States v. Babcock, 250 U. S. 328, 331. There is nothing in the award by the Secretary in the case at bar which would justify characterizing it as arbitrary or capricious or fraudulent or an abuse of discretion. The Secretary's view that it was not just or equitable to include loss by a land purchase within the gratuity of the government as defined by the statute must therefore prevail against mandamus.

Lane v. Hoglund, 244 U. S. 174, Ballinger v. Frost, 216 U. S. 240, Garfield v. Goldsby, 211 U. S. 249, Roberts v. United States, 176 U. S. 221, Butterworth v. Hoe, 112 U. S. 50, United States v. Schurz, 102 U. S. 378, were all cases in which the court found that all the conditions had been fulfilled upon which the relator in the mandamus was entitled to call upon the officer to do an act beneficial to the relator and that the act was thus a ministerial duty, as in the Kendall Case.

There is a class of cases in which a relator in mandamus has successfully sought to compel action by an officer who has discretion concededly conferred on him by law. The relator in such cases does not ask for a decision any particular way but only that it be made one way or the other. Such are Louisville Cement Company v. Interstate Commerce Commission, 246 U. S. 638, and Interstate Commerce Commission v. Humboldt S. S. Company, 224 U. S. 474. They follow the decision in Commissioner of Patents v. Whiteley, 4 Wall. 522. They are analogous to Hohorst, Petitioner, 150 U. S. 653; Parker, Petitioner, 131 U. S. 221; Ex parte Parker, 120 U. S. 737, and others which hold that mandamus may issue to an inferior judicial tribunal if it refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise. It is sought to bring the present case within this class by the averment in the petition that the Secretary of the Interior has refused to take jurisdiction of the claim for the loss of $9,600 through the real estate contract. This averment is met by a denial in the answer and the affirmative allegation that the Secretary did consider the claim and disallowed it for cause deemed by him to be good. This mandamus was granted by the courts below on demurrer to the answer. Its allegations must be taken as admitted. Moreover, it is clearly shown by the exhibits to the pleadings that the Secretary decided that on its merits the claim was not for the kind of loss which Congress intended the Secretary to reimburse.

Our conclusion makes it unnecessary for us to consider the contention of the Government that the relator here is estopped to urge the present claim by his acceptance of the award already made.

Reversed.

FIRST MOON v. WHITE TAIL AND UNITED STATES.

1926. Supreme Court of the United States. 270 U. S. 243.

Appeal from a decree of the District Court dismissing, for want of jurisdiction, a bill to establish an interest in an Indian allotment.

Mr. Justice McReynolds delivered the opinion of the court.

Appellant seeks to establish an interest in certain lands allotted to Little Soldier, a Ponca Indian, under the General Allotment Act of 1887, c. 119, 24 Stat. 388, as amended by the Act of 1891, c. 383, 26 Stat. 794. Trust patents were issued therefor in 1895, and he died March 1, 1919. It appears from the bill that the Secretary of the Interior after due consideration determined who were the heirs, and in doing so eliminated appellant, although she claimed to be the only surviving lawful wife. It is alleged that upon the facts found by him the Secretary misapplied the law.

The court below held, correctly we think, that it was without jurisdiction, since the matter had been entrusted to the exclusive cognizance of the Secretary of the Interior by the Act of June 25, 1910, c. 431, 36 Stat. 855, which provides: "That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

The question presented must be regarded as settled by what this court has said in Hallowell v. Commons,[1] 239 U. S. 506; Lane v. Mickadiet, 241 U. S. 201; United States v. Bowling, 256 U. S. 484. The legislative history of the Act of 1910—Cong. Rec. vol. 45, p. 5811—lends support to this construction; and abundant reason for the provision becomes apparent upon consideration of the infinite difficulties which otherwise would arise in connection with the sundry duties of the Secretary of the Interior relative to Indian allotments. * * *

The decree is Affirmed.

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[1] The cited case was this: In 1884 the Secretary of the Interior acting under a statute had allotted 80 acres of lands to Jacob Hallowell and issued to him a preliminary patent. The statute provided that the legal title should remain in the United States for 25 years, the United States to hold the land in trust for the benefit of the allottee or in case of his decease for the benefit "of his heirs according to the laws of the State of Nebraska." Jacob died in 1885. Simeon Hallowell claiming to be sole heir according to the laws of Nebraska filed a bill in the United States District Court against a United States Indian agent and other persons who claimed to be heirs, to restrain them from interfering with his leasing the land and collecting the rents for his sole benefit. The particular issue was whether Nebraska law recognized as valid a polygamous marriage between Indians contracted in accordance with Indian custom, and whether a child of the second of the two polygamous wives, both living, was legitimate. The District Court dismissed the suit. The Circuit Court of Appeals affirmed this dismissal on the ground that the Act of June 25, 1910, quoted in the principal case above, deprived the courts of jurisdiction. Having in mind that the instant suit was one in equity to quiet title the court said: "While it is true that the judicial power of the United States extends to all cases in equity arising under the laws of the United States, it does not follow that the jurisdiction of any given court extends thereto. The Congress had power to confer such jurisdiction upon any court created by it. The original jurisdiction of the Supreme Court is defined by the Constitution by Clause 2 of Section 2 of Article III, and it is not pretended that such cases as this come within its provisions. It was entirely optional with Congress under Section 1 of Article III whether it would create any inferior courts at all. It has undoubted power to create such courts to exercise a portion only of the judicial power." 210 Fed. 793, 797-798. The court added: "Aside from the fact that the act of June 25, 1910, provided that the decisions of the Secretary of the Interior shall be final and conclusive, which we think Congress had the power to do, as to lands the legal title to which the government held, it is not alleged in the bill that the Secretary of the Interior has as yet passed upon the question as to who are the heirs of Jacob Hallowell, according to the laws of the state of Nebraska, and the rule asserted would not give the courts any right to interfere until the matter had been passed upon by the Secretary of the Interior. This necessitates the affirmance of this case," * * * . This decision was affirmed by the Supreme Court in Hallowell v. Commons, 239 U. S. 506, 60 L. ed. 409, supra.

Compare the statement in Lane v. Mickadiet (1916) 241 U. S. 201, 207-208, 60 L. ed. 956: "It is undoubted that the fee simple to the land embraced by the allotment had not passed from the United States and that, as expressly stated in the granting act, the land was held in trust by the United States for the benefit of the allottees to await the expiration of the trust period fixed by law when the duty on the part of the United States of conveying the fee of the land would arise. It is equally undoubted under these conditions that the land was under the control in an administrative sense of the Land Department for the purpose of carrying out the act of Congress. As there is no dispute, and could be none, concerning the general rule that courts have no power to interfere with the performance by the Land Department of the administrative duties devolving upon it, however much they may when the functions of that Department are at an end correct as between proper parties errors of law committed in the administration of the land laws by the Department, * * * ."

Section 7.—Administration of the Law Governing Public Utilities.

INTERSTATE COMMERCE COMMISSION v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

1913. Supreme Court of the United States. 227 U. S. 88.

MR. JUSTICE LAMAR delivered the opinion of the court.

The New Orleans Board of Trade, in October and November, 1907, brought three separate proceedings against the Louisville & Nashville Railroad, asking the Commerce Commission to set aside as unfair, unreasonable and discriminatory certain class and commodity rates (local) from New Orleans to (1) Mobile, to (2) Pensacola, and (3) through rates, via those cities, to Montgomery, Selma, and Prattville. The Railroad answered. A hearing was had, the issue as to commodity rates was adjusted by agreement, and on December 31, 1909, the Commission made a single order in which it found the class rates complained of to be unreasonable, directed the old locals to be restored and a corresponding reduction made in the through rates. The Railroad thereupon, on January 26, 1910, filed a bill, in the United States Circuit Court for the Western District of Kentucky, praying that the Commission be enjoined from enforcing this order, which it alleged was arbitrary, oppressive and confiscatory, and deprived the company of its property and right to make rates, without due process of law.

After a hearing before three Circuit Court judges, the carrier's application for a temporary injunction was denied (184 Fed. Rep. 118). Testimony was then taken before an Examiner. Later the suit was transferred to the newly organized Commerce Court—the United States being made a party. There, in addition to the evidence in the Circuit Court, the Railroad exhibited all that had been introduced before the Commission, as a basis for the contention that this evidence utterly failed to show that the rates attacked were unreasonable. This view was sustained by the Commerce Court, which, in a lengthy opinion, held (one judge dissenting) that the order was void because there was no material evidence to support it.

On the appeal here, the government insisted that while the act of 1887 to regulate commerce (24 Stat. 379, c. 104, §§ 14, 15, 16) made the orders of the Commission only prima facie correct, a different result followed from the provision in the Hepburn Act of 1906 (34 Stat. 584, c. 3591, § 15) that rates should be set aside if after a hearing the "Commission shall be of the opinion that the charge was unreasonable." In such case it insisted that the order based on such opinion is conclusive, and (though Int. Com. Comm.

v. Union Pacific R. R., 222 U. S. 541, 547, was to the contrary) could not be set aside, even if the finding was wholly without substantial evidence to support it.

1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the "indisputable character of the evidence." Tang Tun v. Edsell, 223 U. S. 673, 681; Chin Yow v. United States, 208 U. S. 8, 13; Low Wah Suey v. Backus, 225 U. S. 460, 468; Zakonaite v. Wolf, 226 U. S. 272; or, if the facts found do not, as a matter of law, support the order made. United States v. B. & O. S. W. R. R., 226 U. S. 14. Cf. Atlantic C. L. v. North Carolina Corp. Com., 206 U. S. 1, 20; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 301; Oregon Railroad v. Fairchild, 224 U. S. 510; I. C. C. v. Illinois Central, 215 U. S. 452, 470; Southern Pacific Co. v. Interstate Com. Comm., 219 U. S. 433; Muser v. Magone, 155 U. S. 240, 247.

2. The government's claim is not only opposed to the ruling in I. C. C. v. Union Pacific, 222 U. S. 541, 547, and the cases there cited, but is contrary to the terms of the Act to Regulate Commerce, which, in its present form, provides (25 Stat. 861, § 17) for methods of procedure before the Commission that "conduce to justice." The statute, instead of making its orders conclusive against a direct attack, expressly declares that "they may be suspended or set aside by a court of competent jurisdiction." 36 Stat. 539 (15). Of course, that can only be done in cases presenting a justiciable question. But whether the order deprives the carrier of a constitutional or statutory right; whether the hearing was adequate and fair, or whether, for any reason, the order is contrary to law—are all matters within the scope of judicial power.

3. Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitu-

tion of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order. Int. Com. Comm. v. Northern Pacific Ry., 216 U. S. 538, 544. In a case like the present the courts will not review the Commission's conclusions of fact (Int. Com. Comm. v. Delaware &c. Ry., 220 U. S. 235, 251), by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, "be set aside by a court of competent jurisdiction." 36 Stat. 551.

4. The government further insists that the Commerce Act (36 Stat. 743) requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of § 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, but is not available, as such, in cases where the party is entitled to a hearing. The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Int. Com. Comm. v. Baird, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. United States v. Baltimore & Ohio S. W. R. R., 226 U. S. 14.

As these contentions of the government must be overruled, it is necessary to examine the record with a view of determining whether there was substantial evidence to support the order. * * * [The court proceeded to discuss the evidence and concluded that there was sufficient for this purpose.]

The order of the Commission, restoring a local rate that had been in force for many years, and making a corresponding reduction in the through rate, was not arbitrary but sustained by substantial, though conflicting evidence. The courts cannot settle the conflict nor put their judgment against that of the rate-making body, and the decree is Reversed.[1]

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[1] "The District Courts [of the United States] have jurisdiction over 'cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.' Act of June 18, 1910, c. 309, 36 Stat. 539; Judicial Code, § 207, Act of March 3, 1911, c. 231, 36 Stat. 1148; Act of October 22, 1913, c. 32, 38 Stat. 219. * * * The authority conferred upon * * * the District Courts * * * is confined to determining whether the Commission's order violates the Constitution, or exceeds the power delegated by statute, or is an exercise of power so arbitrary as virtually to transcend the authority conferred. Kansas City Southern Ry. Co. v. United States, 231 U. S. 423, 439; Manufacturers Ry. Co. v. United States, 246 U. S. 457, 483, 489. * * * The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions." United States v. New River Co. (1924) 265 U. S. 533, 68 L. ed. 1165.

State courts have no jurisdiction to entertain bills to enjoin enforcement of orders of the Interstate Commerce Commission. Lambert Run Coal Co. v. Baltimore & Ohio R. Co. (1922) 258 U. S. 377, 66 L. ed. 671.

"In view of the doctrine announced in Interstate Com. Comm. v. Illinois Cent. R. R., 215 U. S. 452; Interstate Com. Comm. v. Delaware, L. & W. R. Co., 220 U. S. 235; Interstate Com. Comm. v. Louisville & Nashville R. R., 227 U. S. 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the [Interstate Commerce] Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. East Tenn. &c. Ry. Co. v. Interstate Com. Comm., 181 U. S. 1, 23-29. And the amendments by which it came to pass that the findings of the Commission were made not merely prima facie but conclusively correct in case of judicial review, except to the extent pointed out in the Illinois Central and other cases, supra, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It cannot be otherwise since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action."—White, C. J., for the court, in United States v. Louisville & Nashville R. Co. (1914) 235 U. S. 314, 320-321, 59 L. ed. 245.

"While a finding of fact made by the [Interstate Commerce] Commission concerning a matter within the scope of the authority delegated to it [herein an order fixing a commodity rate] is binding and may not be re-examined in the courts, it is undoubted that where it is contended that an order whose enforcement is resisted was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact, but one of law which it is the duty of the courts to examine and decide." Florida East Coast R. Co. v. United States (1910) 234 U. S. 167, 185, 58 L. ed. 1267.

The legislation of Congress, as construed, permits so wide a range of judicial review of the widely variant types of orders of the Interstate Commerce Commission, that no case has come before the courts presenting any important con-

BLUEFIELD WATER WORKS AND IMP. CO. v. PUBLIC SERVICE COMMISSION OF WEST VIRGINIA.

1923. Supreme Court of the United States. 262 U. S. 679.

Error to a judgment of the Supreme Court of Appeals of West Virginia, sustaining an order of a state commission fixing water rates, in a suit brought by the plaintiff in error to set the order aside.

MR. JUSTICE BUTLER delivered the opinion of the court.

Plaintiff in error is a corporation furnishing water to the city of Bluefield, West Virginia, and its inhabitants. September 27, 1920, the Public Service Commission of the state, being authorized by statute to fix just and reasonable rates, made its order prescribing rates. In accordance with the laws of the state (§ 16, c. 15-O, Code of West Virginia), the company instituted proceedings in the Supreme Court of Appeals to suspend and set aside the order. The petition alleges that the order is repugnant to the Fourteenth Amendment, and deprives the company of its property without just compensation and without due process of law, and denies it equal protection of the laws. A final judgment was entered, denying the company relief and dismissing its petition. The case is here on writ of error.

1. The city moves to dismiss the writ of error for the reason, as it asserts, that there was not drawn in question the validity of a statute or an authority exercised under the state, on the ground of repugnancy to the federal Constitution.

The validity of the order prescribing the rates was directly challenged on constitutional grounds, and it was held valid by the highest court of the state. The prescribing of rates is a legislative act. The commission is an instrumentality of the state, exercising delegated powers. Its order is of the same force as would be a like enactment by the Legislature. If, as alleged, the prescribed rates are confiscatory, the order is void. Plaintiff in error is entitled to bring the case here on writ of error and to have that question decided by this court. The motion to dismiss will be denied. See Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, and cases cited; also Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287.

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stitutional issue as to how far judicial review could be cut off. If a carrier on a bill in a federal court should challenge a rate order of the commission on the contention that it rendered the net income resulting from its whole rate structure so low as to be confiscatory and in violation of the due process clause of the Fifth Amendment, whether the court would treat the Commission's finding of the controlling ultimate facts as conclusive has not been decided (1929). For a few "dark sayings *obiter*" see John Dickinson, Administrative Justice (1927) p. 176, n. 21. Compare Ohio Valley Water Co. v. Ben Avon Borough (1920) 253 U. S. 287, 64 L. ed. 908.

2. The commission fixed $460,000 as the amount on which the company is entitled to a return. It found that under existing rates, assuming some increase of business, gross earnings for 1921 would be $80,000 and operating expenses $53,000, leaving $27,000, the equivalent of 5.87 per cent., or 3.87 per cent. after deducting 2 per cent. allowed for depreciation. It held existing rates insufficient to the extent of $10,000. Its order allowed the company to add 16 per cent. to all bills, excepting those for public and private fire protection. The total of the bills so to be increased amounted to $64,000. That is, 80 per cent. of the revenue was authorized to be increased 16 per cent., equal to an increase of 12.8 per cent. on the total,—amounting to $10,240.

As to value: The company claims that the value of the property is greatly in excess of $460,000. Reference to the evidence is necessary. There was submitted to the commission evidence of value which it summarized substantially as follows:

a. Estimate by company's engineer on basis of reproduction new, less depreciation, at pre-war prices	$ 624,548.00
b. Estimate by company's engineer on basis of reproduction new, less depreciation, at 1920 prices	1,194,663.00
c. Testimony of company's engineer fixing present fair value for rate making purposes	900,000.00
d. Estimate by commission's engineer on basis of reproduction new, less depreciation at 1915 prices, plus additions since December 31, 1915, at actual cost, excluding Bluefield Valley Waterworks, water rights, and going value	397,964.38
e. Report of commission's statistician showing investment cost less depreciation	365,445.13
f. Commission's valuation, as fixed in case No. 368 ($360,000), plus gross additions to capital since made ($92,520.53)	452,520.53

It was shown that the prices prevailing in 1920 were nearly double those in 1915 and pre-war time. The company did not claim value as high as its estimate of cost of construction in 1920. Its valuation engineer testified that in his opinion the value of the property was $900,000—a figure between the cost of construction in 1920, less depreciation, and the cost of construction in 1915 and before the war, less depreciation.

The commission's application of the evidence may be stated briefly as follows:

As to "a," supra. The commission deducted $204,000 from the estimate (details printed in the margin),[2] leaving approximately $421,000, which it contrasted with the estimate of its own engineer, $397,964.38 (see "d," supra). It found that there should be included $25,000 for the Bluefield Valley Waterworks plant in Virginia, 10 per cent. for going value, and $10,000 for working capital. If these be added to $421,000, there results $500,600. This may be compared with the commission's final figure, $460,000.

As to "b" and "c," supra. These were given no weight by the commission in arriving at its final figure, $460,000. It said:

"Applicant's plant was originally constructed more than twenty years ago, and has been added to from time to time as the progress and development of the community required. For this reason, it would be unfair to its consumers to use as a basis for present fair value the abnormal prices prevailing during the recent war period; but when, as in this case, a part of the plant has been constructed or added to during that period, in fairness to the applicant, consideration must be given to the cost of such expenditures made to meet the demands of the public."

As to "d," supra. The commission taking $400,000 (round figures) added $25,000 for Bluefield Valley Waterworks plant in Virginia, 10 per cent. for going value, and $10,000 for working capital, making $477,500. This may be compared with its final figure, $460,000.

As to "e," supra. The commission, on the report of its statistician found gross investment to be $500,402.53. Its engineer applying the straight line method found 19 per cent. depreciation. It applied 81 per cent. to gross investment and added 10 per cent. for going value and $10,000 for working capital, producing $455,500.[3] This may be compared with its final figure, $460,000.

As to "f," supra. It is necessary briefly to explain how this figure, $452,520.53, was arrived at. Case No. 368 was a proceeding initiated by the application of the company for higher rates, April 24, 1915. The commission made a valuation as of January 1, 1915. There were presented two estimates of reproduction cost less depreciation, one by a valuation engineer engaged by the company and the other by a valuation engineer engaged by the city, both "using the same method." An inventory made by the company's engineer was accepted as correct by the city and by the commission. The method

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[2]

Difference in depreciation allowed	$ 49,000
Preliminary organization and development cost	14,500
Bluefield Valley waterworks plant	25,000
Water rights	50,000
Excess overhead costs	39,000
Paving over mains	28,500
[Sic.]	$204,000

[3] As to "e": $365,445.13 represents investment cost less depreciation. The gross investment was found to be $500,402.53, indicating a deduction on account of depreciation of $134,957.40, about 27 per cent., as against 19 per cent. found by the commission's engineer.

"was that generally employed by courts and commissions in arriving at the value of public utility properties under this method," and in both estimates "five year average unit prices" were applied. The estimate of the company's engineer was $540,000 and of the city's engineer, $392,000. The principal differences as given by the commission are shown in the margin.[4] The commission disregarded both estimates and arrived at $360,000. It held that the best basis of valuation was the net investment, i. e., the total cost of the property less depreciation. It said:

"The books of the company show a total gross investment, since its organization, of $407,882, and that there has been charged off for depreciation from year to year the total sum of $83,445, leaving a net investment of $324,427. * * * From an examination of the books * * * it appears that the records of the company have been remarkably well kept and preserved. It therefore seems that when a plant is developed under these conditions the net investment which of course means the total gross investment less depreciation is the very best basis of valuation for rate making purposes and that the other methods above referred to should be used only when it is impossible to arrive at the true investment. Therefore, after making due allowance for the capital necessary for the conduct of the business and considering the plant as a going concern, it is the opinion of the commission that the fair value for the purpose of determining reasonable and just rates in this case of the property of the applicant company, used by it in the public service of supplying water to the city of Bluefield and its citizens, is the sum of $360,000, which sum is hereby fixed and determined by the commission to be the fair present value for the said purpose of determining the reasonable and just rates in this case."

In its report in No. 368, the commission did not indicate the amounts respectively allowed for going value or working capital. If 10 per cent. be added for the former, and $10,000 for the latter (as fixed by the commission in the present case), there is produced $366,870, to be compared with $360,000, found by the commission in its valuation as of January 2, 1915. To this it added $92,520.53, expended since, producing $452,520.53. This may be compared with its final figure, $460,000.

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[4]

	Company Engineer.	City Engineer.
1. Preliminary cost	$14,455	$1,000
2. Water rights	50,000	Nothing
3. Cutting pavements over mains	27,744	233
4. Pipe lines from gravity springs	22,072	15,442
5. Laying cast iron street mains	19,252	15,212
6. Reproducing Ada springs	18,558	13,027
7. Superintendence and engineering	20,515	13,621
8. General contingent cost	16,415	5,448
	$189,011	$63,983

The state Supreme Court of Appeals holds that the valuing of the property of a public utility corporation and prescribing rates are purely legislative acts not subject to judicial review except in so far as may be necessary to determine whether such rates are void on constitutional or other grounds; and that findings of fact by the commission based on evidence to support them will not be reviewed by the court. Bluefield v. Waterworks Co., 81 W. Va. 201, 204; Coal & Coke Co. v. Public Service Commission, 84 W. Va. 662, 678; Charleston v. Public Service Commission, 86 W. Va. 536.

In this case (89 W. Va. 736) it said (p. 738):

"From the written opinion of the commission we find that it ascertained the value of the petitioner's property for rate making [then quoting the commission] 'after maturely and carefully considering the various methods presented for the ascertainment of fair value and giving such weight as seems proper to every element involved and all the facts and circumstances disclosed by the record.'"

The record clearly shows that the commission in arriving at its final figure did not accord proper, if any, weight to the greatly enhanced costs of construction in 1920 over those prevailing about 1915 and before the war, as established by uncontradicted evidence; and the company's detailed estimated cost of reproduction new, less depreciation, at 1920 prices, appears to have been wholly disregarded. This was erroneous. Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, 262 U. S. 276. Plaintiff in error is entitled under the due process clause of the Fourteenth Amendment to the independent judgment of the court as to both law and facts. Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 289, and cases cited.

We quote further from the court's opinion (pp. 739, 740):

"In our opinion the commission was justified by the law and by the facts in finding as a basis for rate making the sum of $460,000.00 * * * In our case of Coal & Coke Ry. Co. v. Conley, 67 W. Va. 129, it is said: 'It seems to be generally held that, in the absence of peculiar and extraordinary conditions, such as a more costly plant than the public service of the community requires, or the erection of a plant at an actual, though extravagant, cost, or the purchase of one at an exorbitant or inflated price, the actual amount of money invested is to be taken as the basis, and upon this a return must be allowed equivalent to that which is ordinarily received in the locality in which the business is done, upon capital invested in similar enterprises. In addition to this, consideration must be given to the nature of the investment, a higher rate being regarded as justified by the risk incident to a hazardous investment.'

"That the original cost considered in connection with the history and growth of the utility and the value of the services rendered constitute the principal elements to be considered in connection with rate making, seems to be supported by nearly all the authorities."

The question in the case is whether the rates prescribed in the commission's order are confiscatory and therefore beyond legislative power. Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this court that citation of the cases is scarcely necessary. "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience." Smyth v. Ames (1898) 169 U. S. 466, 547.

"There must be a fair return upon the reasonable value of the property at the time it is being used for the public. * * *

"And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase." Willcox v. Consolidated Gas Co. (1909) 212 U. S. 19, 41, 52.

"The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts." Minnesota Rate Cases (1913) 230 U. S. 352, 434.

"And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property." Smyth v. Ames, supra, 546, 547.

"* * * The making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law." Minnesota Rate Cases, supra, 454.

In Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, supra, applying the principles of the cases above cited and others, this court said:

"Obviously, the Commission undertook to value the property without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing in 1913, 1914 and 1916. As a matter of common knowledge, these increases were large. Competent witnesses estimated them as 45 to 50 per centum * * *. It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible. Estimates for tomorrow cannot ignore prices of today."

It is clear that the court also failed to give proper consideration to the higher cost of construction in 1920 over that in 1915 and before the war, and failed to give weight to cost of reproduction less depreciation on the basis of 1920 prices, or to the testimony of the company's valuation engineer, based on present and past costs of construction, that the property in his opinion, was worth $900,000. The final figure, $460,000, was arrived at substantially on the basis of actual cost less depreciation plus 10 per cent. for going value and $10,000 for working capital. This resulted in a valuation considerably and materially less than would have been reached by a fair and just consideration of all the facts. The valuation cannot be sustained. Other objections to the valuation need not be considered.

3. *Rate of Return.* The state commission found that the company's net annual income should be approximately $37,000, in order to enable it to earn 8 per cent. for return and depreciation upon the value of its property as fixed by it. Deducting 2 per cent. for depreciation, there remains 6 per cent. on $460,000, amounting to $27,600 for return. This was approved by the state court.

The company contends that the rate of return is too low and confiscatory. What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

In 1909, this court, in Willcox v. Consolidated Gas Co., 212 U. S. 19, 48-50, held that the question whether a rate yields such a return as not to be confiscatory depends upon circumstances, locality and risk, and that no proper rate can be established for all cases; and that, under the circumstances of that case, 6 per cent. was a fair return on the value of the property employed in supplying gas to the city of New York, and that a rate yielding that return was not confiscatory. In that case the investment was held to be safe, returns certain and risk reduced almost to a minimum—as nearly a safe and secure investment as could be imagined in regard to any private manufacturing enterprise.

In 1912, in Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655, 670, this court declined to reverse the state court where the value of the plant considerably exceeded its cost, and the estimated return was over 6 per cent.

In 1915, in Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 172, this court declined to reverse the United States District Court in refusing an injunction upon the conclusion reached that a return of 6 per cent. per annum upon the value would not be confiscatory.

In 1919, this court in Lincoln Gas Co. v. Lincoln, 250 U. S. 256, 268, declined on the facts of that case to approve a finding that no rate yielding as much as 6 per cent. on the invested capital could be regarded as confiscatory. Speaking for the court, Mr. Justice Pitney said:

"It is a matter of common knowledge that, owing principally to the World War, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the court below. And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future."

In 1921, in Brush Electric Co. v. Galveston, the United States District Court held 8 per cent. a fair rate of return.[5]

In January, 1923, in City of Minneapolis v. Rand, the Circuit Court of Appeals of the Eighth Circuit (285 Fed. 818, 830) sustained, as against the attack of the city on the ground that it was excessive, 7½ per cent., found by a special master and approved by the District Court as a fair and reasonable return on the capital investment—the value of the property.

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[5] This case was affirmed by this Court, June 4, 1923, Brush Electric Co. v. City of Galveston, 262 U. S. 443, 67 L. ed. 1076.

Investors take into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an undertaking. Low, uncertain, or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors. The fact that the company may not insist as a matter of constitutional right that past losses be made up by rates to be applied in the present and future tends to weaken credit, and the fact that the utility is protected against being compelled to serve for confiscatory rates tends to support it. In this case the record shows that the rate of return has been low through a long period up to the time of the inquiry by the commission here involved. For example, the average rate of return on the total cost of the property from 1895 to 1915, inclusive, was less than 5 per cent.; from 1911 to 1915, inclusive, was less than 5 per cent.; from 1911 to 1915, inclusive, about 4.4 per cent., without allowance for depreciation. In 1919 the net operating income was approximately $24,700, leaving $15,500, approximately, or 3.4 per cent. on $460,000 fixed by the commission, after deducting 2 per cent. for depreciation. In 1920, the net operating income was approximately $25,465, leaving $16,265 for return, after allowing for depreciation. Under the facts and circumstances indicated by the record, we think that a rate of return of 6 per cent. upon the value of the property is substantially too low to constitute just compensation for the use of the property employed to render the service.

The judgment of the Supreme Court of Appeals of West Virginia is reversed.

MR. JUSTICE BRANDEIS concurs in the judgment of reversal for the reasons stated by him in Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri, supra.[6]

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[6] In several cases the Supreme Court has overturned rate schedules made by state commissions on the ground of error of law—for example, error by failing to consider indicators of value which the law of the Constitution as interpreted by the Supreme Court requires to be considered. Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Commission (1923) 262 U. S. 276, 67 L. ed. 981; Ohio Utilities Co. v. Public Utilities Commission (1925) 267 U. S. 359, 69 L. ed. 656. Do such cases hold that the valuation arrived at by the commission is necessarily erroneous in amount?

That the Supreme Court holds that the federal courts may set aside orders of the Interstate Commerce Commission for error of law see Dickinson (1927) Administrative Justice, pp. 167-174. See also A. M. Tollefson (1927) 11 Minn. L. Rev. 389, 504.

The determination by public utility commissions of the existence of jurisdictional facts is held not to be conclusive. Interstate Commerce Commission v. Northern Pacific R. Co., ante, p. 974, n. 4; Allen v. Railroad Commission of State of Cal. (1918), 179 Cal. 68, 175 Pac. 466; 8 A. L. R. 249.

Where a state administrative board, authorized to regulate intrastate railroad rates, fixed a rate for the intrastate transportation of logs without "attempting to show by evidence, reasonably specific and direct, what the actual operating cost of this traffic was to the several carriers" but by making a calculation based upon an average cost of operation in carrying all kinds of freight, the court said: "The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed

PRENTIS ET AL., CONSTITUTING THE STATE CORPORATION COMMISSION OF VIRGINIA v. ATLANTIC COAST LINE CO.

1908. Supreme Court of the United States. 211 U. S. 210.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are bills in equity brought in the Circuit Court to enjoin the members and clerk of the Virginia State Corporation Commission from publishing or taking any other steps to enforce a certain order fixing passenger rates. The bills allege, with some elaboration of the facts, that the rates in question are confiscatory, and other matters not necessary to mention, and set up the Fourteenth Amendment, etc. The defendants appeared specially, and by demurrer and plea respectively put forward that the proceedings before the commission are proceedings in a court of the state, which the courts of the United States are forbidden to enjoin. Rev. Stats. § 720, and that the decision of the commission makes the legality of the rates res judicata. On these pleadings final decrees were entered for the plaintiffs, and the defendants appealed to this court. Therefore, as the case is presented, it is to be assumed that the order confiscates the plaintiffs' property and infringes the Fourteenth Amendment if the matter is open to inquiry. The question principally argued, and the main question to be discussed, is whether the order is one which, in spite of its constitutional invalidity, the courts of the United States are not at liberty to impugn.

The State Corporation Commission is established and its powers are defined at length by the constitution of the state. There is no

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incompetent, United States v. Abilene & Southern Ry., 265 U. S. 274, 288, or mere error in reasoning upon evidence introduced, does not invalidate an order. But where rates found by a regulatory body to be compensatory are attacked as being confiscatory, courts may enquire into the method by which its conclusion was reached. An order based upon a finding made without evidence, The Chicago Junction Case, 264 U. S. 258, 263, or upon a finding made upon evidence which clearly does not support it, Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541, 547, is an arbitrary act against which courts afford relief. The error under discussion was of this character. It was a denial of due process. Compare New York & Queens Gas Co. v. McCall, 245 U. S. 345, 348." Northern Pacific R. Co. v. Department of Public Works (1925) 268 U. S. 39, 44-45, 69 L. ed. 836.

A state public utilities commission decided that a water supply company was engaged in public service against the contention that it was engaged solely in private sale of water and issued an order fixing rates to be charged by it. The state statute provided that "the findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review"; and that upon certiorari review might be had in the state supreme court but only "to determine whether the commission has regularly pursued its authority, including * * * whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State." The court said that the question at issue was one of mixed law and fact that went to the jurisdiction of the commission; it considered the evidence and, concluding that the company's business was not conducted as a public service, annulled the commission's order. Allen v. Railroad Commission of State of Cal. (1918), 179 Cal. 68, 175 Pac. 466, 8 A. L. R. 249.

need to rehearse the provisions that give it dignity and importance or that add judicial to its other functions, because we shall assume that for some purposes it is a court within the meaning of Rev. Stats. § 720, and in the commonly accepted sense of that word. Among its duties it exercises the authority of the state to supervise, regulate and control public service corporations, and to that end, as is said by the Supreme Court of Virginia and repeated by counsel at the bar, it has been clothed with legislative, judicial and executive powers. Norfolk & Portsmouth Belt Line R. R. Co. v. Commonwealth, 103 Virginia, 289, 294.

The state constitution provides that the commission, in the performance of the duty just mentioned, shall from time to time prescribe and enforce such rates, charges, classification of traffic, and rules and regulations, for transportation and transmission companies doing business in the state, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just. Before prescribing or fixing any rate or charge, etc., it is to give notice (in case of a general order not directed against any specific company by name, by four weeks' publication in a newspaper) of the substance of the contemplated action and of a time and place when the commission will hear objections and evidence against it. If an order is passed, the order again is to be published as above before it shall go into effect. An appeal to the Supreme Court of Appeals is given of right to any party aggrieved, upon conditions not necessary to be stated, and that court, if it reverses what has been done, is to substitute such order as in its opinion the commission should have made. The commission is to certify the facts upon which its action was based and such evidence as may be required, but no new evidence is to be received, and how far the findings of the commission can be revised perhaps is not quite plain. No other court of the state can review, reverse, correct or annul the action of the commission, and in collateral proceedings the validity of the rates established by it cannot be called in doubt.

When a rate has been fixed, the commission has power to enforce compliance with its order by adjudging and enforcing, by its own appropriate process, against the offending company the fines and penalties established by law. But a hearing is required, and the validity and reasonableness of the order may be attacked again in this proceeding, and all defenses seem to be open to the party charged with a breach.

[After notice and hearing the commission made an order prescribing specific passenger rates.] Publication of the order was directed, and at that stage these bills were brought.

In order to decide the cases it is not necessary to discuss all the questions that were raised or touched upon in argument, and some we shall lay on one side. We shall assume that when, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned. Dreyer v. Illinois, 187 U. S. 71, 83, 84; Winchester & Strasburg R. R. Co. v. Commonwealth, 106 Virginia, 264, 268. We shall assume, as we have said, that some of the powers of the commission are judicial, and we shall assume, without deciding, that, if it was proceeding against the appellees to enforce this order and to punish them for a breach, it then would be sitting as a court and would be protected from interference on the part of courts of the United States.

But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by § 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind, as seems to be fully recognized by the Supreme Court of Appeals, Commonwealth v. Atlantic Coast Line Ry. Co., 106 Virginia, 61, 64, and especially by its learned President in his pointed remarks in Winchester and Strasburg R. R. Co. and others v. Commonwealth, 106 Virginia, 264, 281. See further Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479, 499, 500, 505; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 440.

Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stats. § 720, no matter what may be the general or dominant character of the body in which they may take place. Southern Ry. Co. v. Greensboro Ice & Coal Co., 134 Fed. Rep. 82, 94, affirmed sub nom. McNeill v. Southern Ry. Co., 202 U. S. 543. That question depends not upon the character of the body but upon the character of the proceedings. Ex parte Virginia, 100 U. S. 339, 348. They are not a suit in which a writ of error would lie under Rev. Stats. § 709, and Act of February 18, 1875, c. 80, 18 Stat. 318. See Upshur County v. Rich, 135 U. S. 467; Wallace v. Adams, 204 U. S. 415, 423. The decision upon them cannot be res judicata when a suit is brought. See Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362. And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigation. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. * * * If a state constitution should provide for a hearing before any law should be passed, and should declare that it should be a judicial proceeding in rem and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the constitutionality of the law res judicata, if it subsequently should be drawn in question before a court of the United States. And all that we have said would be equally true if an appeal had been taken to the Supreme Court of Appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called. We gather that these are the views of the Supreme Court of Appeals itself. Atlantic Coast Line Ry. Co. v. Commonwealth, 102 Virginia, 599, 621. They are implied in many cases in this and other United States courts in which the enforcement of rates has been enjoined, notwithstanding notice and hearing, and what counsel in this case call litigation in advance. Legislation cannot bolster itself up in that way. Litigation cannot arise until the moment of legislation is past. See Southern Ry. Co. v. Commonwealth, 107 Virginia, 771, 772.

It appears to us that the most plausible objection to these bills is not the one most dwelt upon in argument, but that they were brought too soon. Our doubt is a narrow one and its limits should be understood. It seems to us clear that the appellees were not bound to wait for proceedings brought to enforce the rate and to punish them for departing from it. Those, we have assumed in favor of the appellants would be proceedings in court and could not be enjoined; while to confine the railroads to them for the assertion of their rights would be to deprive them of a part of those rights. If the railroads were required to take no active steps until they could bring a writ of error from this court to the Supreme Court of Appeals after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing if otherwise competent. "A state cannot tie up a citizen of another state, having property within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts." Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 391; Smyth v. Ames, 169 U. S. 466, 517. * * *

Our hesitation has been on the narrower question whether the railroads, before they resorted to the Circuit Court, should not have taken the appeal allowed to them by the Virginia constitution at the legislative stage, so as to make it absolutely certain that the officials of the state would try to establish and enforce an unconstitutional rule. * * *

The question to be decided, we repeat, is legislative, whether a certain rule shall be made. Although the appeal is given as a right, it is not a remedy, properly so called. At that time no case exists. We should hesitate to say, as a general rule, that a right to resort to the courts could be made always to depend upon keeping a previous watch upon the bodies that make laws, and using every effort and all the machinery available to prevent unconstitutional laws from being passed. * * *

But this case hardly can be disposed of on purely general principles. The question that we are considering may be termed a question of equitable fitness or propriety, and must be answered on the particular facts. The establishment of railroad rates is not like a law that affects private persons who may never have heard of it till it was passed. It is a matter of great interest, both to the railroads and to the public, and is watched by both with scrutinizing care. The railroads went into evidence before the commission. They very well might have taken the matter before the Supreme Court of Appeals. No new evidence and no great additional expense would have been involved.

The State of Virginia has endeavored to impose the highest safeguards possible upon the exercise of the great power given to the state Corporation Commission, not only by the character of the members of that commission, but by making its decisions dependent upon the assent of the same historic body that is entrusted with the preservation of the most valued constitutional rights, if the railroads see fit to appeal. It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the state in its final legislative action would not respect what they think their rights to be, before resorting to the courts of the United States.

If the rate should be affirmed by the Supreme Court of Appeals and the railroads still should regard it as confiscatory, it will be understood from what we have said that they will be at liberty then to renew their application to the Circuit Court, without fear of being met by a plea of res judicata. It will not be necessary to wait for a prosecution by the commission. We may add that when the rate is fixed a bill against the commission to restrain the members from enforcing it will not be bad as an attempt to enjoin legislation or as a suit against a state, and will be the proper form of remedy. * * *

Decrees Reversed.

OHIO VALLEY WATER CO. v. BEN AVON BOROUGH.

1920. Supreme Court of the United States. 253 U. S. 287.

Mr. Justice McReynolds delivered the opinion of the court.

Acting upon a complaint charging plaintiff in error, a water company, with demanding unreasonable rates, the Public Service Commission of Pennsylvania instituted an investigation and took evidence. It found the fair value of the company's property to be $924,744 and ordered establishment of a new and lower schedule which would yield seven per centum thereon over and above operating expenses and depreciation.

Claiming the Commission's valuation was much too low and that the order would deprive it of a reasonable return and thereby confiscate its property, the company appealed to the Superior Court. The latter reviewed the certified record, appraised the property at $1,324,621.80, reversed the order and remanded the proceeding with directions to authorize rates sufficient to yield seven per centum of such sum.

The Supreme Court of the state reversed the decree and reinstated the order saying—"The appeal [to the Superior Court] presented for determination the question whether the order appealed from was reasonable and in conformity with law, and in this inquiry was involved the question of the fair value, for rate making purposes, of the property of appellant, and the amount of revenue which appellant was entitled to collect. In its decision upon the appeal, the Superior Court differed from the commission as to the proper valuation to be placed upon several items going to make up the fair value of the property of the water company for rate making purposes." It considered those items and held that as there was competent evidence tending to sustain the Commission's conclusion and no abuse of discretion appeared, the Superior Court should not have interfered therewith. "A careful examination of the voluminous record in this case has led us to the conclusion that in the items wherein the Superior Court differed from the commission upon the question of values, there was merely the substitution of the former's judgment for that of the commission, in determining that the order of the latter was unreasonable."

Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal.

The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. Prentis v. Atlantic Coast Line Co., 211 U. S. 210; Lake Erie & Western R. R. Co. v. State Public Utilities Commission, 249 U. S. 422, 424. In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. Missouri Pacific Ry. Co. v. Tucker, 230 U. S. 340, 347; Wadley Southern Ry. Co. v. Georgia, 235 U. S. 651, 660, 661; Missouri v. Chicago, Burlington & Quincy R. R. Co., 241 U. S. 533, 538; Oklahoma Operating Co. v. Love, 252 U. S. 331.

Here the insistence is that the Public Service Company Law as construed and applied by the Supreme Court has deprived plaintiff in error of the right to be so heard; and this is true if the appeal therein specifically provided is the only clearly authorized proceeding where the Commission's order may be challenged because confiscatory. Thus far plaintiff in error has not succeeded in obtaining the review for which the Fourteenth Amendment requires the state to provide.

Article VI, Public Service Company Law of Pennsylvania—

"Section 31. No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The court of Common Pleas of Dauphin County is hereby clothed with exclusive jurisdiction throughout the Commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid. Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act."

It is argued that this section makes adequate provision for testing judicially any order by the Commission when alleged to be confiscatory, and that plaintiff in error has failed to take advantage of the opportunity so provided.

The Supreme Court of Pennsylvania has not ruled upon effect or meaning of § 31, or expressed any view concerning it. So far as counsel have been able to discover, no relief against an order alleged to be confiscatory has been sought under this section, although much litigation has arisen under the act. It is part of the article entitled —"Practice and Procedure before the Commission and upon Appeal." Certain opinions by the Supreme Court seem to indicate that all objections to the Commission's orders must be determined upon appeal—St. Clair Borough v. Tamaqua & Pottsville Electric Ry. Co., 259 Pa. St. 462; Pittsburgh Railways Co. v. Pittsburgh, 260 Pa. St. 424—but they do not definitely decide the point.

Taking into consideration the whole act, statements by the state Supreme Court concerning the general plan of regulation, and admitted local practice, we are unable to say that § 31 offered an opportunity to test the order so clear and definite that plaintiff in error was obliged to proceed thereunder or suffer loss of rights guaranteed by the federal Constitution. On the contrary, after specifying that within thirty days an appeal may be taken to the Superior Court (§ 17) the act provides (§ 22): "At the hearing of the appeal the said court shall, upon the record certified to it by the Commission, determine whether or not the order appealed from is reasonable and in conformity with law." But for the opinion of the Supreme Court in the present cause, this would seem to empower the Superior Court judicially to hear and determine all objections to an order on appeal and to make its jurisdiction in respect thereto exclusive. Of this the latter court apparently entertained no doubt; and certainly counsel did not fatally err by adopting that view, whatever meaning finally may be attributed to § 31.

Without doubt the duties of the courts upon appeals under the act are judicial in character—not legislative, as in Prentis v. Atlantic Coast Line Co., supra. This is not disputed; but their jurisdiction, as ruled by the Supreme Court, stopped short of what must be plainly entrusted to some court in order that there may be due process of law.

Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the state (including of course § 31), the challenged order is invalid.

The judgment of the Supreme Court of Pennsylvania must be reversed and the cause remanded there with instructions to take further action not inconsistent with this opinion.

Reversed.

MR. JUSTICE BRANDEIS, dissenting. * * *

First: [After stating his opinion that § 31 of the Public Service Law (quoted above) did give an "unrestricted remedy; the one commonly pursued when challenging the validity of a legislative order of this nature, namely a suit in equity to enjoin its enforcement" and that the decisions of the Supreme Court of Pennsylvania were not even by inference to the contrary:]

Where a state offers a litigant the choice of two methods of judicial review, of which one is both appropriate and unrestricted, the mere fact that the other which the litigant elects is limited, does not amount to a denial of the constitutional right to a judicial review. The alternative or additional remedy in the present case was in effect an appeal on the law applicable to facts found below. It is in substantial accord with the practice pursued in other appellate courts and approved in New York & Queens Gas Co. v. McCall, 245 U. S. 345. It is true, however, that an additional or alternative remedy may deny the constitutional right to due process of law because of its nature or the course of the proceeding. See Iowa Central Ry. Co. v. Iowa, 160 U. S. 389. And it is the contention of the plaintiff that because the Supreme Court did not weigh the evidence but reinstated the order of the Commission on account of there being substantial evidence to support it, the procedure was not a judicial review and denied it due process of law. * * *

The contention of neither party is in my opinion wholly correct. Both overlook the nature of the question of law which was under review by the Supreme Court. It is true that there was no statutory limitation upon the scope of its review; but it does not follow either that the Supreme Court weighed the evidence and found that the preponderance supported the findings, or that because it failed to weigh the evidence there was either a denial of due process or even a mistake of law. The questions of law before the Supreme Court were, first, whether the Superior Court had jurisdiction to weigh the evidence; second, whether in rendering its decision it weighed the evidence; and third, whether the valuation of the plaintiff's property was so low that a rate based upon it would operate to deprive the plaintiff of property without due process of law, would confiscate its property. On each of these questions the Supreme Court found against the contentions of the plaintiff. It held that the Superior Court did not have revisory legislative powers, but only the power to review questions of law—in the present case, whether there was evidence on which the valuation adopted could reasonably have been found; and in so holding it acted upon the established principle applied in reviewing the findings of administrative boards, that "courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order," Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, 547-548. It, therefore, reinstated the order of the Commission. But it did not do so as an appellate court reviewing on the weight of the evidence findings of fact made by the Superior Court. It did so solely because the only question before it was whether there was substantial evidence to support the finding of value; for if the valuation was legally arrived at, the order was confessedly reasonable. Interstate Commerce Commission v. Union Pacific R. R. Co., supra; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 441, 442. The presumption created by § 23, P. L., p. 1427, by which an order of the Commission is made prima facie evidence of its reasonableness is in no sense a limitation upon the scope of the review. It is in effect the presumption which this court has declared to exist in rate cases, independently of statute, in favor of the conclusion of an experienced administrative body reached after a full hearing. Darnell v. Edwards, 244 U. S. 564, 569.

Second. As the company had the opportunity for a full judicial review through a suit in equity for an injunction, as it was not denied due process by disregard in the proceedings actually taken of the essentials of judicial process, and since it is clear that the findings of the Commission were supported by substantial evidence, the judgment of the Supreme Court of Pennsylvania must be affirmed, unless, as contended, the claim of confiscation compels this court to decide, upon the weight of the evidence, whether or not its property has been undervalued or unless some error in law is shown.

The case is here on writ of error to a state court. It is settled that in such cases we accept the facts as there found, not only in actions at law, Dower v. Richards, 151 U. S. 658; but, also, where, as in chancery, the record contains all the evidence and it was open for consideration by and actually passed upon by the highest court of the state, Egan v. Hart, 165 U. S. 188; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 107. And this is true, although the existence of a federal question depends upon the determination of the issue of fact, and although the finding of fact will determine whether or not there has been a taking of property in violation of the Fourteenth Amendment. Minneapolis & St. Louis R. R. Co. v. Minnesota, 193 U. S. 53, 65. This court may, of course, upon writ of error to a state court "examine the entire record, including the evidence, * * * to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter," Kansas City Southern Ry. Co. v. Albers Commission Co., 223 U. S. 573, 591-593; Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655, 668; Graham v. Gill, 223 U. S. 643, 645. But in order that such examination may be required or be permissible, its purpose must not be to pass upon the relative weight of conflicting evidence, Oregon Railroad & Navigation Co. v. Fairchild, 224 U. S. 510, 528, and to substitute the judgment therein of this court for that of the lower court; but to ascertain whether a finding was unsupported by evidence, or whether evidence was properly admitted or excluded, or whether in some other way a ruling was involved which is within the appellate jurisdiction of this court. Northern Pacific Ry. Co. v. North Dakota, 236 U. S. 585, 593; Norfolk & Western Ry. Co. v. West Virginia, 236 U. S. 605.

Here, it is clear, there was substantial evidence to support the findings of the Commission; and no adequate reason is shown for declining to accept as conclusive the facts found by the state tribunals. See Portland Railway, Light & Power Co. v. Oregon Railroad Commission, 229 U. S. 397; Miedreich v. Lauenstein, 232 U. S. 236. The rates are predicated on the company's earning seven per cent. net on the value of its property used and useful in the service, after deducting from the income all expenses and charges for depreciation. It is conceded that seven per cent. is a fair return upon the investment and it is not contended that any erroneous rule has been applied in ascertaining the expenses of operation or the depreciation charges. The claim that the rates are confiscatory rested wholly on the contention that the property was undervalued; and on that question the contention is that the court failed to give due weight to the evidence adduced by the company and that the processes by which the Commission arrived at the value it fixed differed from that often pursued by courts and administrative bodies. To this the Supreme Court of Pennsylvania said: "The ascertainment of the fair value of the property, for rate making purposes, is not a matter of formulas, but it is a matter which calls for the exercise of a sound and reasonable judgment upon a proper consideration of all relevant facts." The objections to the valuation made by the company raise no question of law but concern pure matters of fact; and the finding of the Commission, affirmed by the highest court of the State, is conclusive upon this court. The case at bar is wholly unlike Great Northern Ry. Co. v. Minnesota, 238 U. S. 340; and Union Pacific R. R. Co. v. Public Service Commission of Missouri, 248 U. S. 67, where this court reversed the judgments as matter of law upon the facts found by the Commission.

In my opinion the judgment of the Supreme Court of Pennsylvania should be affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE CLARKE concur in this dissent.[7]

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[7] "Where * * * the probative force of the evidence may be considered free from any question of confiscation, the rule declared in Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, which requires in confiscation cases a judicial determination on the weight of the evidence, does not apply." Brandeis, J., in St. Louis & O'Fallon R. Co. v. United States (1929) 279 U. S. 461, 538, 73 L. ed. 798. See also Louisville & N. R. Co. v. Garrett (1913) 231 U. S. 298, 313, 58 L. ed. 229.

Compare with the principal case, People ex rel. N. Y. &c. Gas Co. v. McCall (1916) 219 N. Y. 84, 113 N. E. 795, Ann. Cas. 1916E, 1042, affirmed on writ of error in (1917) 245 U. S. 345, 62 L. ed. 337; Keller v. Potomac Electric Power Co. (1923) 261 U. S. 428, 67 L. ed. 731; Booth Fisheries Co. v. Industrial Commission (1926) 271 U. S. 208, 70 L. ed. 908.

Valuation of property for the purpose of determining the amount of tax to be paid under an *ad valorem* levy often is confided to administrative officers and their determination of value made unreviewable by any court. Such legislation is not held invalid on the ground that it does not give the tax-payer the independent judgment of a court. Why the difference? Sustaining this sort of tax procedure see, Passavant v. United States (1893) 148 U. S. 214, 37 L. ed. 426 (valuation of imported goods subject to *ad valorem* duty); Chicago, M. & St. P. R. Co. v. Drainage Dist. No. 8 (1917) 253 Fed. 491, 493 (semble, valuation of benefit of public improvement where taxes are paid in proportion to benefit.) Fallbrook Irrigation Dist. v. Bradley (1896) 164 U. S. 112, 41 L. ed.

Section 8.—Administrative Interference With Liberty and Destruction of Property.[1]

LOVELL v. SEEBACK.

1891. Supreme Court of Minnesota. 45 Minn. 465.

Action brought in the district court for Ramsey county, to recover $10,000 damages for the kidnapping of the plaintiff and abducting her from Goodhue to Steele county. The action was removed for trial to Goodhue county, and the defendants (county officers of that county) answered, alleging the matters stated in the opinion. A demurrer to the answer of defendant Seeback was overruled by McCluer, J., and the plaintiff appealed.

Dickinson, J. Appeal by the plaintiff from an order overruling a demurrer to the answer of the defendant Seeback. The complaint set forth as a cause of action, among other things, that while the plaintiff was a resident of the county of Goodhue, she was, by the

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369 (same); Board of Comrs. of Finney County v. Bullard (1908) 77 Kans. 349, 94 Pac. 129 (valuation of land); San Jose Gas Co. v. January (1881) 57 Cal. 614 (valuation of a public utility's property); State v. Bley (1909) 162 Ala. 239, 50 So. 263 (personal property); Stratford v. Franklin Paper Mills Co. (1917) 257 Pa. 163, 101 Atl. 349. But even in absence of a statute providing therefor some courts go behind the valuations of assessors or boards of equalization where there is wilful overvaluation, or where the overvaluation is so excessive as to be deemed by the court "constructively fraudulent." Cases are collected in (1920) 9 A. L. R. 1284.

For discussions of the principal case see notes in (1921) 20 Mich. L. Rev. 231; (1921) 69 U. of Penn. L. Rev. 148 and Lawrence Curtis, Judicial Review of Commission (1921) 34 Harv. L. Rev. 862; Frederick Green, The Ohio Valley Water Case (1921) 4 Ill. L. Quart. 44; Ernst Freund, The Right to a Judicial Review in Rate Controversies (1921) 27 W. Va. L. Quart. 205; Ray A. Brown, The Functions of Courts and Commissions in Public Utility Rate Regulation (1924) 38 Harv. L. Rev. 141.

On judicial review of administrative decisions in various fields of law administration, see John Dickinson, Administrative Justice (1927); Nathan Isaacs, Judicial Review of Administrative Findings (1921) 30 Yale L. J. 781; E. F. Albertsworth, Judicial Review of Administrative Action by the Federal Supreme Court (1921) 35 Harv. L. Rev. 127; Samuel C. Wiel, Administrative Finality (1925) 38 Harv. L. Rev. 447; Warren H. Pillsbury, Administrative Tribunals (1923) 36 Harv. L. Rev. 405, 583.

[1] There is no longer any question but that property may be destroyed by government, without compensation when there is adequate justification under the standards evolved in application of the requirement of due process of law as a limit on the substance of legislation. See Miller v. Schoene, 276 U. S. 272, 72 L. ed. 568 ante, p. 704. So with animals affected with contagious diseases, City of New Orleans v. Charouleau (1908) 121 La. 890, 46 So. 911, 18 L. R. A. (N. S.) 368, 126 Am. St. 332, 15 Ann. Cas. 46; Torruella v. Fernandez (1908) 14 P. R. 591; decayed food, North American Cold Storage Co. v. City of Chicago (1908) 211 U. S. 306, 53 L. ed. 195; trees and other plants infected with contagious plant diseases, State v. Main (1897) 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. 30; Balch v. Glenn (1911) 85 Kans. 735, 119 Pac. 67, 43 L. R. A. (N. S.) 1080, Ann. Cas. 1913A, 406; Louisiana State Board v. Tanzmann (1917) 140 La. 756, 73 So. 854, L. R. A. 1917C, 894, Ann. Cas. 1917E, 217; apples boxed for shipment and infected with plant disease, Colvill v. Fox (1915) 51 Mont. 72, 149 Pac. 496, L. R. A. 1915F, 894; potatoes at market infected with

command and warrant of the defendant Seeback and others, forcibly arrested and taken to the county of Steele. The answer, the sufficiency of which is brought in question by the demurrer, sets forth at length that the respondent was a member and the chairman of the board of county commissioners of Goodhue county; that the plaintiff resided and was legally settled in the county of Steele, but that, being temporarily in the county of Goodhue in the summer of 1888, she applied to one of the board of commissioners of the latter county for public support and relief; that this application having been reported to the respondent, as chairman of the board, he officially warned the plaintiff, pursuant to Gen. St. 1878, c. 15, § 14, to depart from that county to the place of her legal settlement, the county of Steele, which she refused and neglected to do; that thereupon in January, 1889, the plaintiff being in destitute circumstances, and likely to become chargeable upon the county of Goodhue for support, the respondent, as chairman of the board of county commissioners, following the terms of the statute, executed an order of removal, and delivered it to a constable, who in compliance therewith took the plaintiff into custody, and removed her to the county of Steele. The principal question arising upon the demurrer is as to whether this statute is invalid, on constitutional grounds, so that the authority in terms conferred by it is unavailing to justify the order of removal, under the facts set forth in the answer and admitted by the demurrer. * * * It is to be taken as admitted that the facts were such as the statute contemplates as justifying an order of removal; and the question is whether it is within the power of the legislature to enact a law to the effect that when a poor person, having a legal settlement in some county in this state, but temporarily being in another county, applies for public support therein, and, being in destitute circumstances, is likely to become chargeable for public support in that county, the county commissioners of that county, or their chairman, may lawfully cause such person, after he shall have refused to depart, to be removed to the county of his legal settlement, without judicial proceedings, without notice to such person of the contemplated removal, and without opportunity to be heard in respect thereto. Would this be an inter-

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contagious plant disease, Los Angeles Berry Growers Co-op. Assn. v. Huntley (1915) 84 Wash. 155, 146 Pac. 373. Neither the apples nor the potatoes of the last two cases were said to be affected with diseases injurious to human health.

Statutes which authorize destruction by administrative officers of animals so aged or disabled as to be unfit for use (not confined to those affected with contagious diseases), without notice or prior hearing and without compensation from public funds, are usually held unconstitutional. See cases collected in (1920) 8 A. L. R. 67.

The question in this section is what is the constitutionally permissible procedure in destruction where the legislature has power to accomplish it in some manner.

ference with the right of personal liberty "without due process of law?"

We shall confine our decision strictly to the case here presented, which, as it will be observed, does not involve an inquiry as to the power of the county commissioners, by their ex parte proceedings, to conclude the person removed in regard to any fact upon which the order of removal may be based. We do not decide whether under this statute the county commissioners have any power to finally determine any such questions. Though it be conceded that they have not, it would not follow that the statute may not be sustained in its application to a case where the facts are shown or admitted to be such as are specified in the law as reasons justifying removal. Many illustrations may be given of cases where the law, either common or statute, justifies an act or course of conduct by a private person or a public officer, under particular circumstances, which would be illegal except under such circumstances. In such cases the person or officer must accept whatever risk there may be of being held responsible if the facts should not prove to be such as to legally justify his conduct. The abatement of nuisances by a private person, although attended with an interference with or even the destruction of the property of another; the levy of distress for rent at common law and under statutes; the distress of goods for taxes; the taking up and disposing of estrays; the arrest without warrant of one engaged in the commission of a felony; a traveller on a public highway going upon the adjacent land when necessary to avoid an obstruction rendering the highway impassable,—are some of the many instances in which the principle referred to prevails. Whether in such cases the interference with the person or property of another, without any previous adjudication concerning his rights, is justified by the law or not, depends upon the facts, among others, as to whether a nuisance exists; whether rent is due or taxes unpaid; whether animals taken up as estrays are in fact such; whether the person arrested is in fact committing a felony; whether the highway is impassable. Such illustrations, and others which might be mentioned, especially cases involving the exercise of the general police power of the state, show that, both according to the ancient principles of the common law and by statute, a person may, under some circumstances, be lawfully deprived of his property, or temporarily restrained of his liberty, without any previous adjudication concerning his rights. The meaning of the phrase "due process of law" in the Constitution is not strictly limited to judicial process or proceedings. * * *

[The statute] giving lawful authority to county commissioners to the extent which we have above indicated, may be sustained upon the grounds that such power, resting probably upon grounds of general necessity and expediency, was sanctioned by statute before the adoption of our constitution, has ever since been acquiesced in, and that similar statutes have been in force since the early settlement of this country. It is a measure pertaining to the administration of public affairs, and concerning the reasonable necessity for which a considerable discretion must be allowed to the law-making department of the government, although, of course, subject to such defined constitutional limitations as, under the circumstances, shall be considered as clearly intended to be applicable to such cases. * * *

Our conclusion is that the statute, at least if it has only the limited scope which we have before referred to, (and it is enough for the purpose of this decision if it has that scope), is not so clearly beyond the legislative power that it should be declared to be invalid. * * *

Order affirmed.[2]

STOCKWELL v. STATE.

1920. Supreme Court of Texas. 110 Tex. 550.

MR. CHIEF JUSTICE PHILLIPS delivered the opinion of the court.

The suit was by the state through the Commissioner of Agriculture to have declared as a nuisance and abated a certain citrus trifoliata hedge belonging to the defendant Stockwell and situated on his premises in Alvin, Texas, and to enjoin him from in any manner interfering with the destruction of the hedge by the Commissioner or his deputies or agents.

It was asserted in the petition that the citrus trees in the hedge were all badly infected with citrus canker, a disease alleged to be contagious and destructive to citrus fruit trees; that under the law it is the duty of the Commissioner to destroy all such trees found to be infected with citrus canker and thereby eradicate the disease so as to protect and save the uninfected trees, hedges and orchards within the state; that he had caused the defendant's hedge to be inspected by his deputies and assistants who were learned in the matter of citrus canker and other diseases of citrus fruit trees, and who found it to be badly infected with such canker. That the defendant was thereupon notified to destroy the hedge. That in the manner provided by law he appealed from the decision of the Commissioner's inspectors to the Commissioner, who heard the appeal, all parties at interest being present, and thereafter rendered his judgment sustaining his inspectors and ordering the hedge destroyed. That in pursuance of this order or judgment the Commissioner demanded of the defendant that he destroy his hedge, which the defendant refused to do or to permit the Commissioner's inspector to enter upon his premises for the purpose of destroying it.

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[2] Compare Haverty v. Bass (1876) 66 Maine 71. A statute gave officers of a town authority to confine persons infected with disease dangerous to public health, to a separate house. A police officer and a city physician, acting without a warrant, entered a dwelling by force after a reasonable demand for entrance and took a child that had small pox from its mother's arms and confined it in the city hospital. In an action of trespass brought by the father and mother for this entry and subsequent acts against the mayor of the town who had ordered the acts done, the plaintiffs were nonsuited, and the nonsuit sustained on the ground that the officers acted within the authority of a valid statute.

It was further alleged that the hedge was of no value to the defendant and would die within a few years from the effect of the canker; and that its absolute destruction was the only way to suppress the disease and preserve other citrus trees and orchards from its infection.

The defendant entered a general denial of all these allegations. He pleaded that the property on which the hedge was situated was his homestead and had been for many years. He denied that all the trees in the hedge were badly infected with citrus canker, though admitting that some of the twigs and foliage on some of the trees were so infected. He denied that other citrus trees and orchards were becoming infected from his trees, or that citrus canker could be communicated to other trees and orchards a great distance away. He denied that his hedge constituted a nuisance, or that it was necessary to destroy it in order to eradicate the canker, alleging that such leaves and twigs on those of the trees that were infected with the canker could be pruned and by that means or proper spraying the canker be effectually controlled, rendering it wholly unnecessary to destroy his entire hedge. He further alleged in his answer that the destruction of his hedge would not eradicate citrus canker in the vicinity of Alvin nor appreciably affect its prevalence, in that it existed upon all citrus trees of every character, not only in the vicinity of Alvin, but in all the orange growing counties of the state, and for the further reason that many wild trees, shrubs, and plants were likewise infected with it, and were contiguous to all the farm lands in such counties. That the Commissioner and his inspectors and agents were making no effort to destroy it upon such wild trees, shrubs and plants, or upon all the citrus trees in orange growing counties.

He further alleged that the hedge was of great value to him, that it served the purpose of a fence and windbreak, and furnished seed from which the stock on which satsuma oranges are grafted, is grown. That the Commissioner in seeking the destruction of his hedge was making an exception of his property, in that he was not attempting to destroy the trees of other persons infected with the canker. * * *

He further denied that citrus canker was a seriously injurious tree or plant disease, and alleged that the trees in his hedge had never been injured by it to the extent that they were infected with it, but were in a healthy and vigorous condition, and had had a vigorous growth from year to year, and would continue to so grow and bear fruit to his profit.

He alleged that the action of the Commissioner was unreasonable and oppressive; that in the arbitrary exercise of his authority he was subjecting the defendant to discrimination, whereby he was being denied the equal protection of the laws and his property threatened with destruction without the due process of the law.

A demurrer to the answer * * * was sustained, and the defendant denied any character of hearing on the facts. An injunction was thereupon granted in the terms prayed for by the Commissioner. On the defendant's appeal from this decree, it was affirmed by the honorable Court of Civil Appeals.

The statute under which the Commissioner acted and the trial court proceeded is article 4459. It begins by declaring that no person shall knowingly or wilfully keep certain named fruit trees affected with certain named contagious diseases, namely "yellows," "nematode galls," "crown galls" and "root rot," etc.; any tree, shrub or plant infected with "San Jose scale," or other insect pest dangerously injurious to or destructive of trees, shrubs or other plants; nor any orange or lemon trees, citrus stock, cape jasmines, or other trees, plants or shrubs infested with "white fly," *"or other injurious insect pests or contagious disease of citrus fruits."*

Citrus canker is not specified in the article as a contagious disease of citrus fruits. If it falls within the condemnation of the statute, it is in virtue of the general clause italicized.

Every such tree, shrub or plant, the article continues, shall be "a public nuisance," which it shall be the duty of the Commissioner of Agriculture, or his representatives, to abate. If the Commissioner or his inspectors shall determine, upon inspection, that any such trees, etc., shall be destroyed, the owner, it is provided, shall be notified and thereupon it is required that within ten days he remove and burn them. If in the judgement [of] the Commissioner or his representatives the trees, etc., can be treated with sufficient remedies, the owner is required to administer such treatment under the direction of the Commissioner. If the owner objects to the findings of the inspectors, he is permitted to appeal to the Commissioner. The Commissioner's decision on the appeal, it is provided, shall be final. * * *

In our opinion the Commissioner could not be clothed with any such arbitrary power. * * *

Where the Legislature has found and defined as expressed in its statute, a certain thing to be a public nuisance, only in clear cases would courts be warranted in going behind its findings and determining the contrary. But whether something not defined as a public nuisance by the statute is such under its general terms, is undoubtedly a judicial question.

The state may also remit to such agencies as health boards, or other proper administrative officers, the authority of determining whether other things constitute public nuisances, with the power to abate them. But where this is done, the determination of such boards or officers is not conclusive and cannot be made so, unless it be with respect to something having the nature of a public emergency, threatening public calamity, and presenting an imminent and controlling exigency before which, of necessity, all private rights must immediately give way. If this were not true, all property would be at the uncontrolled will of temporary administrative authorities, exercising not judicial powers but purely executive powers. * * *

With the Legislature not having assumed to denounce trees infected with citrus canker as a public nuisance, no court would be warranted in holding, without proof, that they were plainly such a nuisance. What reason, then, is there for holding that the decision of the Commissioner—a purely administrative and not a judicial officer, with no authority to adjudge property rights—shall be held final and absolute when sought to be enforced for the destruction of the property of a citizen, in the face of the challenge of the facts as presented here by the defendant's pleading? If justifiable at all in this case, it could only be on account of some pressing public emergency caused by the condition of these trees, making it necessary for the safety of the public that the Commissioner's decision be held inviolate and the trees be immediately destroyed.

We decline to hold that any such emergency was presented. It is wholly unreasonable that the trees of this one hedge threatened a general pestilence for all the citrus fruit trees in that vicinity.

Under the contest made by his pleading, before the property of the defendant could be summarily destroyed, he was entitled to a judicial hearing and the decision as to whether it ought to be destroyed. As applied to such a case, nothing less would amount to due process of law, without which the Bill of Rights declares no citizen shall be deprived of his property.

The judgments of the Court of Civil Appeals and District Court are reversed and the case remanded to the District Court for hearing on the facts.[3]

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[3] Compare Los Angeles County v. Spencer (1899) 126 Cal. 670, 59 Pac. 202, 385, 77 Am. St. 217. The statute there involved declared that orchards infected with "scale insects or codlin moth or other pests injurious to fruit plants" are public nuisances, and authorized eradication by administrative officers at the expense of owners. The court said: "In determining whether any particular place is a nuisance, the commissioner, no doubt, exercises some discretion which, in a strict sense, is in its nature judicial; but the executing of a police regulation quite often calls into action that kind of discretion. And yet the acts of a commissioner involved in this case are no more judicial than the acts of

COMMONWEALTH v. SISSON.

1905. Supreme Judicial Court of Massachusetts. 189 Mass. 247.

[On exceptions to rulings at the trial at which defendant was convicted for violating an order of the fish and game commissioners. The latter acting under a statute had ordered the defendant to cease discharging sawdust from his mill into Konkapot River and not to accumulate a pile of it on the banks. The order recited that the Commissioners had determined that the fish in the stream were of sufficient value to warrant their action and that the discharge of sawdust into the stream materially injured the fish therein. The defendant offered evidence to show that the Commissioners had refused him a hearing and did not act on sworn evidence or personal knowledge as to the value of the fish or the effect of sawdust. This evidence was excluded. One requested instruction that the trial court refused to give the jury was that such a determination by the commissioners was a judicial act and that such an act could not be performed without hearing evidence.]

Loring, J. The defendant's grievance is that by an order of the board of fish and game commissioners they have been deprived, without compensation being made therefor, of the right to conduct the business of sawing wood as they and their predecessors in title have conducted it for thirty years last past; that from this decision there is no appeal; and that not only was the order made without a hearing, but, when a hearing was asked for by the defendants, it was denied. * * *

In support of their contention they argue that the board, in determining (1) that the fish in Konkapot river are of sufficient value to warrant the prohibition or regulation of the discharge of sawdust therein, and (2) that the discharge of sawdust from the defendants' mill materially injured such fish, was a judicial action; and, in connection with this argument, they rely on the distinction pointed out in Salem v. Eastern Railroad Co., 98 Mass. 431, between the action of a local board of health in making general regulations respecting articles capable of conveying infection or creating sickness and the authority of such a board to examine into the existence of any specific case of nuisance, filth or cause of sickness dangerous to the public health and to make an order for the removal of it. The former, being a rule for all, is legislative in character; the latter, being a determination as to a particular thing, resulting in an order to the owner of it to do a specified act, is judicial in character. For a later case, where it is pointed out that similar legislative and

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officers under many other laws and ordinances which have been held valid." Accord: Balch v. Glenn (1911) 85 Kans. 735, 749, 119 Pac. 67, 43 L. R. A. (N. S.) 1080, Ann. Cas. 1913A, 406.

judicial powers are given to the state board of health in connection with the pollution of a body of water used as a supply of a city or town, see Nelson v. State Board of Health, 186 Mass. 330.

We agree with the defendant's counsel as to what the order here in question is not. We agree that it is not a general regulation. What is determined by it is that the discharge of sawdust from the defendants' mill materially injures the fish in Konkapot River, and it orders the defendants to erect a blower, and forbids the defendants making a pile of sawdust in connection with the mill; and it resulted in an order served on these defendants to do these acts. This is not a general regulation. But we do not agree that, because it is not a general regulation, it is a judicial action. * * *

We are of opinion * * * that in case the Legislature thought that in regulating the conflicting rights of individuals to run sawmills on the banks of a river on the one hand, and of the public, on the other hand, to have fish live and increase in the same stream, it was not worth while to forbid sawdust being discharged into every stream in which there were edible fish, they could leave to a board having peculiar knowledge on the subject the selection of the brooks and rivers in which the fish were of sufficient value to warrant the prohibition or regulation of the discharge of sawdust. The right of the Legislature to delegate some legislative functions to state boards was considered by this court in Brodbine v. Revere, 182 Mass. 598. And, further, in case the Legislature thought that an act which forbade any sawdust to be discharged into any of the streams selected by the board was an unnecessarily stringent one, they could, in our opinion, leave it to the board to settle in each particular case the practical details required to harmonize best these two conflicting rights.

The power thus delegated to the board of fitting the details of regulation to the particular circumstances of each case is of the same character as that long exercised by the fish and game commissioners and their predecessors, the board of inland fisheries, in prescribing the details of the construction of the fishways to be constructed in dams where by law fishways have to be maintained. See St. 1866, c. 238, §§ 2, 6; St. 1867, c. 344; Pub. St. c. 91, § 4. See, also, Prov. St. 1745-46, c. 20; 3 Prov. Laws, (State ed.) p. 267. These acts provide that the board, after examination of dams upon rivers where the law requires fishways, is to determine whether the fishways in existence are sufficient, and to prescribe by an order in writing what changes or repairs, if any, shall be made, and at what times the fishways are to be kept open, and to give notice thereof to the owners of such dams. The action of the fish commissioners under these acts is unquestionably legislative in character, and we cannot doubt that their action under them, exercised and acquiesced in by the public for this length of time, is valid.

The result is that in our opinion the action of the board in the case at bar was the working out of details under a legislative act. The board is no more required to act on sworn evidence than is the Legislature itself, and no more than in case of the Legislature itself is it bound to act only after a hearing, or to give a hearing to the plaintiff when he asks for one; and its action is final, as is the action of the Legislature in enacting a statute. And being legislative, it is plain that the questions of fact passed upon by the commissioners in adopting the provisions enacted by them cannot be tried over by the court. * * *

The practical result is that the defendants are forbidden to conduct their sawmill as they had conducted it for thirty years by a board who have not heard evidence and have refused the defendants a hearing; that the action of the board is final, and that no compensation is due to them. This result may seem strange. But it is no less strange than the practical results in cases which are decided law. Take the case before the court in Nelson v. State Board of Health, 186 Mass. 330, namely, a farm on the banks of a pond used as the water supply of a town. The state board of health can pass a general regulation under § 113, of R. L. c. 75, forbidding privies within a specified distance from its shore; and, if the defendant had had a privy there for thirty years, his right to maintain it would cease, although the order was made without hearing; and the action of the board is final. On the other hand, if the board had proceeded, under § 118, to investigate this particular privy, the defendant would have been entitled to a hearing and, on appeal, to a jury, as provided by § 119. * * *

That is to say, on the one hand, where the law is general and the question is whether under it the defendants are committing a nuisance, the facts are determined by judicial action. On the other hand, the determination of the same facts is legislative in case the Legislature decides to make the thing a nuisance per se. And where it is legislative it is final, and no hearing is necessary; and where, as is the case here, it is made in the exercise of the police power, no compensation is due. The delegation of such legislative powers to a board is going a great way. But the remedy is by application to the Legislature, if a remedy should be given. In our opinion it is within its constitutional power, and the court can give no remedy.

For similar cases where the use which can be made of property has been left to the final determination of boards, see Newton v. Joyce, 166 Mass. 83; Commonwealth v. Roberts, 155 Mass. 281. See, also, in this connection, Wares, Petitioner, 161 Mass. 70. The difference between the majority and the minority of the court in

Miller v. Horton, 152 Mass. 540, was on the construction of the act there in question.

Exceptions overruled.

LAWTON v. STEELE.

1894. Supreme Court of the United States. 152 U. S. 133.

[In the Supreme Court of the county of Jefferson, New York, the plaintiff sued to recover the value of fifteen fish nets belonging to him, destroyed by defendant Steele. The facts were undisputed, that Steele acted in his official capacity as a game and fish protector, that he found most of the nets set to catch fish and the rest on the shore having recently been used for the same purpose. The defendant justified under a game and fish statute. The plaintiff replied that if the statute purported to justify Steele's action it was unconstitutional. On a verdict of $216, plaintiff was given judgment. On appeal to the General Term this judgment was reversed, and upon further appeal the Court of Appeals ordered judgment for the defendant. Now on writ of error:]

Mr. Justice Brown delivered the opinion of the court.

This case involves the constitutionality of an act of the legislature of the State of New York * * * entitled "An act for the appointment of game and fish protectors." * * *

By the act of 1880, as amended by the act of 1883:

"Sec. 2. Any net * * * for taking * * * fish, * * * set, * * * found, or maintained, in or upon any of the waters of this state, or upon the shores * * * in violation of any * * * laws for the protection of fish, is hereby declared to be, and is, a public nuisance, and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector * * * to seize and remove and forthwith destroy the same * * * and no action for damages shall lie or be maintained against any person for or on account of any such seizure or destruction."

This last section was alleged to be unconstitutional and void for three reasons: 1, as depriving the citizen of his property without due process of law. * * *

The main, and only real difficulty connected with the act in question is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries, is to be treated as a public nuisance, "and may be abated and summarily destroyed." * * * The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offence, and to take such measures as were reasonable and necessary to prevent such offences in the future. * * *

In this case there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic; distilleries or breweries illegally carried on or operated, and buildings standing upon or near the boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, or infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. Newark Railway v. Hunt, 50 N. J. Law, 308; Blazier v. Miller, 10 Hun 435; Mouse's Case, 12 Coke, 62; Stone v. New York, 25 Wend. 157, 173; Am. Print Works v. Lawrence, 21 N. J. Law, 248; 23 N. J. Law, 590.

It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling-room.

The value of the nets in question was but $15 apiece. The cost of condemning one (and the use of one is as illegal as the use of a dozen), by judicial proceedings, would largely exceed the value of the net, and doubtless the state would, in many cases, be deterred from executing the law by the expense. They could only be removed from the water with difficulty, and were liable to injury in the process of removal. The object of the law is undoubtedly a beneficent one, and the state ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation. * * *

Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute. * * *

It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose (Ely v. Supervisors, 36 N. Y. 297), but where minor articles of personal property are devoted to such use the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them. The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question (People v. West, 106 N. Y. 293), and in such case the legislature may annex to the prohibited act all the incidents of a criminal offence, including the destruction of property denounced by it as a public nuisance.

* * * Judgment Affirmed.[4]

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[4] In Colvill v. Fox (1915) 51 Mont. 72, 77-78, 149 Pac. 496, 72 L. R. A. 1915F, 894, holding valid a statute in conformity with which apples boxed for shipment, infected with a contagious fruit disease, were destroyed by an administrative officer without a hearing and without provision for compensation, the court said: "The statute and board regulations are attacked also upon the ground that they are unreasonable, in that they admit of the total destruction of affected fruit which is not altogether useless, and in this connection our attention is directed to certain of the regulations which lodge with the inspector

[Fuller, C. J., delivered a dissenting opinion, concurred in by Field and Brewer, JJ.]

MILLER v. HORTON ET AL.

1891. Supreme Judicial Court of Massachusetts. 152 Mass. 540.

[Tort action for killing a horse. Trial in the Superior Court without a jury. The defendants, members of the local board of health, admitted the killing and justified by showing that they did so in pursuance of an order of the Commissioners on Contagious Diseases among Domestic Animals, which recited that the Commissioners had adjudged that the animal had the contagious disease known as glanders, condemned it and directed the defendants to have it killed. The evidence showed that this order had been issued after an examination of the horse made by a medical doctor on behalf of the Commissioners.

At the trial, over defendants' objection, the plaintiff called two veterinary surgeons who testified that the horse did not have glanders.

The judge found as a fact, if the evidence of the two veterinary surgeons was admissible, that the horse did not have glanders or any other contagious disease, but declined to rule that the justification was insufficient and gave judgment for the defendants. Plaintiff excepted.]

Holmes, J. * * * The language of the material part of § 13 of the act of 1887 is: "In all cases of farcy or glanders, the commissioners, having condemned the animal infected therewith, shall cause such animal to be killed without an appraisal, but may pay the owner or any other person an equitable sum for the killing and burial thereof." Taken literally, these words only give the commissioners jurisdiction and power to condemn a horse that really has the glanders. The question is whether they go further by implication, so that, if a horse which has not the disease is condemned by the commissioners, their order will protect the man who kills it in a subsequent suit by the owner for compensation.

The main ground for reading into the statute an intent to make the commissioners' order an absolute protection is, that there is no provision for compensation to the owner in this class of cases, and

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the discretion to permit the owner of apples affected with the scab to manufacture such fruit into cider, jellies, or other by-products. It would seem to answer this contention to say that the complaint does not charge abuse of discretion on the part of the inspector, or make any claim that plaintiff desired to use the fruit in question for any of the purposes permitted by the board. He alleges, on the contrary, that it was his intention to ship the fruit to other points for sale in the open market."

therefore, unless the order is a protection, those who carry it out will do so at their peril. Such a construction when once known would be apt to destroy the efficiency of the clause, as few people could be found to carry out orders on these terms.

On the other hand, this same absence of any provision for compensation to the owner, even if not plainly founded on the assumption that only a worthless thing and a nuisance is in question, still would be an equally strong argument for keeping to the literal and narrower interpretation. If the Legislature had had in mind the possible destruction of healthy horses, there was no reason in the world why it should not have provided for paying the owners.

* * *

The reasons for this construction seem decisive to a majority of the court, when they consider the grave questions which would arise as to the constitutionality of the clause if it were construed the other way.

Section 13 of the act of 1887, by implication, declares horses with the glanders to be nuisances, and we assume in favor of the defendant that it may do so constitutionally, and may authorize them to be killed without compensation to the owners. But the statute does not declare all horses to be nuisances, and the question is, whether, if the owner of the horse denies that his horse falls within the class declared to be so, the Legislature can make the ex parte decision of a board like this conclusive upon him. That question is answered by the decision in Fisher v. McGirr, 1 Gray, 1. It is decided there that the owner has a right to be heard, and, further, that only a trial by jury satisfies the provision of Article XII. of the Declaration of Rights, that no subject shall be deprived of his property but by the judgment of his peers, or the law of the land.

* * *

Of course there cannot be a trial by jury before killing an animal supposed to have a contagious disease, and we assume that the Legislature may authorize its destruction in such emergencies without a hearing beforehand. But it does not follow that it can throw the loss on the owner without a hearing. If he cannot be heard beforehand, he may be heard afterward. The statute may provide for paying him in case it should appear that his property was not what the Legislature has declared to be a nuisance, and may give him his hearing in that way. If it does not do so, the statute may leave those who act under it to proceed at their peril, and the owner gets his hearing in an action against them. * * *

It is true that it is said in Salem v. Eastern Railroad, 98 Mass. 431, that the board's determination of questions of discretion and judgment in the discharge of their duties would protect all those employed to carry such determinations into effect. The remark is *obiter*, and it is doubtful perhaps, on reading the whole case, whether it means that the determination would protect them in an action for damages, when the statute provides no compensation for property taken which is not a nuisance. * * *

But we are led by the dictum in Salem v. Eastern Railroad to consider another possible suggestion. It may be said, suppose that the decision of the board is not conclusive that the plaintiff's horse had the glanders, still the legislature may consider that self-protection requires the immediate killing of all horses which a competent board deem infected, whether they are so or not, and, if so, the innocent horses that are killed are a sacrifice to necessary self-protection, and need not be paid for.

In Train v. Disinfecting Co., 144 Mass. 523, it was held that all imported rags might be required to be put through a disinfecting process at the expense of the owner. Of course, the order did not mean that the legislature or board of health declared all imported rags to be infected, but simply that the danger was too great to risk an attempt at discrimination. If the legislature could throw the burden on owners of innocent rags in that case, why could it not throw the burden on the owners of innocent horses in this? If it could order all rags to be disinfected, why might it not have ordered such rags to be disinfected as a board of three should determine summarily, and without notice or appeal? The latter provision would have been more favorable to owners, as they would have had a chance at least of escaping the burden, and it would stand on the same ground as the severer law.

The answer, or a part of it, is this: Whether the motives of the legislature are the same or not in the two cases supposed, it declares different things to be dangerous and nuisances unless disinfected. In the one, it declares all imported rags to be so; in the other, only all infected rags. Within limits, it may thus enlarge or diminish the number of things to be deemed nuisances by the law, and courts cannot inquire why it includes certain property, and whether the motive was to avoid an investigation. But wherever it draws the line, an owner has a right to a hearing on the question whether his property falls within it, and this right is not destroyed by the fact that the line might have been drawn so differently as unquestionably to include that property. Thus, in the first case, the owner has a right to try the question whether his rags were imported; in the second, whether they were infected. His right is no more met in the second case by the fact that the legislature might have made the inquiry immaterial by requiring all imported rags to be disinfected, than it would be in the first by the suggestion that possibly the legislature might require all rags to be put through the same process whether imported or not. But if the property is admitted to fall within the line, there is nothing to try, provided the line drawn is a valid one under the police power. All that

Train v. Boston Disinfecting Co. decided was that the line there considered was a valid one.

Still it may be asked, if self-protection required the act, why should not the owner bear the loss? It may be answered that self-protection does not require all that is believed to be necessary to that end, nor even all that reasonably is believed to be necessary to that end. It only requires what is actually necessary. It would seem doubtful at least whether actual necessity ought not to be the limit when the question arises under the constitution between the public and an individual. Such seems to be the law as between private parties in this commonwealth in the case of fires, as we have seen. * * *

Again, there is a pretty important difference of degree, at least, (Rideout v. Knox, 148 Mass. 368, 372,) between regulating the precautions to be taken in keeping property, especially property sought to be brought into the state, and ordering its destruction. We cannot admit that the legislature has an unlimited right to destroy property without compensation, on the ground that destruction is not an appropriation to public use within article X of the Declaration of Rights. When a healthy horse is killed by a public officer, acting under a general statute, for fear that it should spread disease, the horse certainly would seem to be taken for public use as truly as if it were seized to drag an artillery wagon. The public equally appropriate it, whatever they do with it afterwards. Certainly the legislature could not declare all cattle to be nuisances, and order them to be killed without compensation. Watertown v. Mayo, 109 Mass. 315, 319; In re Jacobs, 98 N. Y. 98, 109. It does not attempt to do so. As we have said, it only declares certain diseased animals to be nuisances. And even if we assume that it could authorize some trifling amount of innocent property to be destroyed as a necessary means to the abatement of a nuisance, still, if in this § 13 it had added in terms that such healthy animals as should be killed by mistake for diseased ones should not be paid for, we should deem it a serious question whether such a provision could be upheld. See, further, Hutton v. Camden, 10 Vroom 122; Hale v. Lawrence, 1 Zabr. 714; Grant v. U. S., 1 Ct. Cl. 41; Wiggins v. U. S., 3 Ct. Cl. 412; Mitchell v. Harmony, 13 How. 115, 134.

For these reasons, the literal, and, as we think, the true, construction of § 13 seems to us the only safe one to adopt, and accordingly we are of opinion that the authority and jurisdiction of the commissioners to condemn the plaintiff's horse under § 13 was conditional upon its actually having the glanders. If this be so, their order would not protect the defendants in a case where the commissioners acted outside their jurisdiction. * * *

Exceptions sustained.

[Devens, J., with whom concurred Allen and Knowlton, JJ., dissented, interpreting the statute as making the adjudication of the commissioners conclusive, and a protection to the persons who executed their order and holding it valid as thus construed.][5]

PEOPLE EX REL. COPCUTT v. BOARD OF HEALTH OF CITY OF YONKERS.

1893. Court of Appeals of New York. 140 N. Y. 1.

The Nepperhan river is a small stream of water flowing through the city of Yonkers, and across the stream there were several dams to furnish power to drive machinery. Much complaint having been made to the board of health that these dams created nuisances, the members of the board resolved to hold a meeting on the 27th day of March last to consider the condition of the dams, and they ordered notice to be given to the owners of the dams to show cause at that time why the dams should not be removed. In pursuance of this resolution notice was served upon the relator, who owned or was interested in two of the dams and the ponds and water powers thereby created, called the 5th and 6th water powers, and he appeared before the board at the time and place in person and by counsel; and he gave evidence tending to show that the two dams were not nuisances, and did not create nuisances, and there was also evidence in conflict with the case made by him. After hearing the evidence the board made its determination that the dams were nuisances, and ordered them removed.

The relator then instituted this proceeding by certiorari to review this determination. The board made return to the writ, setting forth all its proceedings and the evidence taken by it, and stated in its return that its determination and action were based "not only upon testimony given by the witnesses, but that the determination of the said board of health, and the members thereof, has been based mainly upon the individual knowledge and experience of the members of said board of health concerning the ponds in the Nepperhan stream, and the condition thereof, inasmuch as each member of the board of health, in performance of the duties imposed by law, has personally inspected and has examined and inquired into the condition of said ponds and of said stream, and that the conclusions reached by this board have been reached and depend largely upon personal knowledge and experience of the individual members of this board, and for this reason it is apparent that this board cannot certify to and reproduce before this court all of the proofs, nor all of the grounds of the determination of said board, nor any considerable part thereof." Upon the return and the papers filed therewith the General Term affirmed the action of the board, and then the relator appealed to this court. * * *

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[5] Supporting the reasoning of the majority are: Pearson v. Zehr (1891) 138 Ill. 48, 29 N. E. 854, 32 Am. St. 113 ("To permit the commissioners to determine, ex parte, that some of the horses had the glanders and that the others had been exposed thereto, and to hold that determination a justification for slaughtering the horses, without imposing upon appellants the burden of establishing affirmatively the actual existence of such disease and such exposure, would not be a valid exercise of the police power, but would be a palpable violation of the" due process of law requirement); Lowe v. Conroy (1904) 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 Am. St. 983, 1 Ann. Cas. 341; Newark &c. Horse R. Co. v. Hunt (1888) 50 N. J. L. 308, 12 Atl. 697. See State v. Keller (1922) 108 Nebr. 742, 189 N. W. 374, 25 A. L. R. 115 and therewith compare Runge v. Glerum (1917) 37 N. Dak. 618, 164 N. W. 284, both dealing with conclusiveness of administrative determination that buildings are fire menaces, and of orders to repair or remove.

Earl, J. The disposition of this case turns largely upon the effect and the construction of the statutes constituting the board of health, and defining its powers and duties, and we will, therefore, first give attention to the statutes. * * *

By chapter 270 of the Laws of 1885, the general act for the preservation of the public health, it is provided that the board of health in any city of the state, except the cities of New York, Brooklyn and Buffalo, shall have the power, and it shall be its duty, "to receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances or causes of danger or injury to life and health within the limits of its jurisdiction; to enter upon or within any place or premises where nuisances or conditions dangerous to life and health are known or believed to exist, and by appointed members or persons to inspect and examine the same, and all owners, agents and occupants shall permit such sanitary examinations, and said board of health shall furnish said owners, agents and occupants a written statement of results or conclusions of such examinations; and every such board of health shall have power, and it shall be its duty, to order the suppression and removal of nuisances and conditions detrimental to life and health found to exist within the limits of its jurisdiction," and "to make, without the publication thereof, such orders and regulations in special and individual cases, not of general application, as it may see fit, concerning the suppression and removal of nuisances." It is further authorized to abate nuisances, and to impose penalties for the violation of its orders and regulations, and the violation of them is also made a misdemeanor, and it may commence actions to restrain and abate nuisances, and to enforce its orders and regulations.

A careful examination of the two acts shows that there is no provision for a hearing before the board on the part of any person who is charged with maintaining a nuisance upon his premises. The right to such a hearing is not expressly given and cannot be implied from any language found in either act or from the nature of the subjects dealt with in the acts. Boards of health and other like boards act summarily, and it has not been usual anywhere to require them to give a hearing to any person before they can exercise their jurisdiction for the public welfare. The public health might suffer or be imperiled if their action could be delayed until a protracted hearing could be brought to a termination. There is no provision in the acts for calling or swearing witnesses, and there is no general law giving them power to do so. * * *

The question may be asked, how can these provisions conferring powers upon boards of health to interfere with and destroy property, and to impose penalties and create crimes, stand with the Constitution securing to every person due process of law before his property or personal rights or liberty can be interfered with? The answer must be that they could not stand if we were obliged to hold that the acts referred to made the determinations of the board of health as to the existence of nuisances final and conclusive upon the owners of the premises whereon they are alleged to exist. Before such a final and conclusive determination could be made, resulting in the destruction of property, the imposition of penalties and criminal punishments, the party proceeded against must have a hearing, not as matter of favor but as matter of right, and the right to a hearing must be found in the acts. (Stuart v. Palmer, 74 N. Y. 183.)

As we have said, there is no provision of law giving any party a right to a judicial hearing before these boards, and there is no provision making their determination final. If the decisions of these boards were final and conclusive, even after a hearing, the citizen would in many cases hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated and generally unfitted to discharge grave judicial functions. Boards of health under the acts referred to cannot, as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. They have no jurisdiction to make any order or ordinance abating an alleged nuisance unless there be in fact a nuisance. * * *

It may be said that if the determination of a board of health as to a nuisance be not final and conclusive, then the members of the board, and all persons acting under their authority in abating the alleged nuisance, act at their peril; and so they do, and no other view of the law would give adequate protection to private rights. They should not destroy property as a nuisance unless they know it to be such, and if there be doubt whether it be a nuisance or not the board should proceed by action to restrain or abate the nuisance, and thus have the protection of a judgment for what it may do. * * *

Thus the views we take of these acts and similar acts conferring powers upon local officers to proceed summarily upon their own view and examination furnish adequate protection to boards of health, to the public and to property owners; and while these views are not supported by all the decided cases upon the subject, they have the support of the best reasons and of ample authority. * * * The result of these authorities is that whoever abates an alleged nuisance and thus destroys or injures private property, or interferes with private rights, whether he be a public officer or private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril, and when his act is challenged in the regular judicial tribunals it must appear that the thing abated was in fact a nuisance. This rule has the sanction of public policy and is founded upon fundamental constitutional principles.

The way is now clear to the disposition of this case. The board of health did act and had a right to act upon its own inspection and knowledge of the alleged nuisance. It was not obliged to hear any party. It could obtain its information from any source and in any way, and hence its determination upon the question of nuisance is not reviewable by certiorari. (People ex rel. v. McCarthy, 102 N. Y. 630.) * * *

Our conclusion, therefore, is that the judgment of the General Term should be affirmed, with costs.

All concur.

Judgment affirmed.[6]

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[6] Other cases sustaining statutes that clothe administrative officers with power to destroy property without previous judicial proceeding are New Orleans v. Charouleau, supra, n. 1; Torruella v. Fernandez, supra, n. 1; Balch v. Glenn, 85 Kans. 735, 119 Pac. 67, supra, n. 3; Colvill v. Fox, 51 Mont. 72, 149 Pac. 496, supra, n. 4; Los Angeles Berry Growers Co-op. Assn. v. Huntley, 84 Wash. 155, 146 Pac. 373, supra, n. 1; North American Cold Storage Co. v. City of Chicago, 211 U. S. 306, 53 L. ed. 195, supra, n. 1; and see Adams v. City of Milwaukee (1913) 228 U. S. 572, 57 L. ed. 971. See also Durand v. Dyson (1916) 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84 (sixty-one head of registered cattle, but here the statute provided for at least partial compensation from public funds at statutory rates.)

CHAPTER VIII.

POWER OF EMINENT DOMAIN.

Section 1.—Nature of the Power.

KOHL ET AL. v. UNITED STATES.

1875. Supreme Court of the United States. 91 U. S. 367.
[Printed ante, p. 241.][1]

STATE OF GEORGIA v. CHATTANOOGA, TENNESSEE.

1924. Supreme Court of the United States. 264 U. S. 472.

MR. JUSTICE BUTLER delivered the opinion of the court.

The State of Georgia obtained leave to file its bill of complaint in this court in a suit against the City of Chattanooga to enjoin it from appropriating for street purposes certain lands constituting a part of a railroad yard which that state owns in Chattanooga.

The substance of the bill may be stated briefly. In 1837, Georgia undertook the construction of a railroad, known as the Western and Atlantic Railroad, extending from Atlanta to Chattanooga. The legislature of Tennessee granted to Georgia the right to acquire the necessary right of way from the state line to Chattanooga and also land for terminal facilities. In 1852, Georgia purchased about 11 acres, then in the outskirts of that city, on which is located its railroad yard. The city has grown and this tract of land is now near the business center. Georgia owns and formerly operated the railroad, but since 1870, it has been operated by lessee companies; and now the Nashville, Chattanooga & St. Louis Railway Company operates it under a lease which will expire in 1969.

For some years, there has been a demand for extending one of the principal streets of the city through this railroad yard. Georgia denies the power of the city to condemn the necessary right of way for the street. * * * The city moves to dismiss the bill. The motion must be granted.

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[1] The Fifth Amendment does not prohibit uncompensated confiscation by the United States of the private property of persons who are subjects of countries with which the United States is at war. United States v. Chemical Foundation, Inc. (1926) 272 U. S. 1, 11, 71 L. ed. 131.

1. The power of Tennessee, or of Chattanooga as its grantee, to take land for a street is not impaired by the fact that a sister state owns the land for railroad purposes. Having acquired land in another state for the purpose of using it in a private capacity, Georgia can claim no sovereign immunity or privilege in respect to its expropriation. The terms on which Tennessee gave Georgia permission to acquire and use the land and Georgia's acceptance amount to consent that Georgia may be made a party to condemnation proceedings.

The power of eminent domain is an attribute of sovereignty, and inheres in every independent state. See Boom Co. v. Patterson, 98 U. S. 403, 406; United States v. Jones, 109 U. S. 513, 518; Shoemaker v. United States, 147 U. S. 282, 300; Cincinnati v. Louisville & Nashville R. R. Co., 223 U. S. 390, 404. The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state. It cannot be surrendered, and if attempted to be contracted away, it may be resumed at will. Pennsylvania Hospital v. Philadelphia, 245 U. S. 20; Galveston Wharf Co. v. Galveston, 260 U. S. 473. It is superior to property rights (Kohl v. United States, 91 U. S. 367, 371) and extends to all property[2] within the jurisdiction of the state,—to lands already devoted to railway use, as well as to other lands within the state. United States v. Gettysburg Electric Ry. Co., 160 U. S. 668, 685; Adirondack Ry. Co. v. New York State, 176 U. S. 335, 346. Land acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership. The proprietary right of the owning state does not restrict or modify the power of eminent domain of the state wherein the land is situated. See Burbank v. Fay, 65 N. Y. 57, 62; United States v. Railroad Bridge Co., 6 McLean, 517, 533; United States v. Chicago, 7 How. 185, 194. Tennessee by giving Georgia permission to construct a line of railroad from the state boundary to Chattanooga did not surrender any of its territory or give up any of its governmental power over the right of way and other lands to be acquired by Georgia for railroad purposes. The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad; and, as to that property, it cannot claim sovereign privilege or immunity. Bank of the United States v. Planters' Bank, 9 Wheat. 904, 907;

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[2] "Intangible property, such as choses in action, patent [illegible]ts, franchises, charters or any other form of contract are within the swee[illegible] of this sovereign authority as fully as land or other tangible property." [illegible]hols, Eminent Domain, (2d ed. 1917) 67-68, citing cases, and referring to '[illegible]argely academic discussion" whether money can be taken, p. 69.

Property devoted to a public use may be taken for another public use where there is legislative authority therefor. Cases collected in (1922) 18 A. L. R. 1271.

Bank of Kentucky v. Wister, 2 Pet. 318, 323; Louisville, C. & C. R. R. Co. v. Letson, 2 How. 497, 550; South Carolina v. United States, 199 U. S. 437, 463. Undoubtedly Tennessee has power to open roads and streets across the railroad land owned by Georgia.

Chattanooga contends that Georgia has consented to be sued in the courts of Tennessee in respect of its railroad in that state.

* * *

But we need not decide the broad question whether Georgia has consented generally to be sued in the courts of Tennessee in respect of all matters arising out of the ownership and operation of its railroad property in that state. The Circuit Court of Hamilton County had jurisdiction in the matter of the condemnation of land for streets by the City of Chattanooga, and exercised it prior to the filing of the bill of complaint in this court. The State of Georgia and its lessee were named as parties. Notice was given to Georgia as a non-resident by publication. Having divested itself of its sovereign character, and having taken on the character of those engaged in the railroad business in Tennessee (Bank of the United States v. Planters' Bank, supra), its property there is as liable to condemnation as that of others, and it has, and is limited to, the same remedies as are other owners of like property in Tennessee. The power of the city to condemn does not depend upon the consent or suability of the owner. Moreover, the acceptance by Georgia of the permission given it to acquire the railroad land in Tennessee is inconsistent with an assertion of its own sovereign privileges in respect of that land and precludes a claim that it is not subject to taking for the use of the public, and amounts to a consent that it may be condemned as may like property of others.

2. There is such a want of equity that the bill will be dismissed. The lack of opportunity to be heard before the passage of the ordinance opening the street furnishes no ground for complaint. The taking is a legislative and not a judicial function, and an opportunity to be heard in advance need not be given. Bragg v. Weaver, 251 U. S. 57, 58. Personal service upon the owner is not essential; publication of notice is sufficient. Bragg v. Weaver, supra, 59, 61. No complaint is made that the laws of Tennessee do not afford the State of Georgia and other owners reasonable notice and opportunity to be heard before the final determination of judicial questions that may be involved in the condemnation proceedings, e. g., whether the state has delegated to the city the power to condemn; whether the taking is for a public purpose; (Rindge Co. v. Los Angeles, 262 U. S. 700, 705; Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 606) and the amount of the compensation. Seaboard Air Line Ry. Co. v. United States, 261 U. S. 299, 304. Georgia has been given notice and has the right voluntarily to appear. See Clark v. Barnard, 108 U. S. 436, 447. All its objections and defenses

may be interposed in the Tennessee court. * * * If the decision of that court shall deny to Georgia any rights secured to it by the Constitution and laws of the United States, the case may be brought here for reexamination and review. * * *

Bill dismissed without prejudice.[3]

BEDFORD v. UNITED STATES.

1927. Circuit Court of Appeals, First Circuit. 23 Fed. (2d) 453.

In Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

Condemnation proceedings by the United States, in which the Town of Bedford was denied compensation, and it brings error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. Proceeding under Stat. 1888, c. 728 (25 Stat. p. 357 [40 USCA §§ 257, 258; Comp. St. §§ 6909, 6910]), the United States took, as of November 10, 1926, by eminent domain, for a Veterans' Hospital, a tract of land in the town of Bedford containing about 400 acres. The taking covered "all rights of every name, nature, and description in and to that portion of Springs road so called, as shown" on a plan referred to. Springs road was an old road, used from time immemorial, and maintained at the expense of the town. The taking cuts out about a half mile of the road, but the severance will render other portions unavailable and require new roads to connect the termini. The facts concerning the extent of the damage need not now be stated; for it is stipulated that, if the town is entitled to recover, the amount shall be $10,000.

The court below ruled against the town, without opinion. The single question here is whether the taking by the United States, by eminent domain, of a way located in the town, entitles the town to compensation.

The United States attorney undertakes to support this ruling by urging that "the United States is not liable unless the commonwealth would have been liable if it had taken it for its own use." Otherwise stated, the sole reliance of the government is on the Massachusetts rule that a taking by the commonwealth for one public use grounds no right to compensation in a town which has previously devoted the land taken to another public use. But the rule is not applicable.

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[3] A state can not authorize the taking of "public lands" of the United States set aside as a federal forest reservation, though the purposed taking is generation of electric power for public use. Utah Light & Power Co. v. United States (1917) 243 U. S. 389, 61 L. ed. 791, annotated in (1919) 4 A. L. R. 548.

In Town of Nahant v. United States, 136 F. 273, 275, 69 L. R. A. 723, this court expressly held that under this statute of 1888, supra, the proceeding for condemnation is not so far authorized by the commonwealth as to entitle the United States to stand upon the Massachusetts law as to the rule of damages, where the property taken for a second and different public use is connected with a prior public use authorized by the state. The same case affirming the same doctrine was again before this court in United States v. Town of Nahant, 153 F. 520.

This taking in Bedford was by virtue of the authority of the United States, and not under authority delegated to the United States by the commonwealth of Massachusetts. See Chappell v. United States, 160 U. S. 499, 510, 16 S. Ct. 397, 40 L. Ed. 510; United States v. Gettysburg Electric R. Co., 160 U. S. 668, 679, 16 S. Ct. 427, 40 L. Ed. 576; Kohl v. United States, 91 U. S. 367, 371, 23 L. Ed. 449.

The present question, then, is not whether the town could have recovered, if the taking had been by the commonwealth for another public use, but whether, when the federal government, as an act of paramount sovereignty, has taken this land and the rights of the town in this highway, the town is entitled to be made good for an actual loss of $10,000 thus caused.

The rulings relied upon concerning takings where the authority is delegated by the commonwealth are not in point. In re Certain Land in Lawrence (D. C.) 119 F. 453, 454; Burt v. Merchants' Ins. Co., 106 Mass. 356, 8 Am. Rep. 339, dealing with land for the Boston post office. Statutes cited in Gen. Laws Mass. vol. 1, p. 5.

While it is settled that in Massachusetts, ordinarily, towns do not own the fee in town ways (Inhabitants of Millbury v. Blackstone Canal Co., 8 Pick. 473), and that the easement is not technically vested in the town, but belongs to the general public (Inhabitants of Andover v. Sutton, 12 Metc. 182, 188), it is also settled that the town has a qualified property or interest in its highways (McHugh v. City of Boston, 173 Mass. 408, 53 N. E. 905). Towns may recover for the obstruction or destruction of town ways. See Town of Troy v. Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177, in which is a learned and instructive opinion by Judge Bell as to the rights and obligations of towns concerning highways. Cf. Gilman v. Town of Laconia, 55 N. H. 130, 131, 20 Am. Rep. 175; Town of Monroe v. Connecticut River Lumber Co., 68 N. H. 89, 92, 39 A. 1019. Towns are permitted to recover for damages done town ways, for the simple reason that thus additional burdens are imposed upon the taxpayers required by law to maintain such ways. Cf. Gen. Laws Mass. c. 84, §§ 1, 15, 22. Towns cannot discontinue highways without becoming liable for damages to landowners injured thereby. Gen. Laws, c. 79, § 9 et seq.

For present purposes, a town may be regarded as a group of taxpayers, charged, inter alia, with the burden of building and maintaining such highways as common convenience and necessity require. Any act that increases those burdens takes additional money from that group of taxpayers. A highway once built exonerates, pro tanto, that group; taken or otherwise destroyed, a new burden is imposed. To take the furnished means of meeting a liability imposed by law has the same effect as taking property technically vested; loss accrues. Bedford's right in Springs road was as real a property right as a leasehold of the same land, or as an abutting owner's right of access to the street. Rigney v. City of Chicago, 102 Ill. 64; Hart v. Buckner (C. C. A.) 54 F. 925, 930; Old Colony & F. R. R. Co. v. Inhabitants of Plymouth County, 14 Gray (Mass.) 155.

Doubtless cases may be found in which recovery has been refused because of an erroneous conception of the real meaning of the word "property" as used in the Constitution and in eminent domain cases. 2 Lewis on Eminent Domain (3d Ed.) §§ 62-69; 3 Dillon's Munic. Corporations (5th Ed.) §§ 1015-1018. Perhaps the best discussions of this point are found in Eaton v. Boston, C. & M. R. R., 51 N. H. 504, 12 Am. Rep. 147, and Thompson v. Androscoggin River Imp. Co., 54 N. H. 545.

In the Eaton Case, Judge Jeremiah Smith pointed out (page 511) that the constitutional prohibition against taking private property without compensation has received in some quarters a construction which renders it of comparatively little worth, because grounded on a misconception of the meaning of the word property. He observes that in strict legal sense even land is not property, but merely the subject of property. The learned judge then discusses, with great acuteness and copious citation of authorities, the real meaning of the word "property."

In the Thompson Case is an illuminating discussion by Judge Doe of the same general problem. See page 551 et seq., in which he points out that "property in land must be considered, for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations necessary for the highest enjoyment of land by the entire community of proprietors." * * * Property is taken when any one of these proprietary rights is taken or destroyed. Arimond v. Green Bay & M. Canal Co., 31 Wis. 316, 335. Applying the reasoning of these cases to the problem before us, it is clear that the town of Bedford had a property right in this town way. The road was, as already noted, a furnished means for the performance of a legal duty. While the town had not the right of exclusive user, it did have a right to exclude all not using the highway in a manner consistent with the equal rights of other users, who in turn had rights that the town was bound to maintain.

But it is not—and under the stipulation herein cannot—be contended that Bedford has not suffered a damage of $10,000 by the government's taking of this way. The case, therefore, falls plainly under the protection of the Fifth Amendment. * * *

Parenthetically, question might be made of the power of the federal officials acting in this taking to take such a public facility as this town way without express authority from either Congress or the commonwealth of Massachusetts. See the observations of Judge Putnam in the New Castle Case (C. C.) 165 F. 783, 788, a taking under the same statute. Judge Putnam there observes: * * * "It would be unreasonable to assume that Congress intended that federal officials should assert jurisdiction to interfere with the public purposes of sovereign states without express authority therefor. The presumption is that authorized public uses are not to be interfered with under mere general terms of federal or state legislation."

* * *

However, no question as to the validity of this taking is now submitted, and we intimate no opinion upon it. But the contention that the United States may, under a grant in general terms of power of eminent domain, and without any cession or grant of authority from the state, take or destroy public facilities existing under the law of the state, is a very far-reaching proposition, particularly when coupled with the present contention of immunity from obligation to pay any compensation for such public utilities. Could the United States, under the same statute, take or destroy without compensation, the metropolitan waterworks? * * *

The relation of the United States to this highway is quite different from that of the commonwealth of Massachusetts. Cf. Proprietors of Mt. Hope Cemetery v. City of Boston, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515, a learned and elaborate opinion dealing with the distinction between property held by a municipality in its private or proprietary character, and property or rights held "for purposes deemed strictly public," in which the town "holds merely as an agency of the state government for the performance of the strictly public duties devolved upon it." It is settled law that the commonwealth may reallocate, without compensation, to other public uses, property or rights thus held as a mere agency of the state government, but may not so deal with many other kinds of property owned "in its private or proprietary character, as a private corporation might own it." 158 Mass. 519, 33 N. E. 698. The unlimited power of the state over the first kind of property rests upon the broad proposition that cities and towns are, for most practical purposes, mere creatures of the state. Their boundaries may be changed; their powers enlarged or limited; the state may delegate to them more or less of control over taxation, police protection, schools, and other functions—social, business, or political. It may regard lands appropriated for town ways as of more public utility if used for a water system. Inhabitants of Cheshire v. Adams & C. Reservoir Co., 119 Mass. 356. Any increased tax burden resulting from such shifting of the public use of lands lying in any town is within the scope of the Legislature's general control over the allocation of tax burdens. 119 Mass. 360. But the federal government's power of eminent domain—necessarily implied as an efficient and appropriate means of exercising other powers expressly given—is to be used subject to the broad limitations of the Fifth Amendment. It is a stranger to the town. It can no more take, without compensation, their property rights, than it can those of an individual.

The result is that, pursuant to the stipulation, the decree of condemnation is to be amended by awarding $10,000 to the town of Bedford, with interest thereon from November 10, 1926.[4]

CHICAGO, B. & Q. R. CO. v. CHICAGO.

1897. Supreme Court of the United States. 166 U. S. 226.
[Printed ante, p. 673.][5]

FAIRCHILD ET AL. v. ST. PAUL.

1891. Supreme Court of Minnesota. 46 Minn. 540.

Appeal by plaintiffs * * * from a judgment of the district court for Ramsey county * * *.

Mitchell, J. This was an action to recover damages for certain alleged acts of trespass in removing stone from the premises of the plaintiffs. The defendant justified the acts on the ground that it had acquired the title to the land for the purposes of a public street. The case was tried upon the theory that its decision depended on the question whether or not the city of St. Paul had acquired a title in fee, and by stipulation it was agreed that the court should determine two questions, viz.: First, had the defendant the power and right to condemn the fee of land for street purposes? and, if so, second, had the defendant duly condemned, for such purposes, the fee of the land in question?

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[4] See note on right of a governmental unit to compensation where property held by it is taken for another public purpose, in (1928) 56 A. L. R. 365.

[5] Specific clauses against taking private property for public use without compensation are found in the constitutions of all the states except Kansas, New Hampshire and North Carolina. In none of them is "public use" defined, except in that of Idaho. The decision in Chicago, B. & Q. R. Co. v. Chicago, did more than to supply these omissions; it made federal questions, with federal judicial review, of what otherwise would have been questions solely of state constitutional law. Is it the doctrine of this case that the Fourteenth Amendment imposes exactly the same limitation on the states that the eminent domain clause of the Fifth Amendment imposes on the central government? The state constitutional provisions in force in 1914 are collected in (1915) Index Digest of State Constitutions.

1. The main contention of the plaintiffs upon the argument was, to use their own language, "that the public exigencies do not demand the taking and condemnation of the absolute fee-simple title to land for the purpose of highways and streets; that the public wants are supplied by the enjoyment of an easement; and that any act of the legislature which assumes and attempts to authorize a municipality to take and condemn the absolute fee-simple title to land for such purposes is unconstitutional and void." More briefly stated, the proposition is that the legislature cannot authorize the taking of any greater estate in land for a public use than is necessary; that an estate in fee is not necessary for the purposes of a street; therefore the legislature cannot authorize the taking of such an estate for such purposes. While we have given the question the careful examination due to the elaborate brief and very earnest argument of the learned counsel, yet it has never seemed to us that there was anything in his contention.

In this case it must be conceded that the legislature, if it had the power to do so, has given the city of St. Paul authority to condemn an estate in fee for street purposes; the language of the charter being: "In all cases the land taken and condemned in the manner aforesaid (for streets) shall be vested absolutely in the city of St. Paul in fee-simple." Mun. Code 1884, § 153 (Sp. Laws 1874, p. 59, § 17). There is nothing better settled than that, the power of eminent domain being an incident of sovereignty, the time, manner, and occasion of its exercise are wholly in the control and discretion of the legislature, except as restrained by the constitution. It rests in the wisdom of the legislature to determine when and in what manner the public necessities require its exercise; and with the reasonableness of the exercise of that discretion the courts will not interfere. Wilkin v. First Div., etc., R. Co., 16 Minn. 271; Weir v. St. Paul, S. & T. F. R. Co., 18 Minn. 155. As the legislature is the sole judge of the public necessity which requires or renders expedient the exercise of the power of eminent domain, so it is the exclusive judge of the amount of land, and of the estate in land, which the public end to be subserved requires shall be taken. The only limitation—at least, the only one applicable to a case like the present—which the constitution imposes upon the exercise of the right of eminent domain by the legislature is that private property shall not be taken for public use without just compensation therefor first paid or secured. Of course, there is the further limitation, necessarily implied, that the use shall be a public one; upon which question the determination of the legislature is not conclusive upon the courts. But, when the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. Consequently, if in the legislative judgment it is expedient to do so, it has the power expressly to authorize a municipal corporation compulsorily to acquire the absolute fee-simple to lands of private persons condemned for street or any other public purpose. The authorities are so numerous and uniform to this effect that an extended citation of them is unnecessary. See, however, Dill. Mun. Corp. § 589; Cooley, Const. Lim. 688; Lewis, Em. Dom. 277; Elliott, Roads & S. 172; Mills, Em. Dom. §§ 50, 51; Boom Co. v. Patterson, 98 U. S. 403, 406; Sweet v. Buffalo, etc., Ry. Co., 79 N. Y. 293, 299.

It is often laid down as the law that the taking of property must always be limited to the necessity of the case, and, consequently, no more can be appropriated in any instance than is needed for the particular use for which the appropriation is made. But it will be found that this is almost invariably said, not in discussing the extent of the power of the legislature, but with reference to the construction of statutes granting authority to exercise the right of eminent domain, and where the authority to take a certain quantity of land or particular estate therein depended, not upon an express grant of power to do so, but upon the existence of an alleged necessity, from which the disputed power is to be implied. This distinction is clearly brought out by Justice Cornell in Milwaukee & St. Paul Ry. Co. v. City of Faribault, 23 Minn. 167. Upon the principle that statutes conferring compulsory powers to take private property are to be strictly construed, it follows that, when the estate or interest to be taken is not defined by the legislature, only such an estate or interest can be taken as is necessary to accomplish the purpose in view, and, when an easement is sufficient, no greater estate can be taken. It is on this principle that where the legislature has authorized the taking of land for the purposes of streets, without defining the estate that may be taken, or expressly authorizing the taking of the fee, it is held that only an easement can be taken. This is construed, under such statutes, to be the extent of the grant of authority; but no well-considered case can be found which holds that the legislature might not authorize the taking of the fee, if it deemed it expedient. * * *

Judgment affirmed.[6]

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[6] Where a project is of a type that is a public use, determination of the existence of a necessity for the project, whether particular property is needed therefor and what amount is needed may be delegated to an administrative officer exclusive of judicial review. State v. Voll (1923) 155 Minn. 72, 192 N. W. 188 (highway commissioner, locating a public road); In re Condemnations for Improvement of Rouge River (1920) 266 Fed. 105 (Secretary of War, taking to improve navigation); United States v. Forbes (1919) 259 Fed. 585 (Secretary of War, taking for military camp).

"Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate.

Section 2.—Public Use.

DAYTON GOLD AND SILVER MINING CO. v. SEAWELL.

1876. Supreme Court of Nevada. 11 Nev. 394.

[The mining company herein applied to the state Supreme Court for a mandamus to compel a state district judge to entertain proceedings brought by the petitioner to condemn a strip of land belonging to another private owner and claimed to be necessary to petitioner to enable it to transport wood, lumber, timbers and other materials needed for the conduct of its business of mining. The district judge had refused on the ground that the state statute relied upon was invalid. The statute declared mining, milling,

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They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment. Boom Co. v. Patterson, 98 U. S. 403, 406; Backus v. Fort Street Union Depot Co., 169 U. S. 557, 568; Adirondack Ry. Co. v. New York, 176 U. S. 335, 349; Sears v. Akron, 246 U. S. 242, 251. But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard." Van Devanter, J., in Bragg v. Weaver (1919) 251 U. S. 57, 58-59, 64 L. ed. 135. So a legislature may confer upon a municipality authority to determine without a hearing what land may be taken for an authorized public use, Joslin Mfg. Co. v. Providence (1921) 262 U. S. 668, 67 L. ed. 1167; or upon a county board of supervisors, Rindge Co. v. Los Angeles County (1923) 262 U. S. 700, 708, 67 L. ed. 1186.

"Where the court finds that the use for which the property is to be taken is a public one, it will not inquire into the amount of property necessary for such use, unless it appears that the quantity of property taken is grossly in excess of the amount necessary." Winchester v. Ring (1924) 312 Ill. 544, 555, 144 N. E. 333, 36 A. L. R. 520. Similar dicta, that a taking grossly in excess of need is "an abuse of power" which the court will prevent, occur in other cases. Forest Preserve District v. Kean (1921) 298 Ill. 37, 46, 131 N. E. 117. See Nichols, Eminent Domain (2d ed., 1917) § 333 and cases there cited. That author adds: "But while the courts have frequently declared their power to set aside acts of the legislature upon such a ground, cases in which the power has been actually exercised seem rarely to have arisen."

Where a municipality or other authority authorized to take for specified public purposes attempts under guise of taking for such a purpose to take for an unauthorized purpose, though a public one, the courts give relief. State ex rel. Ford Motor Co. v. District Court (1916) 133 Minn. 221, 158 N. W. 240 and cases there cited.

"But the grant of the right of eminent domain is fraught with the possibility of the disregard of another's rights. 'It's exercise', in the terse sentence of Judge Deasy, 'should be sedulously guarded.' Sidelinker v. Water Company, 117 Maine, 528. The Legislature can make the question of the existence of a genuine necessity for the appropriation determinable by a court. [Citing cases] * * * Our legislature has done this very thing in the instance of the taking by a water district." Roberts v. Portland Water District (1924) 124 Maine 63, 126 Atl. 162.

In a few states peculiar provisions either expressly or by interpretation have made the question of necessity a judicial one. See George v. Consolidated Lighting Co. (1914) 87 Vt. 411, 89 Atl. 635, 52 L. R. A. (N. S.) 850, Ann. Cas. 1916C, 416; Tracy v. Elizabethtown L. & C. R. Co. (1882) 80 Ky. 259, 265-266, but see First Nat. Bank, v. Paducah (1924) 202 Ky. 48, 258 S. W. 938. By Michigan Const. (1850) art. 18, § 2, the question is to be decided by a jury or commissioners, and by Wisconsin Const. (1848) art. 11, § 2, by a jury when a municipality is the taker.

smelting or other reduction of ores to be public uses, and authorized condemnation of private lands in aid thereof.]

By the Court, HAWLEY, C. J. * * * It is contended by petitioner that this declaration of the legislature is conclusive upon the courts; in other words, that it is not within the legitimate province of the judiciary to control the judgment or decision of the legislature. There are some very respectable opinions which tend to support this view; but the decided weight of the authorities as well as reason is against it. As we construe the provision of the constitution, there is a limit upon the exercise of legislative power which prohibits that body from enacting any law which takes the property of one citizen and gives it to another for a private use, and if the legislature has, in the passage of this act, gone beyond this limitation it is the clear and positive duty of this court to declare the act unconstitutional and void. But in this connection it must, as we think, be admitted that although the action of the legislature is not final, its decision upon this point is to be treated by the courts with the consideration which is due to a co-ordinate department of the state government, and in case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail. * * *

This brings us to the direct question: What is the meaning of the words "public use" as contained in the provision of our state constitution? It is contended by respondent that these words should be construed with the utmost rigor against those who try to seize property, and in favor of those whose property is to be seized. In other words, that in favor of private rights the construction should be strict; that the words mean possession, occupation, or direct enjoyment by the public. On the other hand, it is claimed by petitioner that courts should give to the words a broader and more extended meaning, viz., that of utility, advantage or benefit; that any appropriation of private property under the right of eminent domain for any purpose of great public benefit, interest or advantage to the community is a taking for a public use. No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words "public use" as found in the different state constitutions regulating the right of eminent domain. The reasoning is in many of the cases as unsatisfactory as the results have been uncertain. The beaten path of precedent to which courts, when in doubt, seek refuge, here furnishes no safe guide to lead us through the long lane of uncertainty to the open highway of public justice and of right. The authorities are so diverse and conflicting, that no matter which road the court may take it will be sustained, and opposed, by about an equal number of the decided cases. In this dilemma, the meaning must, in every case, be determined by the common sense of each individual judge who has the power of deciding it. Upon examining the authorities, we find that private property has been taken under a similar provision in the different state constitutions, for the purpose of making public highways, turnpike roads, and canals; of building railroads; of constructing wharves and basins; of establishing ferries; of draining swamps and marshes; of bringing water into cities and towns; of the establishment of water-power for manufacturing purposes; of laying out a public park; of constructing sewers; of erecting levees, to prevent inundation; of building lateral railroads to coal mines; of laying pipe for the transportation of oil from oil-wells to a railroad; of laying gas-pipes; of disposing of stagnant and offensive water, etc., etc.

It has frequently been decided that the public have an interest in the use of a railroad because it increases the facility for travel and transportation from one part of the country to another, and every citizen may use it by paying the usual rates of fare; the owners may also be prosecuted for any damage sustained by their refusal to transport individuals or their property upon the payment of the fare or freight. A turnpike is said to be for a public use because every man can, with his own horses and teams, or on foot, travel upon it for a fixed compensation, and the legislature may, from time to time, limit the amount of toll which the owners may take, and regulate the franchise under which their right to collect tolls exists. The same principle has been applied to many of the other enumerated cases. It is, however, evident that the act in question cannot be sustained upon any such reasoning. It can only be sustained, if at all, by adopting the theory advanced by petitioner's counsel. The issue is clearly presented and it ought to be fairly met. That the purposes mentioned in the act "are of vital necessity to the people of this state," cannot be denied; that mining is the paramount interest of the state is not questioned; that anything which tends directly to encourage mineral developments and increase the mineral resources of the state is for the benefit of the public and is calculated to advance the general welfare and prosperity of the people of this state, is a self-evident proposition. Hence, it necessarily follows that if the position contended for by petitioner is correct, and I believe it is, then the act is constitutional and should be upheld. Although other and weaker reasons have more frequently been assigned, it seems to me that this is the true interpretation upon which courts have really acted in sustaining the right of eminent domain in favor of railroads and other objects, and in several of the decided cases this reason is expressly given.

Chancellor Walworth, in Beekman v. Saratoga and Schenectady Railroad Co., [3 Paige (N. Y.) 73] * * * said: "It is upon this principle that the legislature of several of the states have authorized the condemnation of the lands of individuals for mill-sites, where from the nature of the country such mill-sites could not be obtained for the accommodation of the inhabitants without overflowing the lands thus condemned * * *."

It is true that these acts in Massachusetts, owing to some of the provisions of the constitution of that state, could perhaps have been upheld under the existing colonial laws in force in that state, in relation to the rights of proprietors of land traversed by mill streams, at the time of the adoption of the state constitution; but the reasoning of the courts in sustaining the acts is generally, if not universally, based upon the grounds relied upon to sustain the validity of the statute of this state. * * *

The principle is * * * stated by Chief Justice Shaw, who delivered the opinion of the court in Hazen v. Essex Company. * * * The court say: "The establishment of a great mill power for manufacturing purposes, as an object of great public interest, especially since manufacturing has come to be one of the great public industrial pursuits of the commonwealth, seems to have been regarded by the legislature and sanctioned by the jurisprudence of the commonwealth, and, in our judgment, rightly so, in determining what is a public use, justifying the exercise of the right of eminent domain." (12 Cush. 477.) * * *

The principle announced in these cases was approved and followed by a majority of the court in Newcomb v. Smith, 2 Pin. (Wis.) 131. It must, however, be admitted, that the value of this case as an authority is materially weakened by a very able dissenting opinion delivered by Larrabee, J., and concurred in by Chief Justice Stow, and the fact that in Fisher v. Horicon Iron and Manufacturing Company (10 Wis. 351), and other subsequent cases, the supreme court of that state question the correctness of the conclusion reached by the majority of the court in Newcomb v. Smith, that the "mill-dam" law was constitutional, but adhere to it solely upon the doctrine of *stare decisis*. * * *

In Minnesota the supreme court, in Miller v. Troost, held that the act relating to "dams and mills" went to the extreme limit of legislative power, and after expressing the opinion that if such laws had not been sustained by the courts of other states, they would hesitate long before upholding the act, say: "The decisions, however, are so numerous, and by courts of so great authority, that we are constrained to hold the law to be constitutional." (14 Minn. 369.)

In the light of these authorities, nearly all of which were decided prior to the adoption of our state constitution, I think it would be an unwarranted assumption upon our part to declare that the framers of the constitution did not intend to give the term "public use" the meaning of public utility, benefit and advantage, as construed in the decisions we have quoted.

The reasons in favor of sustaining the act under consideration are certainly as strong as any that has been given in support of the mill-dam, or flowage acts, as well as some of the other objects heretofore mentioned. Mining is the greatest of the industrial pursuits of this state. All other interests are subservient to it. Our mountains are almost barren of timber, and our valley lands could never be made profitable for agricultural purposes except for the fact of a home market having been created by the mining developments in different sections of the state. The mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills. The mines are fixed by the laws of nature, and are often found in places almost inaccessible. For the purpose of successfully conducting and carrying on the business of "mining, milling, smelting, or other reduction of ores," it is necessary to erect hoisting works, to build mills, to construct smelting furnaces, to secure ample grounds for dumping waste rock and earth; and a road to and from the mine is always indispensable. The sites necessary for these purposes are oftentimes confined to certain fixed localities. Now it so happens, or, at least, is liable to happen, that individuals, by securing a title to the barren lands adjacent to the mines, mills or works, have it within their power, by unreasonably refusing to part with their lands for a just and fair compensation, which capital is always willing to give without litigation, to greatly embarrass if not entirely defeat the business of mining in such localities. In my opinion, the mineral wealth of this state ought not to be left undeveloped for the want of any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining. Nature has denied to this state many of the advantages which other states possess; but by way of compensation to her citizens has placed at their doors the richest and most extensive silver deposits ever yet discovered. The present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals.

But it is argued, that in sustaining this act upon the principles we have announced, there is no limitation to the exercise of legislative will in the appropriation of private property. * * *

If public occupation and enjoyment of the object for which land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theatres. Why not? A hotel is used by the public as much as a railroad. The public have the same right, upon payment of a fixed compensation, to seek rest and refreshment at a public inn as they have to travel upon a railroad.

One purpose is, so far as the legal rights of the citizen are concerned, as public as the other. The same principle is applicable to theatres. All citizens have the undoubted right, upon the payment of the price of admission, to attend all places of public amusement. * * * The truth is, that there is a wide distinction between railroads and hotels, and, also, between the business of mining and that of conducting theatres. A railroad, to be successfully operated, must be constructed upon the most feasible and direct route; it cannot run around the land of every individual who refuses to dispose of his private property upon reasonable terms. In such cases the law interferes, and takes the private property of the citizen upon payment of a just compensation, in order to promote an interest of great public benefit to the community, which could not be successfully carried on without the exercise of this power of eminent domain. The same principle applies to the business of mining; but it cannot reasonably be applied to the building of hotels or theatres. In the building of hotels and theatres the location is not necessarily confined to any particular spot, and it is always within the reach of capital to make the proper selection, and never within the power of any individual, or individuals, however stubborn or unreasonable, to prevent the erection of such buildings. The object for which private property is to be taken must not only be of great public benefit and for the paramount interest of the community, but the necessity must exist for the exercise of the right of eminent domain. * * *

It is, therefore, ordered that the writ of peremptory mandamus be issued.[7]

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[7] In California the exploitation of mines (gold) is held not to be a "public use." Consolidated Channel Co. v. Central Pac. R. Co. (1876) 51 Cal. 269. So also in Pennsylvania (coal), In re Poland Coal Co.'s Case (1914) 58 Pa. Super. Ct. 312. To similar effect, St. Louis, I. M. & S. R. Co. v. Petty (1893) 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434; Sholl v. German Coal Co. (1887) 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379; Chesapeake Stone Co. v. Moreland (1907) 126 Ky. 656, 104 S. W. 762, 16 L. R. A. (N. S.) 479; Alfred Phosphate Co. v. Duck River Phosphate Co. (1907) 120 Tenn. 260, 113 S. W. 410, 22 L. R. A. (N. S.) 701; State ex rel. Morrell v. Superior Court (1903) 33 Wash. 542, 74 Pac. 686.

In accord with the principal case are: Hand Gold Min. Co. v. Parker (1877) 59 Ga. 419; Butte, A. & P. R. Co. v. Montana Union R. Co. (1895) 16 Mont. 504, 41 Pac. 232, 235, 31 L. R. A. 298, 50 Am. St. 508; Highland Boy Gold Min. Co. v. Strickley (1904) 28 Utah 215, 78 Pac. 296, 1 L. R. A. (N. S.) 976, 107 Am. St. 711, 3 Ann. Cas. 1110; and see Tanner v. Treasury Tunnel Mining &c. Co. (1906) 35 Colo. 593, 83 Pac. 464, 4 L. R. A. (N. S.) 106; New Central Coal Co. v. Georges Creek Coal & I. Co. (1873) 37 Md. 537.

"The right to condemn land for a spur or lateral railway track to a mine has frequently been upheld on the ground of the right of the public generally to use the track when constructed." Note in (1928) 54 A. L. R. 69, collecting cases, including jurisdictions so holding though opposed to the doctrine of the principal case. See also Union Lime Co. v. Chicago & N. W. R. Co. (1914) 233 U. S. 211, 58 L. ed. 924.

HEALY LUMBER CO. v. MORRIS.

1903. Supreme Court of Washington. 33 Wash. 490.

[A statute of the State of Washington authorized any owner of timbered lands or timber, who had no practical route or right of way whereon to transport the timber to a place where it might be manufactured or shipped, to acquire by condemnation a right of way for a logging-road by the most direct and feasible route, the appropriator to have exclusive use thereof "subject to the right of any other person * * * to condemn said logging road. * * *"]

Dunbar, J. This is an action brought by appellant to condemn land and waters for a logging road and waterway in King county. A demurrer to the complaint was sustained, and, the plaintiff electing to stand on its complaint, judgment was rendered for the defendants. The complaint made the necessary allegations to bring the case within the statute * * *.

The demurrer was sustained on the ground that the act was in contravention of § 16, art. 1 of the constitution of this state, which provides as follows:

"Private property shall not be taken for public use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of another for agricultural, domestic or sanitary purposes. * * *"

An immense number of authorities have been cited in this case, all of which we have carefully examined, but a particular analysis of which cannot be made within the limits of a reasonable opinion. But, from the research we have made, we conclude that both the weight of authority and the better reasoning sustain the judgment in this case; that, therefore, the statute in question is in contravention of the constitution, and that the words "public use" were not used by the framers of the constitution in the liberal and, it seems to us, somewhat indiscriminate sense which is contended for by the appellant.

The learned attorneys for appellant have favored the court with an exhaustive and earnest argument in their brief, and a painstaking showing is made of the magnitude of the lumbering business and interest of this state, and the effect that it presumably has upon the general prosperity of the commonwealth, and we are urged to announce a broad and statesmanlike principle in determining this question, and one which would further the business prosperity of the state rather than one which would hamper and retard it. But the court cannot invade the province of the law-making powers of government, and intrude into its decrees its opinion on questions of public policy. Its duty is to strictly recognize its legal limitations and confine itself to the narrower duties of interpretation and construction. The main arguments in the brief, powerful as they are, would have been more appropriately presented to the framers of the constitution. * * *

It must be conceded, however, that there are quite a number of decisions to the effect that the phrase "public use" should be construed to be synonymous with public benefit, and that, when it is determined that the use is of great benefit to the public at large, condemnation of private interests should be guaranteed, even though the use is not by the state or through any of its agencies. One of the most prominent and direct decisions thus holding is Dayton Gold, etc., Min. Co. v. Seawell, 11 Nev. 394. * * *

It seems to us, however, that this is the announcement of a dangerous doctrine, tending to encroach upon private rights which the constitution has attempted to safeguard, and to render such rights as uncertain and varying as are the interests of different localities and opinions of different judges on different branches of business. * * *

It cannot be that, within the meaning of the constitution, the distinction between public policy and public use is to be obliterated. It might be of unquestionable public policy, and for the best interests of the state, to allow condemnation of lands in every instance where it would result in aiding prosperous business enterprises which would give employment to labor, stimulate trade, increase property values, and thereby increase the revenues of the state, even if the enterprise was purely private; for such is the relation, under our form of government, between public and private prosperity that one cannot be enjoyed to any appreciable extent without favorably influencing the other. But it is evident that this was not the kind of public use that was within the minds of the framers of the constitution; and it seems to us that the logic of those courts which have sustained appellant's contention is justified solely on grounds of public policy.

It seems scarcely necessary to particularize to show to what extent this doctrine might practically be carried. Under such liberal construction, the brewer could successfully demand condemnation of his neighbor's land for the purpose of the erection of a brewery, because, forsooth, many citizens of the state are profitably engaged in the cultivation of hops. Condemnation would be in order for grist mills, and for factories for manufacturing the cereals of the state, because there is a large agricultural interest to be sustained. Tanneries, woolen factories, oil refineries, distilleries, packing houses, and machine shops of almost every conceivable kind, would be entitled to some consideration for the same reasons; thereby actually destroying any distinctions between public and private use, for the principle in one instance is the same as in the other, the difference is only in degree. * * *

Mr. Lewis, in discussing this identical proposition, in § 165 [of his treatise on Eminent Domain], after giving a history of the earlier decisions, concludes as follows:

"*Public use* means the same as *use by the public,* and this it seems to us is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: *First,* that it accords with the primary and more commonly understood meaning of the words; *second,* it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; *third,* it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application. If the constitution means that private property can be taken only for use *by* the public, it affords a definite guide to both the legislature and the courts; * * *."

From a consideration of all the authorities and from our own views on construction, we are of the opinion that the use under consideration must be either a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state. * * *

The court not having committed error in sustaining the demurrer to the complaint, the judgment is affirmed.[8]

FULLERTON, C. J., and ANDERS, MOUNT, and HADLEY, JJ., concur.

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[8] Accord on like facts: Cozard v. Kanawha Hardwood Co. (1905) 139 N. Car. 283, 51 S. E. 932, 1 L. R. A. (N. S.) 969, 111 Am. St. 779; Paine v. Savage (1927) 126 Maine 121, 136 Atl. 664, 51 A. L. R. 1194, where the court said: "The public benefit doctrine does not obtain in this state." But expropriation for private logging roads in such circumstances is permitted by the unusual provision of the Constitution of Idaho which expressly declares to be a public use, "any use necessary to complete development of the material resources of the state." Blackwell Lumber Co. v. Empire Mill Co. (1916) 28 Idaho 556, 155 Pac. 680, Ann. Cas. 1918A, 189.

In State ex rel. Kirkendall v. Superior Court (1924) 130 Wash. 661, 228 Pac. 695 a state statute was held valid which authorized a private land owner to condemn a way through land of another for an irrigation ditch to irrigate the former's land exclusively. See the provision of the Washington constitution quoted in the principal case. Contra, under the usual "public use" provision, Smith v. Cameron (1922) 106 Ore. 1, 210 Pac. 716, 27 A. L. R. 510 with annotation, and see note in (1920) 9 A. L. R. 583.

In (1928) 54 A. L. R. 7-45 there is a valuable note collecting decisions of the various state courts on what are regarded as within the term "public use" in their respective state constitutions, excluding decisions on those state constitutional provisions which specifically name some purposes for which the power of eminent domain may be used. The note writer draws general conclusions on pp. 44-45.

The note above referred to does not deal with the question, to what purposes a state may, by judicial interpretation or by specific provision in the state constitution, extend the power without violation of the due process of law clause of the Fourteenth Amendment.

On taking partly for public and partly for private use, see (1921) 14 A. L. R. 1350; (1928) 53 A. L. R. 9.

FOUNTAIN PARK COMPANY v. HENSLER.

1927. Supreme Court of Indiana. 199 Ind. 95.

[Proceedings by the Fountain Park Co. to appropriate certain land of Hensler for use as a Chautauqua assembly ground, as specifically authorized by statute. From a judgment sustaining objections of the defendant, plaintiff appeals.]

MARTIN, J. * * *

With all the general principles of law above reviewed in mind, we have carefully considered the nature of the use to which the property in this case would be devoted by the appellant Chautauqua Company.

Admitting the appellant's contention that, as a Chautauqua company, it is "one of the most prominent and useful societies devoted to the public service in teaching morality and justice and civil government, and widening the intellectual horizon of many thousand men, women and children—that it is engaged in a public service of the highest importance to the state," yet we cannot avoid the argument of appellee that "it cannot be insisted that every organization wielding a public benefit can be endowed with the power of eminent domain. If such be true, then churches, lodges, clubs, civic organizations, temperance organizations, theatres, circuses, public halls, * * * hospitals, homes for the aged and helpless and orphans would all be entitled to be the recipients of such power, together with an endless chain that would know no bounds."

The state or government, possessing the sovereign power, has always taken for its use the property it needs.[9] The State of Indiana has, by statute, delegated this power to the following public and private corporations: to cities and counties for aviation fields, to bridge companies, canal companies, to cities, towns and corporations operating public cemeteries, to cities for laying out and changing streets, to the state conservation department, to county commissioners for certain public buildings and monuments, to flouring mills for dams, to electric companies, gas companies, to the State Highway Commission and to counties for highways generally, to counties for general hospitals, to hydraulic and hydraulic power companies, to interurban electric railways, to oil companies for pipe lines, to railroads, to public school corporations, to stock yards companies, to street railroad companies, to turnpike companies and to waterworks companies, but in every such case, it seems that there has been a rule of necessity which required the power to be invoked.

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[9] Even as to takings by government the meaning of public use is not clear. With the taking of land upon which to erect a postoffice or a prison or an agricultural experiment station contrast condemnation by the United States of the private lands that constituted the site of the battle of Gettysburg for the purpose of "preserving the lines of battle," and marking the positions of the forces "with reference to the study and correct understanding of the battle," held to be a condemnation for a public use in United States v. Gettysburg Electric R. Co. (1896) 160 U. S. 668, 40 L. ed. 576; followed in Roe v. Kansas (1929) 278 U. S. 191, 73 L. ed. 259, holding that a state may condemn places of "unusual historical interest" for the purpose of preserving them, therein a Shawnee Indian Mission.

As stated *supra,* the matter of what degree of public good or utility is necessary to constitute a "public use" is governed by questions of public policy and this is a matter which may vary at different times and places. We do not know what the rule of necessity or the demands of public policy may in the future require, but, at the present time in this state, we are sure that they cannot reasonably require that the sovereign prerogative of eminent domain be granted to Chautauqua companies to enable them to condemn a site for their meeting place. Their operation is not a matter of such great public concern as to necessitate their preference over churches, lodges, clubs, private schools and like organizations. Sites have always been procurable for all such institutions, and unless it is impossible for such companies to obtain sites by private contract and unless their operation is required as a matter of public policy, we cannot hold that their operation constitutes such a "public use" as will reasonably warrant the delegation by the legislature of the power of eminent domain.

Appellant has emphasized in its brief "the character, use and purpose, of Chautauqua Assemblies, as an aid to the dissemination of knowledge," and has pointed out that Art. 8 (Education) of the State Constitution provides that "it shall be the duty of the General Assembly to encourage, by all suitable means moral, intellectual, scientific and agricultural improvement," to the end that knowledge and learning be generally diffused throughout the community. Granting that Chautauqua Assemblies do have a great and good influence on the educational as well as the religious life of the country by reason of their summer entertainments, lectures and schools, yet, by reason of the private character of the appellant Chautauqua company, and in the absence of any showing that its meetings are for the whole public or that the general public has the right and the power to compel appellant to serve it, we cannot see that it is in any different situation from a private school. Private schools, though admittedly of value and use to the public, cannot be granted the power of eminent domain. Connecticut College v. Calvert (1913), 87 Conn. 421, 88 Atl. 633, 48 L. R. A. (N. S.) 485, and note p. 491.

Likewise corporations which conduct private cemeteries over which the public has no control and wherein the general public has not and cannot acquire an enforceable right to bury, and which dispose of lots on such terms and conditions as their proprietors see fit, cannot be invested with the power of eminent domain, as such use is not considered to be a public one. See note: 22 L. R. A. (N. S.) 171.

Judgment affirmed.

STRICKLEY v. HIGHLAND BOY GOLD MINING COMPANY.

1906. Supreme Court of the United States. 200 U. S. 527.

Mr. Justice Holmes delivered the opinion of the court.

This is a proceeding begun by the defendant in error, a mining corporation, to condemn a right of way for an aerial bucket line across a placer mining claim of the plaintiffs in error. The mining corporation owns mines high up in Bingham Canyon, in West Mountain Mining District, Salt Lake County, Utah, and is using the line or way to carry ores, etc., for itself and others from the mines, in suspended buckets, down to the railway station, two miles distant and twelve hundred feet below. * * * The trial court found the facts and made an order of condemnation. This order * * * describes the right of way by metes and bounds and specifies that the same is to be used for the erection of certain towers to support the cables of the line, * * *.

The plaintiffs in error set up in their answer to the condemnation proceedings that the right of way demanded is solely for private use, and that the taking of their land for that purpose is contrary to the Fourteenth Amendment of the Constitution of the United States. The mining company on the other hand relies upon the statutes of Utah, which provide that "the right of eminent domain may be exercised in behalf of the following public uses: * * * (6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines." In view of the decision of the state court we assume that the condemnation was authorized by the state laws, subject only to the question whether those laws as construed are consistent with the Fourteenth Amendment. Some objections to this view were mentioned, but they are not open. If the statutes are constitutional as construed, we follow the construction of the state court. * * *

The single question, then, is the constitutionality of the Utah statute, and the particular facts of the case are material only as showing the length to which the statute is held to go. * * *

The question thus narrowed is pretty nearly answered by the recent decision in Clark v. Nash, 198 U. S. 361. That case established the constitutionality of the Utah statute, so far as it permitted the condemnation of land for the irrigation of other land belonging to a private person, in pursuance of the declared policy of the state. In discussing what constitutes a public use it recognized the inadequacy of use by the general public as a universal test. While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent. In such unusual cases there is nothing in the Fourteenth Amendment which prevents a state from requiring such concessions. If the state constitution restricts the legislature within narrower bounds that is a local affair, and must be left where the state court leaves it in a case like the one at bar.

In the opinion of the legislature and the Supreme Court of Utah the public welfare of that state demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong. If, as seems to be assumed in the brief for the defendant in error, the finding that the plaintiff is a carrier for itself and others means that the line is dedicated to carrying for whatever portion of the public may desire to use it, the foundation of the argument on the other side disappears.

Judgment affirmed.

IN RE OPINION OF THE JUSTICES TO THE SENATE.

1921. Supreme Judicial Court of Massachusetts.
237 Mass. 598.

The Justices of the Supreme Judicial Court respectfully submit these answers to the questions set forth in the order of April 6, 1921, copy whereof is hereto annexed.[10]

The general purpose of the pending bill, with reference to which the questions are put, is fairly stated in its title to be "To promote the conservation, development and utilization of the water resources within the Commonwealth." The means by which that general purpose is to be effectuated in any particular instance is, as set forth in the bill, the organization of a corporation, by three or more owners or lessees of a water mill or dam upon any river or waterway within the Commonwealth, for the acquisition, construction and operation of storage reservoirs on such river or waterway in order to regulate its flow and increase its usefulness. All such owners or lessees are permitted although not required to become incorporators, stockholders are confined to such owners and lessees, and shares of stock can be transferred only to successors in title to the water privileges of incorporators. Plans for acquiring and constructing reservoirs, together with estimates of cost and other financial and engineering data must be submitted to the department of public works, which shall consider the project in relation to the public interests and the interests of shareholders. It is only when approved by the department that the project may go forward.

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[10] "(1) Are the uses for which property may be taken by eminent domain under the provisions of said bill public uses within the meaning of the Constitution of the Commonwealth?

"(2) Having authorized the taking of property by eminent domain, as provided in said bill, is it constitutionally competent for the General Court to restrict the participation in the benefits to be derived from such taking to particular persons or corporations?

"(3) Is it constitutionally essential that where property is taken for a public use by eminent domain proceedings, the public generally, without discrimination, shall be entitled to participate in the benefits to be derived from such taking?

"(4) If enacted into law, would said bill be in any respect unconstitutional?"

The taking of property by eminent domain by such corporation for the construction of a storage reservoir may be authorized by the department of public works, and manifestly is within the intendment of the bill. Operation of the reservoirs is required so as to maintain as nearly as is practicable a uniform flow of the stream for the greatest common advantage of the owners of water mills or dams thereon. Authority is conferred upon such corporations to make agreements as to tolls with the owners of water mills or dams on such stream and to lease or make other disposition of the water power developed by any reservoir dam subject to the approval of the department. The right is reserved to the Commonwealth to take or to purchase, after ten years from the incorporation, all or any part of the corporate property at a fair valuation. Such corporation may not engage in the generation of electricity and most of its important functions are subject to the control or supervision of the department of public works. There are in the bill other provisions ancillary to its main features, which need not be recited in detail.

It seems clear from this outline of the provisions of the bill that its main design is to benefit those, so far as they choose to avail themselves of the facilities thereby afforded, who may be or who may hereafter become owners or lessees of dams and mills operated in whole or in part by water power within the Commonwealth, and those who may be able to make profitable use of water power generated from the reservoirs acquired or built by corporations organized under the act. These benefits are to be conferred by the purchase of existing or the construction of new reservoirs for the impounding of flood or other water not producing power directed to industrial uses, so that it may be released during times of low water and thus the flow of the stream at all seasons be equalized and stabilized. The power of eminent domain may be exercised for the construction of reservoirs for this purpose.

The bill apparently is framed in execution of power created by art. 49 of the Amendments to the constitution ratified and adopted by the people on November 5, 1918. The article so far as material to the present inquiry declared that "The conservation, development and utilization of the * * * water * * * resources" of the Commonwealth are "public uses" and confers upon the General Court "power to provide for the taking, upon payment of just compensation therefor, of lands and easements or interests therein, including water and mineral rights, for the purpose of securing and promoting the proper conservation, development, utilization and control thereof and to enact legislation necessary or expedient therefor." * * *

It is apparent from the debates in the convention which proposed the amendment, that one of its aims was to set at rest the question whether the construction of dams for the development of water power for the advantage of privately owned water mills could be regarded as a public use. * * *

The development and utilization of water for power imports of necessity that water shall be impounded and suffered to flow, with considerable regularity, under an adequate head, upon a water wheel. * * * Participation in the benefits of such development is inevitably restricted to comparatively few by the laws of nature concerning water power as at present understood. The development of water power always has been recognized as having peculiar features and limitations. The water course as it flows from its source to the sea affords opportunities for harnessing its current to the uses of man at every fall economically capable of being utilized by the erection of a dam. At every such fall a new potentiality arises for the production of power. The force of the water may be put to work again and again. The conservation of water as a natural resource must be inferred to have been declared in the amendment to be a public use with reference to the industrial situation existing in the Commonwealth at the time of its adoption and ratification as well as to that of the future. It is common knowledge that a large part of the head and fall on many streams in the Commonwealth is already put to use in driving the machinery of mills highly diversified in variety of product. If storage reservoirs are to be built on the upper reaches of such streams, the practicable employment of the water thus stored is by increasing the energy already developed by the appliances at such existing mills. This situation implies that the general public except as represented by the owners of such mills cannot share in the benefits of such new utilization of water resources. * * *

It is a general principle of constitutional law that ordinarily private property can be taken only for a governmental use, the enjoyment and advantage of which is open on equal terms to the public. This is true as to water, light, transportation companies and other corporations privately owned but affected with a public interest and ordinarily given the right to exercise eminent domain. Public use implies public service. There must be a direct and immediate relation between the appropriation of private property and the public enjoyment. The circumstances may be such that only a small portion of the inhabitants may participate in the benefits of the enterprise. But the use or service must be of such character that in its essence it affects them as a community and not merely as individuals. Lowell v. Boston, 111 Mass. 454, 470. Opinions of the Justices, 204 Mass. 607; 211 Mass. 624. Salisbury Land & Improvement Co. v. Commonwealth, 215 Mass. 371. Riverbank Improvement Co. v. Chadwick, 228 Mass. 242. Opinion of the Justices, 118 Maine, 503, 514, 515. See Budd v. New York, 143 U. S. 517, 549. As to water power the amendment has created an exception for the accomplishment of what is regarded as a public advantage not otherwise susceptible of being achieved even though the public has no direct use from the property taken. The general public cannot share in the use of water power development in the sense in which they share in the use of streets, ways, water supply, police and fire protection, railroads, harbor improvements and other functions of government as commonly understood. The public can enjoy water power development only through the general enlargement of manufacturing facilities, through the saving of labor and the conservation of coal and other fuels, and in other kindred ways. The people by the amendment have decided that this is a public use, for which the forces of the government may be invoked. * * *

We are of opinion that the bill will not be held by the Supreme Court of the United States to contravene any provision of the federal Constitution. There are expressions in some judgments of that court which standing alone might well be thought to be incompatible with the constitutionality of the bill. For example, it was said in Kaukauna Water Power Co. v. Green Bay & Mississippi Canal Co., 142 U. S. 254, at page 273, that "it is probably true that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain." It also has been stated: "It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner.

That principle, this court has said, grows out of the essential nature of all free governments." Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U. S. 239, 251. Similar statements are to be found in Missouri Pacific Railway v. Nebraska, 164 U. S. 403, and Hairston v. Danville & Western Railway, 208 U. S. 598, 606. See also Opinion of the Justices, 118 Maine, 503; Helena Power Transmission Co. v. Spratt, 35 Mont. 108; Lucas v. Ashland Light, Mill & Power Co., 92 Neb. 550; Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. 429.

On the other hand, in numerous states the taking of private property by eminent domain under the mill acts has been held to be a public use apart from any such constitutional provision as is found in art. 49 of the amendments. [Citations omitted.]

The people of this Commonwealth have declared by the Forty-ninth Amendment that the development of water power such as is authorized by the bill is a public use. The tendency of recent decisions of the Supreme Court of the United States has been to accept as true in its application to local conditions a constitutional declaration of a state to the effect that a given expropriation of private property is to a public use. Fallbrook Irrigation District v. Bradley, 164 U. S. 112; Wurts v. Hoagland, 114 U. S. 606; Clark v. Nash, 198 U. S. 361; Strickley v. Highland Boy Gold Mining Co., 200 U. S. 527; O'Neill v. Leamer, 239 U. S. 244, 253; Houck v. Little River Drainage District, 239 U. S. 254; Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U. S. 30; Jones v. Portland, 245 U. S. 217; Green v. Frazier, 253 U. S. 233; Walls v. Midland Carbon Co., 254 U. S. 300; Block v. Hirsh, decided by the United States Supreme Court on April 18, 1921. Under all these circumstances, in the light of the decisions just cited, we are of opinion that the Supreme Court of the United States would be likely to uphold the bill if enacted into law as not violative of any provision of the Constitution of the United States.

Therefore, confining ourselves strictly to the proposed bill, we answer questions one and two in the affirmative, and questions three and four in the negative.[11]

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[11] The constitutions of a few other states have provisions which specify certain purposes as within the power of eminent domain. Thus, to run drains and ditches for various purposes, Illinois, New York, Missouri, Washington and Colorado. In Georgia, Michigan and Washington, private ways.

The provision of Idaho, Const. (1889) Art. 1, § 14 is peculiar to that state: "The necessary use of lands for the construction of reservoirs or storage basins, for the purposes of irrigation, or for the rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use, for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state."

Section 3.—What Constitutes a "Taking" of "Property"?

OMNIA COMMERCIAL COMPANY v. UNITED STATES.[12]

1923. Supreme Court of the United States. 261 U. S. 502.
[Printed ante, p. 686.]

PORTSMOUTH HARBOR LAND & HOTEL CO. v. UNITED STATES.

1922. Supreme Court of the United States. 260 U. S. 327.

Appeal from a judgment of the Court of Claims dismissing a petition on demurrer.

Mr. Justice Holmes delivered the opinion of the court.

This is a claim in respect of land which, or an interest in which, is alleged to have been taken by the United States Government. Similar claims in respect of the same land based upon earlier acts of the Government have been made before and have been denied. Peabody v. United States, 231 U. S. 530; Portsmouth Harbor Land & Hotel Co. v. United States, 250 U. S. 1. But it is urged that the cumulative effect of later acts added to those that have been held not enough to establish a taking leads to a different result. The land is on Gerrish Island, lying east of the entrance to Portsmouth Harbor, and borders on the ocean. Its main value is for use as a summer resort. Adjoining it to the north and west lies land of the United States upon which the Government has erected a fort, the guns of which have a range over the whole sea front of the claimants' property. In the first case it was decided that the mere erection of

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With the principal case compare Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co. (1916) 240 U. S. 30, 60 L. ed. 507, where Holmes, J., for the court said: "The purpose of the Power Company's incorporation and that for which it seeks to condemn property of the plaintiff in error is to manufacture, supply, and sell to the public, power produced by water as a motive force. In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public use we should be at a loss to say what is."

[12] Cf. Brooks-Scanlon Corp. v. United States (1924) 265 U. S. 106, 68 L. ed. 934, where one question was whether the United States had expropriated a partly constructed ship then being built by a private shipbuilding company under contract for a private corporation or had expropriated the latter's contract (its interest as promisee). The statute gave the federal agency authority to do either and that agency had dealt rather ambiguously in the matter. On the conflicting facts a majority of the court held that it was the promisee's contract that was taken.

the fort and the fact that guns were fired over the claimants' land upon two occasions about two years and a half before the suit was brought, coupled with the apprehension that the firing would be repeated, but with no proof of intent to repeat it other than the facts stated, did not require the finding of an appropriation and a promise to pay by the United States. The second case was like the first except for "some occasional subsequent acts of gun fire," 250 U. S. 2, and the finding of the Court of Claims for the United States again was sustained.

The present case was decided upon demurrer. The question therefore is not what inferences should be drawn from the facts that may be proved but whether the allegations if proved would require or at least warrant a different finding from those previously reached. There is no doubt that a serious loss has been inflicted upon the claimant, as the public has been frightened off the premises by the imminence of the guns; and while it is decided that that and the previously existing elements of actual harm do not create a cause of action, it was assumed in the first decision that—

"If the Government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made." 231 U. S. 538.

That proposition we regard as clearly sound. The question is whether the petition before us presents the case supposed.

It is alleged that after dismounting the old guns for the purpose of sending them to France during the late war, the United States has set up heavy coast defence guns with the intention of firing them over the claimants' land and without the intent or ability to fire them except over that land. It also, according to the petition, has established upon that land a fire control station and service, and in December, 1920, it again discharged all of the guns over and across the same land. The last fact, although occurring after this petition was filed, may be considered as bearing on the intent in establishing the fire control. If the United States, with the admitted intent to fire across the claimants' land at will should fire a single shot or put a fire control upon the land, it well might be that the taking of a right would be complete. But even when the intent thus to make use of the claimants' property is not admitted, while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove it. Every successive trespass adds to the force of the evidence. The establishment of a fire control is an indication of an abiding purpose. The fact that the evidence was not sufficient in 1905 does not show that it may not be sufficient in 1922. As we have said the intent and the overt acts are alleged as is also the conclusion that the United States has taken the land. That we take to be stated as a conclusion of fact and not of law, and as intended to allege the actual import of the foregoing acts. In our opinion the specific facts set forth would warrant a finding that a servitude has been imposed.

It very well may be that the claimants will be unable to establish authority on the part of those who did the acts to bind the Government by taking the land, United States v. North American Transportation & Trading Co., 253 U. S. 330. But as the allegation is that the United States did the acts in question, we are not prepared to pronounce it impossible upon demurrer. As the United States built the fort and put in the guns and the men, there is a little natural unwillingness to find lack of authority to do the acts even if the possible legal consequences were unforeseen. If the acts amounted to a taking, without assertion of an adverse right, a contract would be implied whether it was thought of or not. The repetition of those acts through many years and the establishment of the fire control may be found to show an abiding purpose to fire when the United States sees fit, even if not frequently, or they may be explained as still only occasional torts. That is for the Court of Claims when the evidence is heard.

Judgment reversed.[13]

[Mr. Justice Brandeis delivered a dissenting opinion, in which Mr. Justice Sutherland concurred.]

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[13] "Where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." Miller, J., for the court, in Pumpelly v. Green Bay Co. (1871) 13 Wall. (80 U. S.) 166, 181, 20 L. ed. 557.

"The case, therefore, amounts to this: The plaintiffs alleged that they were the owners of certain real estate bordering on the Savannah River; that the government, in the exercise of its powers of eminent domain and regulation of commerce, through officers and agents duly empowered thereto by acts of Congress, placed dams, training walls and other obstructions in the river in such manner as to hinder its natural flow and to raise its waters so as to overflow the land of plaintiffs, and overflow it to such an extent as to cause a total destruction of its value. * * *

"Was there a taking? There was no proceeding in condemnation instituted by the government, no attempt in terms to take and appropriate the title. There was no adjudication that the fee had passed from the landowner to the government, and if either of these be an essential element in the taking of lands, within the scope of the Fifth Amendment, there was no taking. * * *

"It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the government has undertaken. Does this amount to a taking? The case of Pumpelly v. Green Bay Company, 13 Wall. 166, answers this question in the affirmative." United States v. Lynah (1903) 188 U. S. 445, 467-468, 469, 47 L. ed. 539.

"The same rule is followed in the state courts, some of which would doubtless be more liberal to the landowner in deciding what injury was serious enough to

RICHARDS v. WASHINGTON TERMINAL COMPANY.

1914. Supreme Court of the United States. 233 U. S. 546.

MR. JUSTICE PITNEY delivered the opinion of the court.

Plaintiff in error, who was plaintiff below, commenced this action in the Supreme Court of the District of Columbia to recover for the damage to his property resulting from the maintenance of an alleged nuisance by defendant by means of the operation of a railroad and tunnel upon its own lands near to but not adjoining those of plaintiff. * * *

From the nearest portion of plaintiff's house to the centre of the south portal, the distance in a straight line is about 114 ft., there being three intervening dwelling houses, two of which have been purchased and are now owned by defendant. From the rear end of plaintiff's lot to the middle of the tracks southwestwardly from the portal the distance in a straight line is about 90 ft. Plaintiff's property has been damaged by the volumes of dense black or grey smoke, and also by dust and dirt, cinders and gases, emitted from the trains while passing over the tracks and in or out of the tunnel or standing upon the tracks near the signal tower. There is a fanning system installed in the tunnel which causes the gases and smoke emitted from engines while in the tunnel to be forced out of the south portal, and these gases and smoke contaminate the air, and also add to the inconvenience suffered by plaintiff in the occupation of his property. His house was pleasant and comfortable for purposes of occupation before the construction of the tunnel and tracks, but since then it has not only depreciated in value, but the tenant removed therefrom, and plaintiff was obliged to occupy the house himself by reason of his inability to rent it. The property has depreciated from a value of about $5,500 to about $4,000, and the rental value from $30 per month to $20 per month. The furniture and other belongings in the house have been depreciated from a value of $1,200 to $600, all of which depreciation is due to the presence of smoke, cinders, and gases emitted from passing trains and from the mouth of the tunnel, which smoke, cinders, and gases enter the dwelling house and settle upon the furniture and other personal property contained in it, contaminating the air and rendering the house objectionable as a habitation. The house has also been damaged by vibrations caused by the movement of trains on the track or in the tunnel, resulting in cracking the walls and wall paper, breaking glass in the windows, and disturbing the peace and slumber of the occupants. * * *

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constitute a taking. A single flood of short duration, or occasional temporary flowage, is not usually held to amount to a taking; but this is, of course, a question of degree, and a serious flood, especially if frequently recurring and accompanied by other damage, might well be held to fall upon the other side of the line." 1 Nichols, Eminent Domain (2d ed. 1917) 313-314, collecting cases.

The tunnel and the tracks leading from it across Square 693 were located and constructed and are now maintained under the authority of acts of Congress of February 12, 1901, c. 354, 31 Stat. 774, and February 28, 1903, c. 856, 32 Stat. 909, in accordance with plans and specifications approved by those acts. No claim is made by plaintiff that the tunnel, the tracks in Square 693, and the trains operated therein and thereon, were constructed, operated, or maintained in a negligent manner; and it is conceded that the tunnel and tracks were built upon property acquired by purchase or condemnation proceedings, and were constructed under authority of the acts of Congress and of permits issued by the Commissioners of the District of Columbia.

Such being the essential facts to be deduced from the evidence, we have reached the conclusion, for reasons presently to be stated, that with respect to most of the elements of damage to which the plaintiff's property has been subjected, the courts below correctly held them to be *damnum absque injuria;* but that with respect to such damage as is attributable to the gases and smoke emitted from locomotive engines while in the tunnel, and forced out of it by means of the fanning system through a portal located so near to plaintiff's property that these gases and smoke materially contribute to injure the furniture and to render the house less habitable than otherwise it would be, there is a right of recovery.

The acts of Congress referred to, followed by the construction of the tunnel and railroad tracks substantially in the mode prescribed, had the effect of legalizing the construction and operation of the railroad, so that its operation, while properly conducted and regulated, cannot be deemed to be a public nuisance. Yet it is sufficiently obvious that the acts done by defendant, if done without legislative sanction, would form the subject of an action by plaintiff to recover damages as for a private nuisance.

At the same time, there is no exclusive and permanent appropriation of any portion of plaintiff's land, which indeed does not even abut upon defendant's property. The acts of Congress do not in terms provide for the payment of compensation to property owners damnified through the construction and operation of the tunnel and railroad lines in question, except to those whose lands, or a portion thereof, were necessarily appropriated. For damages, whether direct or consequential, to non-contiguous parcels such as that of plaintiff, there is no express provision. But § 9 of the act of 1903 (32 Stat. p. 916) authorizes the Terminal Company, to acquire, by purchase or condemnation, "the lands and property necessary for all and every the purposes contemplated" by the several acts of Congress under which the tunnel and railroad were constructed and are operated. This grant of the power of condemnation is very broad, but it has not been acted upon by the company in the case of the present plaintiff. And since he is not wholly excluded from the use and enjoyment of his property, there has been no "taking" of the land in the ordinary sense. * * *

We deem the true rule, under the Fifth Amendment, as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use. Pennsylvania R. R. Co. v. Angel, 41 N. J. Eq. 316, 329; Costigan v. Pennsylvania R. R. Co., 54 N. J. L. 233; Cogswell v. N. Y., N. H. & H. R. R., 103 N. Y. 10; Garvey v. Long Island R. R. Co., 159 N. Y. 323; Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18, 29; Sadlier v. City of New York, 81 N. Y. S. 308.

But the question remains, in cases of the class now before us, What is to be deemed a private nuisance such as amounts to a taking of property? And by a great and preponderant weight of judicial authority, in those states whose constitutions contain a prohibition of the taking of private property for public use without compensation, substantially in the form employed by the Fifth Amendment, it has become established that railroads constructed and operated for the public use, although with private capital and for private gain, are not subject to actions in behalf of neighboring property owners for the ordinary damages attributable to the operation of the railroad, in the absence of negligence. Such roads are treated as public highways, and the proprietors as public servants, with the exemption normally enjoyed by such servants from liability to private suit, so far as concerns the incidental damages accruing to owners of non-adjacent land through the proper and skillful management and operation of the railways. Any diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a "taking" within the constitutional provision. The immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad. It includes the noises and vibrations incident to the running of trains, the necessary emission of smoke and sparks from the locomotives, and similar annoyances inseparable from the normal and non-negligent operation of a railroad. Transportation Co. v. Chicago, 99 U. S. 635, 641; Beseman v. Pennsylvania R. R. Co., 50 N. J. L. 235, 240; affirmed 52 N. J. L. 221.[14]

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[14] "The decisions holding that the construction of a steam railroad in a street is a taking are based on the fact that the adjoining owner holds the fee or certain easements in the land actually covered by the tracks. If he has no such rights he is not entitled to compensation for damages to his land outside the line of the street." 1 Nichols, Eminent Domain (2d ed. 1917) 317-318.

That the constitutional inhibition against the taking of private property for public use without compensation does not confer a right to compensation upon a land owner, no part of whose property has been actually appropriated, and who has sustained only those consequential damages that are necessarily incident to proximity to the railroad, has been so generally recognized that in some of the states (Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, South Dakota, Texas, West Virginia, and Wyoming are, we believe, among the number) constitutions have been established providing in substance that private property shall not be taken *or damaged,* for public use without compensation. * * *

In Baltimore & Potomac R. R. Co. v. Fifth Baptist Church, 108 U. S. 317, the court, while recognizing (p. 331) that the legislative authority for operating a railway carried with it an immunity to private action based upon those incidental inconveniences that are unavoidably attendant upon the operation of a railroad, nevertheless sustained the right of action in a case where a building for housing and repairing locomotive engines was unnecessarily established in close proximity to a place of public worship and so used that the noises of the shop and the rumbling of the locomotive engines passing in and out, the blowing off of steam, the ringing of bells, the sound of whistles, and the smoke from the chimneys, created a constant disturbance of the religious exercises. The court (speaking by Mr. Justice Field) held that the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others; and that whatever the extent of the authority conferred, it was accompanied with the implied qualification that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. * * *

The present case, in the single particular already alluded to—that is to say, with respect to so much of the damage as is attributable to the gases and smoke emitted from locomotive engines while in the tunnel, and forced out of it by the fanning system therein installed, and issuing from the portal located near to plaintiff's property in such manner as to materially contribute to render his property less habitable than otherwise it would be, and to depreciate it in value; and this without, so far as appears, any real necessity existing for such damage—is, in our opinion, within the reason and authority of the decision just cited. This case differs from that of the Baptist Church, in that there the railroad company was free to select some other location for the repair shop and engine house;

while here the evidence shows that the location of the tunnel and its south portal was established pursuant to law, and not voluntarily chosen by defendant. This circumstance, however, does not, as we think, afford sufficient ground for a distinction affecting the result. The case shows that Congress has authorized, and in effect commanded, defendant to construct its tunnel with a portal located in the midst of an inhabited portion of the city. The authority, no doubt, includes the use of steam locomotive engines in the tunnel, with the inevitable concomitants of foul gases and smoke emitted from the engines. No question is made but that it includes the installation and operation of a fanning system for ridding the tunnel of this source of discomfort to those operating the trains and traveling upon them. All this being granted, the special and peculiar damage to the plaintiff as a property owner in close proximity to the portal is the necessary consequence, unless at least it be feasible to install ventilating shafts or other devices for preventing the outpouring of gases and smoke from the entire length of the tunnel at a single point upon the surface, as at present. Construing the acts of Congress in the light of the Fifth Amendment, they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him. If the damage is not preventable by the employment at reasonable expense of devices such as have been suggested, then plaintiff's property is "necessary for the purposes contemplated," and may be acquired by purchase or condemnation (32 Stat. 909, 916, c. 856, § 9), and pending its acquisition defendant is responsible. If the damage is readily preventable, the statute furnishes no excuse, and defendant's responsibility follows on general principles.

No doubt there will be some practical difficulty in distinguishing between that part of the damage which is attributable to the gases and smoke emitted from the locomotive engines while operated upon the railroad tracks adjacent to plaintiff's land, and with respect to which we hold there is no right of action, and damage that arises from the gases and smoke that issue from the tunnel, and with respect to which there appears to be a right of action. How this difficulty is to be solved in order to determine the damages that should be assessed in this action, or the compensation that should be awarded in case condemnation proceedings are resorted to, is a question not presented by this record, and upon which, therefore, no opinion is expressed. * * *[15]

MR. JUSTICE LURTON dissents.

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[15] By this decision what was the Terminal Co. required to "take" and pay for (if it did not stop driving gas and smoke from its tunnel)? Or had the "taking" already occurred or at least commenced? If so, what is a "taking" of "property"?

WINDSOR v. WHITNEY.

1920. Supreme Court of Connecticut. 95 Conn. 357.

[Suit to restrain the defendants from establishing and maintaining building and curb lines upon a tract of land which they were developing without conforming to a state statute which required building or set-back lines to be in accordance with plans approved by an official commission. Judgment for defendant on the ground that the statute was unconstitutional. Plaintiff appealed. The general tenor of the parts of the majority opinion, by WHEELER, J., which are here omitted, accord with the reasoning in the later cases of Village of Euclid v. Ambler Realty Co., ante, p. 718 and Gorieb v. Fox, ante, p. 725 where this decision is cited with approval, ante, p. 728.]

WHEELER, J. * * * The Act does not contemplate the taking of a part of the defendants' land for streets, nor the taking of a part of their lots by means of a regulation that they may not build upon a part of the lot up to a designated building line. What it intends is the regulation of the defendants' land, so that in case they build thereon the streets and building lines must conform to the plan approved by the commission. * * * This does not physically take the land, but it regulates its use, and hence it deprives the owner of a part of his dominion over his land. The owner may not lay out streets through his land where he chooses and of the width he chooses; nor may he establish the building lines where he wills. There is no provision in the Act for compensation for such interference with the owner's dominion.

Unless this regulation can be supported as a legitimate exercise of the police power, the Act must fall. A town commission plan such as this Act contemplates is distinctly for the public welfare. * * *

The state may regulate the use of property to the point of forbidding thereon certain businesses in themselves lawful, as in the case of slaughter-houses and cemeteries. It may regulate building in the interest of health and fire safety. It may limit the height of buildings in certain districts or the character of the buildings in these districts. It may prevent the erection of billboards or limit their height. In short, it may regulate any business or the use of any property in the interest of the public health, safety or welfare, provided this be done reasonably. To that extent the public interest is supreme and the private interest must yield.

Eminent domain takes property because it is useful to the public. The police power regulates the use of property or impairs the rights in property, because the free exercise of these rights is detrimental to public interest. Freund on Police Power, § 511. It is upon this principle that the state has the right to say, if you lay out streets in the development of your land for building purposes you must make them of reasonable width and you must establish reasonable building lines, for thereby will you protect the public health and safety and the public welfare.

As a rule, building lines have been held to be a taking of property because they impair the use of ownership of land over which building is prohibited. St. Louis v. Hill, 116 Mo. 527, 22 S. W. 861, is perhaps the most often-cited case to this point. The question has not been of the utmost practical importance in New England, for as a rule our municipal charters provide compensation. In practice, the benefits and damages are assessed as equal. "He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property." Cusack Co. v. Chicago, 242 U. S. 526, 530, 37 Sup. Ct. 190.

Nowhere, so far as we can ascertain, has the specific case been before the court which the record in this case presents. The building line in these other cases was not specifically found to have been run in the interest of public safety and health and for the public welfare. That is this case. If a building line six feet from an owner's street line will tend to preserve the public health, add to the public safety from fire, and enhance the public welfare by bettering living conditions and increasing the general prosperity of the neighborhood, can it be run by the legislative authority in the exercise of the police power, when such an exercise of the police power is reasonable under the circumstances of the case? We hold that it can, and that this is not a taking of property in violation of constitutional right for which compensation must be made.

The body of the law upon the subject of the police power is the growth of comparatively recent years. It has been said to be still in the formative stage. The line between eminent domain and the police power is a hard one to hold with constancy and consistency, and it is not surprising that now and again these two great powers of government have been confused. * * *

In this opinion PRENTICE, C. J., BEACH and CASE, Js., concurred.

GAGER, J. (dissenting in part). The majority opinion holds, in part, that the establishment of a reasonable building line is not "a taking of property in violation of constitutional right for which compensation must be made." From this I dissent. The argument seems to be that such a restriction is an exercise of the police power and not of the power of eminent domain. The adoption of the term "police power" as a substitute for "eminent domain," appears to be an attempt to change the character of the act by adopting a hitherto unused designation for what is at all times the same act, to wit: a taking of private property for public use within the meaning of the constitutional provision generally, and of § 11 of our Declaration of Rights. That such designation of a building line comes under the eminent domain power has hitherto been assumed by the legislature of this state to be unquestioned law, and all its legislation has been based on that assumption. Indeed, in the opinion in this case it is admitted that such is the law generally, and that as a rule municipal charters have provided for compensation. In 1 Lewis on Eminent Domain (3d ed.) § 227, citing St. Louis v. Hill, 116 Mo. 527, 22 S. W. 861, and other cases, it is stated as the rule that a law or ordinance establishing a building line "deprives the owner of the lawful use of his property, and amounts to a taking thereof within the meaning of the constitution, and * * * can only be carried out by making provision for the compensation of the owner. In commenting upon such an ordinance, the Supreme Court of Missouri, in the case cited, says: 'The day before the ordinance went into operation defendant had the unquestionable right to build at will on his lot. The day afterwards he was as effectually prevented from building on the forty foot strip, except under the peril of punishment, as if the city had built a wall around it, and this, too, without any form of notice, any species of judicial inquiry, or any tender of compensation. If this is not a "taking" by mere arbitrary edict, it is difficult to express in words the meaning which should characterize the act of the city.'" I had supposed that, both in reason and upon authority, this was thoroughly well-settled law, not only in Connecticut but throughout the United States. As an economic fact the proposition does not seem to me open to discussion. Northrop v. Waterbury, 81 Conn. 305-309, 70 Atl. 1024, regards the establishment of a building line as a taking of property. Benedict v. Pettes, 85 Conn. 537, 84 Atl. 332, clearly states that the establishment of a building line creates an incumbrance. The argument which attempts to show that establishing a building line is not within the constitutional meaning of the taking of private property is opposed to our own decisions and legislative assumptions. "Reasonableness," so much dwelt upon by the court, does not determine whether there is a taking. The Constitution does not limit its protection to an unreasonable taking. On the contrary, it assumes a reasonable taking. Any other is wholly unjustifiable. Moreover, the "reasonableness" talked about in the opinion is not a reasonableness as to a single owner, but a reasonableness of the entire line with reference to the needs of the municipality as a whole. Otherwise, uniformity in the line could seldom result. In Pumpelly v. Green Bay Co., 80 U. S. (13 Wall.) 166, 177, the Supreme Court of the United States said: "It would be a very curious and unsatisfactory result, if * * * it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. * * *"

I do not at all question the desirability of suitable building lines. Nor do I question the power of the state constitutionally to establish them under the eminent domain doctrine. The repeated argument in the opinion as to the desirability of building lines may all be admitted. It by no means follows that the establishment of such a line is not a taking of property. The question in the case is not at all the desirability of such a line, but its effect, when established, upon property rights. Upon this point [a passage is quoted from Chicago, B. & Q. R. Co. v. Drainage Comrs., the lower half of p. 682, ante.]

Building lines are ancillary to highways and in effect extend the width of highways for the purposes, not indeed of literal travel, but of light, air, and freedom of view. A somewhat similar case is that of Matter of Clinton Avenue, 57 N. Y. App. Div. 166, 68 N. Y. Supp. 196; the court says (p. 172): "Conceding that the legislature has the power to increase the width of Clinton Avenue, that it would be justified in taking possession of private property for this purpose upon the payment of just compensation, we are of opinion that it has a right to take a lesser estate in the property than would be necessary for a complete dedication to the use of the public, and that the use is none the less public to the extent to which the property is taken because it is left in the partial control of the present owners. The right that is proposed to be taken is not the right to walk or ride over these particular additions to the width of the avenue, but to afford 'ample space for the access of light and air and also to beautify and adorn.' Matter of Curran, 38 App. Div. 82, 55 N. Y. Supp. 1018. * * *"

I will admit that in a majority of cases, as stated in the opinion, benefits and damages may fairly be assessed as equal. This is not because there is not a taking between the building line and the street line, but because the owner has left a lot of such depth that what is left is still available for building purposes and may be increased in value by the improvement to the street as a whole. But the constitutional provision relates to the land within the restricted area alone. Its application does not depend upon what other land the owner may have. A lot may be so shallow that what is left is not benefited, but becomes practically worthless. That is a question of fact. The constitutional principle must apply as if the lot within the restricted area were the entire lot. It needs no argument to show that a restriction against building at all on a given lot is a serious invasion of property right. Regarding the establishment of such a line as an exercise of the right of eminent domain, neither the owner nor the public can ever be harmed. Treating it as a mere exercise of the police power, may cause serious harm to the owner.

Whether there is benefit or damage is, as to a given lot, a question of fact to be determined by a proper tribunal in which the property owner is given a chance to be heard; it is not a question of law to be determined according as to whether you call the act, which is at all times one and the same, an exercise of the police power or of the right of eminent domain.[16]

PONTIAC IMPROVEMENT CO. v. BOARD OF COMMISSIONERS OF THE CLEVELAND METROPOLITAN PARK DISTRICT.

1922. Supreme Court of Ohio. 104 Ohio St. 447.

[The park commissioners had begun condemnation proceedings to acquire the rights described in the opinion, in private land adjacent to the public park and belonging to the Pontiac Co. The latter brought this suit below to enjoin the proceedings. Its bill was dismissed and this appeal taken.]

JOHNSON, J. The decisive question in the case is whether the park board has the right and power to appropriate the rights sought to be acquired in Parcel No. 2, which are set forth in the petition.

* * *

The statutory language involved in this case is "such board shall have power to acquire lands * * * by purchase or by appropriation * * *. Either the fee or any lesser interest may be acquired."

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[16] On validity of statutes that without compensation diminish the value of land or other things by imposing restrictions upon the use of them, see Mugler v. Kansas, ante, p. 656; Samuels v. McCurdy, ante, p. 662; Laurel Hill Cemetery v. San Francisco, ante, p. 690; Pennsylvania Coal Co. v. Mahon, ante, p. 693.

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain." Holmes, J., for the court in Hudson County Water Co. v. McCarter (1908) 209 U. S. 349, 355, 52 L. ed. 828, 14 Ann. Cas. 560.

In accord with the dissent are: Appeal of White (1926) 287 Pa. 259, 134 Atl. 409, 53 A. L. R. 1215; Watertown v. Dana (1926) 255 Mass. 67, 150 N. E. 860, 44 A. L. R. 1374 ("The establishment of a building line under § 37 [Gen. Laws, Ch. 82] constitutes an encumbrance upon land. It is in the nature of an easement for the benefit of the public.") See the references, ante, p. 729, note 48.

What are the lesser interests which are sought to be acquired in this case? They are * * * briefly the right to regulate and control all planting and floral decorations on all hillsides on the premises, the right and privilege at all times to enter upon the premises for the purpose of planting the slopes and hillsides, the right to regulate and control all grading and filling, and no such grading or filling shall be done without the written consent of the board or its successors, the right at the option and expense of the board to lay, repair, keep and maintain upon the premises such drains as may be suitable to prevent surface water from creating a swampy condition, the right to prevent sewage or foul airs from being emitted upon the lands of the park board, the right to prevent the erection or maintenance of any building, structure, fence or wall of any kind on the slopes and hillsides of the premises, * * * reserving to the owner the right to maintain, repair and renew the present buildings, etc., until the first of January, 1945, the right to prevent the erection or maintenance of telegraph, telephone or electric light poles of certain character, the right to prevent the erection or maintenance of any buildings or structures to be used for any saloon, or for any business, mercantile, mechanical or manufacturing purposes, upon so much of the premises as lies adjacent to or within 100 feet of the boundary line, reserving, however, to the owners the right to use, maintain and repair and renew the present buildings until the first of January, 1945, and the right to prevent the erection or maintenance of any billboard, signboard, or other advertisement, upon the premises last described, in such manner or location as to be seen from any portion of the park or parkway within the Valley of Rocky River.

It will be observed that in a very large sense the thing which the park board desires to acquire in Parcel No. 2 is a regulatory power as to the owner's use of its property. In the description by the park board of the rights and privileges which it seeks to condemn it is not shown that there is any intention to take possession of the property. It is not the purpose of the park board to put the owner out of possession. It is the purpose of the park board to leave the owner in possession, but by this condemnation proceeding to secure the right and power to a very large degree to give directions to the owner as to how it shall use its property.

It is very clear that the purpose of the constitution was to safeguard the rights of private property and to preserve it to the owner, except where it "shall be *taken* for *public use.*"

It must be conceded that the use for which the property is taken must be a *public use* and that the property must be *taken.* No other situation is referred to in the constitution, and under the well-settled rules we have above referred to the owner has the right to insist that the taking must be within the power granted by the constitution, and, if it be conceded that the legislature may define the nature of the use for which the private property may be taken for the public, then it is equally well settled under the rules above stated that the legislation defining and granting such power must be strictly construed in favor of the property owner and that those asserting the power must be confined within the limits of the legislative grant. * * *

The natural import of the words, "taken for public use," used in our constitution is that the thing is to be used by the public or by some agency for the public. * * *

Nichols in his work on Eminent Domain (2 ed.), Section 45, discusses the term and says: "A definition of public use which, while not concise, is consistent in all particulars with the weight of judicial authority, is accordingly the following:

"It is a public use for which the property may be taken by eminent domain, (1) to enable the United States or a state or one of its subdivisions to carry on its governmental functions and to preserve the safety, health and comfort of the public, whether or not the individual members of the public may make use of the property so taken, provided the taking is made by a public body; (2) to serve the public with some necessity or convenience of life which is required by the public as such and which cannot be readily furnished without the aid of some governmental power, whether or not the taking is made by a public body, provided the public may enjoy such service as of right; (3) in certain special and peculiar cases, sanctioned by ancient custom or justified by the requirements of unusual local conditions, to enable individuals to cultivate their land or carry on business in a manner in which it could not otherwise be done, if their success will indirectly enhance the public welfare, even if the taking is made by a private individual and the public has no right to service from him or enjoyment of the property taken."

These observations are quoted and relied on in the brief of the defendant in error in the case before us.

Take the first situation named by the author. Under it the state or one of its subdivisions may appropriate land for fire-engine houses, or for a garbage-disposal plant, or similar matters, "whether or not the individual members of the public may make use of the property so taken, provided the taking is made by a public body."

Now consider the second. Under this a municipality may appropriate lands for the purpose of furnishing a watershed to assist in the maintenance of a system of waterworks which is required by the public, and this taking may be by an incorporated water company, or by a subdivision of the government, provided the public has the right to enjoy the service, and provided the enterprise is a public enterprise. And under the last instance stated, the rights and easements are appropriated for the purpose of locating ditches or roads which will assist individuals in the cultivation of their land and thus indirectly enhance the public welfare. For instance, the language of the Ohio statute as to ditches is that the ditch "will be conducive to the public health, welfare or convenience."

It is manifest from the slightest consideration that in each of these instances there is an actual taking of the land, or an actual acquisition of an easement in the land, a going upon and acquiring either a fee or a lesser interest. * * *

In this case the rights and privileges which are sought to be secured are not certain, and their exercise by the board would be entirely indefinite. The right to regulate and control, the right to prevent certain things, such as the erection of fences, walls, structures, etc., when conferred upon the park board, is not of such a character as to inform the owner of the property as to what has been taken away from him or what uses it would be safe for him to make of his property in the future.

It does not appear that any provision has been made concerning the method of exercising these rights to control, regulate and prevent the various matters stated in the petition, nor does it appear how they are to be enforced, nor how often they may be altered, nor what notice must be given to the owner of the property who remains in its possession, nor whether he shall have a right to be heard touching the various matters. The uncertainty, confusion and contention that would necessarily arise are very apparent.

We think it is clear that the statute involved in this case does not contemplate any such uncertain dealing with the property of citizens.

As pointed out, the statute provides that either the fee or any lesser interest may be acquired, and when an interest less than the fee is sought to be acquired the owner whose property is to be taken against his will shall be apprised of the exact extent of the lesser interest, so that he may know definitely the extent of the interest in the property which is not taken from him. And the lesser interest taken must be described with such certainty as to enable a jury to intelligently assess the compensation to be paid for the interest taken in accordance with the constitution.

The constitution and the statute contemplate the physical possession and use and not the regulatory power which the state might exercise under the police power. * * *

No one would contend that it is not proper to expend public money in the acquisition, care and adornment of public parks. * * *

When the acquisition of private property is necessary for the promotion of these laudable objects, the owner of it must yield in the interest of the public welfare, but the makers of the constitution included in its guaranties that the private property could only be *taken for a public use* after compensation therefor had been first made. * * *

To permit by an appropriation proceeding the engrafting on the property of the plaintiff in this case of rights and privileges of the uncertain and indefinite character set forth in the petition would be a disregard of guaranteed rights of the plaintiff.

The judgment below will be reversed.

Judgment reversed.

SAUER v. NEW YORK.

1907. Supreme Court of the United States. 206 U. S. 536.

The city of New York was and is the owner of the fee of One Hundred and Fifty-fifth street and Eighth avenue, which it holds in trust for the public for highways. Before the passage of the act hereinafter referred to One Hundred and Fifty-fifth street had been graded from Eighth avenue in a westerly direction, until it reached a high and, for street uses, impassable bluff, on the summit of which ran St. Nicholas place, a public highway. The street as laid out on the records, ascends the bluff, and continues westerly to the Hudson River. * * *

In 1887 the legislature of the State of New York enacted a law which authorized the city of New York, for the purpose of improving and regulating the use of One Hundred and Fifty-fifth street, to construct over said street * * * an elevated iron viaduct for the public travel, with the proviso that no railways should be permitted upon it. There was no provision for damages to the owners of land abutting on the street. Subsequently the viaduct was constructed, resting upon iron columns placed in the roadway. * * * Opposite the plaintiff's land it is sixty-three feet wide and about fifty feet above the surface of the original street, which, except as interfered with by the viaduct, remains unobstructed for public travel. * * * Near the plaintiff's land the viaduct may be reached by a stairway. By the construction and maintenance of the viaduct the plaintiff's access to his land and the free and uninterrupted use of light and air have been impaired, and the value of his property has been decreased by reason of the dust, dirt, and noise occasioned by the structure. This action was brought to enjoin the defendant from maintaining the viaduct, or, in the alternative, for the recovery of damages caused by it. There was judgment for the defendant by the Supreme Court, affirmed by the Appellate Division and the Court of Appeals, 180 N. Y. 27. * * *

[Now on writ of error it is claimed that—]

First. Plaintiff has been deprived of his property without due process of law, in violation of § 1 of the Fourteenth Amendment to the Constitution of the United States. * * *

Mr. Justice Moody, after making the foregoing statement, delivered the opinion of the court. * * *

The plaintiff, in his complaint, alleged that this structure was unlawful, because the law under which it was constructed did not provide for compensation for the injury to his private property in the easements of access, light, and air, appurtenant to his estate. The Court of Appeals denied the plaintiff the relief which he sought, upon the ground that, under the law of New York, he had no easements of access, light, or air, as against any improvement of the street for the purpose of adapting it to public travel. In other words, the court in effect decided that the property alleged to have been injured did not exist. The reasons upon which the decision of that court proceeded will appear by quotations from the opinion of the court, delivered by Judge Haight. Judge Haight said (p. 30):

"The fee of the street having been acquired according to the provisions of the statute, we must assume that full compensation was made to the owners of the lands through which the streets and avenues were laid out, and that thereafter the owners of land abutting thereon hold their titles subject to all of the legitimate and proper uses to which the streets and public highways may be devoted. As such owners they are subject to the right of the public to grade and improve the streets, and they are presumed to have been compensated for any future improvement or change in the surface or grade rendered necessary for the convenience of public travel, especially in cities where the growth of population increases the use of the highways. The rule may be different as to peculiar and extraordinary changes made for some ulterior purpose other than the improvement of the street, as, for instance, where the natural surface has been changed by artificial means, such as the construction of a railroad embankment, or a bridge over a railroad, making elevated approaches necessary. But as to changes from the natural contour of the surface, rendered necessary in order to adapt the street to the free and easy passage of the public, they may be lawfully made without additional compensation to the abutting owners, and for that purpose bridges may be constructed over streams and viaducts over ravines, with approaches thereto from intersecting streets." * * *

The plaintiff now contends that the judgment afterwards rendered by the Supreme Court of New York, in conformity with the opinion of the Court of Appeals, denied rights secured to him by the federal Constitution. This contention presents the only question for our determination, and the correctness of the principles of local land law applied by the state courts is not open to inquiry here, unless it has some bearing upon that question. But it may not be inappropriate to say that the decision of the Court of Appeals seems to be in full accord with the decisions of all other courts in which the same question has arisen. The state courts have uniformly held that the erection over a street of an elevated viaduct, intended for general public travel, and not devoted to the exclusive use of a private transportation corporation, is a legitimate street improvement, equivalent to a change of grade; and that, as in the case of a change of grade, an owner of land abutting on the street is not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it. Selden v. Jacksonville, 28 Fla. 558; Willis v. Winona City, 59 Minn. 27; Colclough v. Milwaukee, 92 Wis. 182; Walish v. Milwaukee, 95 Wis. 16; Home Bldg. Co. v. Roanoke, 91 Va. 52 (cited with apparent approval by this court in Meyer v. Richmond, 172 U. S. 82, 95; Willets Mfg. Co. v. Mercer County, 62 N. J. Law, 95; Brand v. Multnomah County, 38 Ore. 79; Mead v. Portland, 45 Ore. 1, affirmed by this court in 200 U. S. 148; Sears v. Crocker, 184 Mass. 586; (semble) De Lucca v. North Little Rock, 142 Fed. 597.

The case of Willis v. Winona, supra, is singularly like the case at bar in its essential facts. There, as here, a viaduct was constructed, connecting by a gradual ascent the level of a public street with the level of a public bridge across the Mississippi. An owner of land abutting on the street over which the viaduct was elevated was denied compensation for his injuries, Mr. Justice Mitchell saying (p. 33):

"The bridge is just as much a public highway as is Main street, with which it connects; and, whether we consider the approach as a part of the former or of the latter, it is merely a part of the highway. The city having, as it was authorized to do, established a new highway across the Mississippi river, it was necessary to connect it, for purposes of travel, with Main and the other streets of the city. This it has done, in the only way it could have been done, by what, in effect, amounts merely to raising the grade of the center of Main street in front of plaintiff's lot. It can make no difference in principle whether this was done by filling up the street solidly, or, as in this case, by supporting the way on stone or iron columns. Neither is it important if the city raise the grade of only a part of the street, leaving the remainder at a lower grade. * * *

"The doctrine of the courts everywhere, both in England and in this country (unless Ohio and Kentucky are excepted), is that so long as there is no application of the street to purposes other than those of a highway, any establishment or change of grade made lawfully, and not negligently performed, does not impose an additional servitude upon the street, and hence is not within the constitutional inhibition against taking private property without compensation, and is not the basis of an action for damages, unless there be an express statute to that effect. That this is the rule, and that the facts of this case will fall within it, is too well established by the decisions of this court to require the citation of authorities of other jurisdictions. * * *

"The New York elevated railway cases cited by plaintiff are not authority in his favor, for they recognize and affirm the very doctrine that we have laid down, Story v. New York Elev. R. Co., 90 N. Y. 122, but hold that the construction and maintenance on the street of an elevated railroad operated by steam, and which was not open to the public for purposes of travel and traffic, was a perversion of the street from street uses, and imposed upon it an additional servitude, which entitled abutting owners to damages." * * *

Has the plaintiff been deprived of his property without due process of law? The viaduct did not invade the plaintiff's land. It was entirely outside that land. But it is said that appurtenant to the land there were easements of access, light, and air, and that the construction and operation of the viaduct impaired these easements to such an extent as to constitute a taking of them. The only question which need here be decided is whether the plaintiff had, as appurtenant to his land, easements of the kind described; in other words, whether the property which the plaintiff alleged was taken existed at all. The court below has decided that the plaintiff had no such easements; in other words, that there was no property taken. It is clear that, under the law of New York, an owner of land abutting on the street has easements of access, light, and air as against the erection of an elevated roadway by or for a private corporation for its own exclusive purposes, but that he has no such easements as against the public use of the streets, or any structures which may be erected upon the street to subserve and promote that public use. The same law which declares the easements defines, qualifies, and limits them. Surely such questions must be for the final determination of the state court. It has authority to declare that the abutting landowner has no easement of any kind over the abutting street; it may determine that he has a limited easement; or it may determine that he has an absolute and unqualified easement. The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the states, and the decisions have been conflicting, and often in the same state irreconcilable in principle. The courts have modified or overruled their own decisions, and each state has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various states to a uniform rule which it shall announce and impose. Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and that therefore there was no property taken, we hold that no violation of the Fourteenth Amendment is shown. * * *

Judgment affirmed.[17]

Section 4.—What is a "Damaging" of "Property"?

RIGNEY v. CHICAGO.

1882. Supreme Court of Illinois. 102 Ill. 64.

[The city of Chicago erected a viaduct along Halsted street in such a manner as to prevent thereafter any direct interchange of traffic between Kinzie and Halsted streets except over stairways. Halsted was a main thoroughfare. Kinzie intersected it at a right angle. Rigney owned a lot which fronted upon Kinzie street about 220 feet distant from Halsted. He sued the city for damages. The evidence showed that the rental value of his lot had decreased from $60 to $23 a month and its market value reduced two-thirds, because of the viaduct. The trial court directed a verdict for the defendant and plaintiff appealed.]

MR. JUSTICE MULKEY delivered the opinion of the court. * * *

It clearly appears from this review of the cases that previous to, and at the time of the adoption of, the present [state] constitution, it was the settled doctrine of this court that any actual physical injury to private property, by reason of the erection, construction, or operation of a public improvement in or along a public street or highway, whereby its appropriate use or enjoyment was materially interrupted, or its value substantially impaired, was regarded as a taking of private property, within the meaning of the constitution, to the extent of the damages thereby occasioned, and actions for such injuries were uniformly sustained.

This construction, making an actual physical invasion of the property affected the test in every case, excluded from the benefits of the constitution many cases of great hardship, for, as in the present case, it often happened that while there was no actual physical injury to the property, yet the approaches to it were so cut off and destroyed as to leave it almost valueless. Under this condition of affairs the framers of the present constitution, doubtless with a view of giving greater security to private rights by affording relief in such cases of hardship where it had before been denied, declared therein that "private property shall not be taken *or damaged* for public use without just compensation."[18] The addition of the words "or damaged" can hardly be regarded as accidental, or as having been used without any definite purpose. On the contrary, we regard them as significant, and expressive of a deliberate purpose to change the organic law of the state. * * *

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[17] There are a very large number of cases, perhaps the most frequent that occur in applying the law of eminent domain, in which the issue is whether the law recognizes as a property right an interest that is interfered with. According as the property concept is expanded or contracted the constitutional right to compensation is expanded or contracted. The clauses requiring compensation for property taken assume a definiteness in the classification of legal relations that does not exist. This chapter could be enlarged almost indefinitely by discussion of important questions of this character, appropriately discussed in treatises on eminent domain. Time limitations of the law school curriculum seem to confine these questions to the courses on property.

It is conceded that some little confusion exists with respect to the use of the expression, "physical injury," in connection with the term *property;* but it is believed this arises mainly from the ambiguous character of the latter term, and doubtless all the apparent[ly] conflicting expressions to be found in the opinions of this court upon this subject may be harmonized, upon the theory that the term property, in that connection, is used in different senses. Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the constitution; yet the term is often used to indicate the *res* or subject of the property, rather than the property itself, and it is evidently used in this sense in some of the cases in connection with the expression physical injury, while at other times it is probably used in its more appropriate sense, as above mentioned. The meaning, therefore, of the expression *"physical* injury," when used in connection with the term "property," would in any case necessarily depend upon whether the term property was used in the one sense or the other. To illustrate: If the lot and buildings of appellant are to be regarded as property, and not merely the subject of property, as strictly speaking they are, then there has clearly been no physical injury to it; but if by property is meant the right of user, enjoyment and disposition of the lot and buildings, then it is evident there has been a direct physical interference with appellant's property, and when considered from this aspect, it may appropriately be said the injury to the property is direct and physical. * * *

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[18] Twenty-four other states have followed the example of Illinois in requiring compensation for property "damaged" as well as for property "taken." These are: Arizona, Arkansas, California, Colorado, Georgia, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, Virginia, Washington, West Virginia and Wyoming. In Alabama, Kentucky and Pennsylvania the provision is: "Municipal and other corporations and individuals * * * shall make compensation * * * for the property taken, injured or destroyed * * *."

Under the constitution of 1848 it was essential to a right of recovery, as we have already seen, that there should be a direct physical injury to the corpus or subject of the property, such as overflowing it, casting sparks or cinders upon it, and the like; but under the present constitution it is sufficient if there is a direct physical obstruction or injury to the right of user or enjoyment, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which, by the common law, would, in the absence of any constitutional or statutory provisions, give a right of action. * * *

The question then recurs, What additional class of cases did the framers of the new constitution intend to provide for which are not embraced in the old? While it is clear that the present constitution was intended to afford redress in a certain class of cases for which there was no remedy under the old constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns or cities which directly impair the value of private property, for which the law does not, and never has afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of *damnum absque injuria.* So as to an obstruction in a public street,—if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law.

The English courts, in construing certain statutes providing compensation for injuries occasioned by public improvements, in which the language is substantially the same as that in our present constitution, after a most thorough consideration of the question, lay down substantially the same rule here announced. Chamberland v. West End of London Railway Co., 2 Best & Smith, 605; Beckitt v. Midland Railway Co., L. R. 1 C. P. 241, on appeal 3 C. P. 82; McCarthy v. Metropolitan Board of Works, L. R. 7 C. P. 508. These statutes required compensation to be made where property was "injuriously affected," which the English courts construe as synonymous with the word "damaged." Hall v. Mayor of Bristol, L. R. 2 C. P. 322; East and West India Docks Co. v. Gattke, 3 McN. & G. 155.

The rule we have adopted was unanimously sustained by the House of Lords in the McCarthy Case, supra, and is believed to be in consonance with reason, justice, and sound legal principles, and while it has not heretofore been formulated in express terms, as now stated, yet the principles upon which the rule rests are fully recognized in the previous decisions of this court. * * *

Judgment reversed.[19]

[Scott, Craig and Sheldon, JJ., dissented. Concurring opinion by Dickey, J., omitted.]

Winchester v. Ring (1924) 312 Ill. 544 (holding that where the city condemned land for a public cemetery, injury to land not taken, by reason of proximity of the cemetery to a dwelling house thereon, need not be compensated for). Stone, J.: The question as to what damages are to be embraced within this construction of the constitution was presented to this court in Frazer v. City of Chicago, 186 Ill. 480. In that case suit was brought against the city of Chicago to recover damages to private property caused by the erection and maintenance of a small-pox hospital on property belonging to the city and situated across the street from the property of the plaintiff. It was there held that the power to establish such a hospital was within the police power of the city, and that in the absence of carelessness or negligence or abuse of that power the hospital could not be considered a public nuisance, and that it could not be considered a private nuisance unless it became so by reason of its subsequent unwarranted use or operation. The building of such a hospital was in that case held to be an exception to the provision of the constitution providing compensation for damages to private property. It was there urged that while the city was within its rights, yet the rights of the plaintiff were damaged by reason of the exercise of such rights on the part of the city, and that the guaranty of the constitution against damage to private property for public use without compensation applied. It was, however, held that such supposed damages must be considered as *damnum absque injuria,* on the theory of the law that the plaintiff is compensated for the injury sustained by sharing the general benefits which are secured to all by it, and that in principle no difference obtained between the right of the city to establish and maintain a small-pox hospital and to erect and use a jail, calaboose, fire engine houses, and the like.[20]

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[19] All the courts agree that "damage" does not include every harm that results in depreciation of the value of the property. Eachus v. Los Angeles Consol. Elec. R. Co. (1894) 103 Cal. 614, 37 Pac. 750, 42 Am. St. 149; Harrison v. Denver City Tramway Co. (1913) 54 Colo. 593, 131 Pac. 409, 44 L. R. A. (N. S.) 1164; Peel v. Atlanta (1890) 85 Ga. 138, 11 S. E. 582, 8 L. R. A. 787; Pennsylvania R. Co. v. Lippincott (1887) 116 Pa. 472, 9 Atl. 871, 2 Am. St. 618; Pennsylvania R. Co. v. Marchant (1888) 119 Pa. 541, 13 Atl. 690, 4 Am. St. 659; Hyde v. Minnesota, D. & P. R. Co. (1912) 29 S. Dak. 220, 136 N. W. 92, 40 L. R. A. (N. S.) 48; Lambert v. Norfolk (1908) 108 Va. 259, 61 S. E. 776, 17 L. R. A. (N. S.) 1061, 128 Am. St. 945; Hieber v. Spokane (1913) 73 Wash. 122, 131 Pac. 478 (a very restricted application).

Accord with the reasoning of the principal case, that appurtenant to a lot on one street is a right to have the intersection with a not remote but non-adjacent street kept open, a physical interference with which is a "damage" to property: Powell v. Houston & T. C. R. Co. (1911) 104 Tex. 219, 135 S. W. 1153, 46 L. R. A. (N. S.) 615. Contra: Smith v. St. Paul, M. & M. R. Co. (1905) 39 Wash. 355, 81 Pac. 840, 70 L. R. A. 1018, 109 Am. St. 889.

A "right of lateral support is one which an owner enjoys in connection with his property, and if he sustains damages by its withdrawal by the adjoining owner he is entitled to be compensated. Where there is an injury to a right of that character there may be a recovery for the depreciation in value by reason of being deprived of the right. (Rigney v. City of Chicago, 102 Ill. 64.) If such support is removed by a city in making an excavation, the city is liable for the damages resulting from its act, if there be any. The measure of damages is the diminution in value of the property by reason of the act of the city. (3 Sutherland on Damages, 417.) The law will protect an owner of property from aggression on the part of the city, but if, upon a consideration of the effects of the improvement upon the property, there is no damage, neither the constitution nor the law authorizes a recovery. The claim that this is deducting benefits from damages, as contended by counsel, was refuted in Page v. Chicago, Milwaukee and St. Paul Railway Co. 70 Ill. 324, as follows (p. 328): 'A partial effect, only, is not to be considered, but the whole effect; and the effect not upon any selected part of the tract, but upon the whole tract. This is not deducting benefits or advantages from damages, but it is ascertaining whether there be damages or not. It is but the estimation of damages, and seems the only fair and just mode of estimating them.'" Schroeder v. Joliet (1901) 189 Ill. 48, 52-53, 59 N. E. 550, 52 L. R. A. 634.

The provision of the constitution that private property shall not be damaged for public use was not intended to reach every possible injury that may be occasioned by a public improvement. If an obstruction or improvement does not practically affect the enjoyment or use of property not taken, and thereby impair its value, no action will lie. To sustain an action for such damages the damage must be to property and not a mere personal inconvenience or injury, such as damage to trade or business. If the injury amounts only to an inconvenience or discomfort to the occupants of the property but does not affect the value of the property, it is not within the provision of the constitution even though a personal action would lie therefor. The injury complained of must also be actual, susceptible of proof and capable of being approximately measured, and must not be speculative, remote, prospective or contingent. To warrant a recovery the damage must be different in kind from that sustained by the people of the whole neighborhood. If it differs only in degree from that suffered in common by the people of the neighborhood the injury is not within the provision of the constitution. Illinois Central Railroad Co. v. Trustees of Schools, 212 Ill. 406; Hohmann v. City of Chicago, 140 Ill. 226.

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[20] It may be noted that in the cited case there was no taking of any *res* from anyone. The court said that the injury was inflicted in exercise of the police power and for that reason no compensation was required. Did the provision that private property shall not be damaged for public use without compensation include exercises of the "police power"?

In Aldrich v. Metropolitan West Side Elevated Railroad Co., 195 Ill. 456, it was held that there could be no recovery for the usual noise and vibration attendant upon the operation of the railroad. That case distinguishes other cases decided by this court, such as Chicago, Milwaukee and St. Paul Railway Co. v. Darke, 148 Ill. 226, and Chicago, Peoria and St. Louis Railway Co. v. Leah, 152 Ill. 249, the first of which was an action for cinders, ashes and smoke thrown upon the plaintiff's premises, and the second for closing the approach to the premises. Counsel for appellant have cited cases of other jurisdictions holding a different view as to compensation for the erection of pesthouses and the like, but the rule is well settled in this state as here stated.

We come, then, to a consideration of the question whether the existence of a cemetery near the dwelling house of the appellant and adjacent to his property is a damage to his property within the meaning of the constitution. The right to damages, as we have seen, must be based on the ground that a right of property has been disturbed, and can not be awarded for an injury to the convenience or feelings of the owner. Likewise the damages must be susceptible of proof. Applying these tests, we are of the opinion that it cannot be said that the damage for which appellant seeks compensation is such as arises out of the disturbance of a property right, nor is it a damage subject to proof or measurement. It is one which affects the feelings of the individual owner, only, and varies with the sentiments of each particular individual. It is, furthermore, not different from that sustained by others residing in that neighborhood though it may be of a greater degree. We are of the opinion, therefore, that the location of this cemetery is not an injury embraced within the constitutional provision for damage to property not taken, and the trial court did not err in refusing to admit evidence concerning such damage.[21]

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[21] Accord: Long v. Elberton (1899) 109 Ga. 28, 34 S. E. 333, 46 L. R. A. 428, 77 Am. St. 363 (jail unless so maintained as to be a nuisance); Schuler v. Wilson (1926) 322 Ill. 503 153 N. E. 737, 48 A. L. R. 1027 (school play-ground); Van De Vere v. Kansas City (1891) 107 Mo. 83, 17 S. W. 695, 28 Am. St. 346 (fire-engine house "so long as the house is not made a nuisance by improper use"); Lambert v. Norfolk (1908) 108 Va. 259, 61 S. E. 776, 17 L. R. A. (N. S.) 1061, 128 Am. St. 945 (public cemetery) the court saying: "The record shows that the establishment of this cemetery has in no way interfered with any of the plaintiff's rights of property, such as access, rights of way, water rights, light and air, easements, lateral support, etc., or that the cemetery is being operated as a nuisance. * * * Her case is based solely upon the theory that the market value of her land has been diminished * * * ."

But where the institution established by public authority is of itself or because of the way it is conducted such that it would be an actionable private nuisance at common-law if conducted on land of a private owner without statutory authority, compensation is required by the damage clause and is to be measured by the depreciation in market value. Paducah v. Allen (1901) 111 Ky. 361, 63 S. W. 981, 98 Am. St. 422 (contagious disease hospital); Georgetown v.

Section 5.—Compensation for a Taking.

BANGOR & PISCATAQUIS R. CO. v. McCOMB.

1872. Supreme Court of Maine. 60 Maine 290.

[On exceptions by the railway company to instructions of the trial judge to the jury in proceedings to assess compensation for taking a part of McComb's land for the location of a railroad.]

KENT, J. * * * We are not to forget that the property has been taken without the consent of the owner; that the act overrides the fundamental right of every man to possess, manage and defend his property, and that it is enough thus to seize his estate without making him a pecuniary sufferer. The words selected are significant,—'just compensation.' These words cover more than the mere value of the quantity taken, measured by rods or acres. They intend nothing less than to save the owner from suffering in his property or estate, by reason of this setting aside of his right of property,—as far as compensation in money can go,—under the rules of law applicable to such cases.

In some cases it is very easy to apply those rules. If it is clear that all of a lot of land, shown to have been worth two thousand dollars, was taken, then that sum would be the extent of the damage. If personal property is taken from the possession of the owner and converted to the use of the public, the value of the thing taken, at the time of the taking, would be the just compensation required. If a man's horse is taken and it goes from his possession, he has no longer any connection with the subsequent use or appropriation of the property. It can no longer affect him in the use or value of his remaining property. But not so with land, unless the whole lot is taken. The land remains unmoved, and in various ways the taking of a part may injure the former owner beyond the mere value of so much land.

The effect of the location of the part taken, upon the remaining portion, may be such as to render it of very little value. It may leave only small gores, or parts incapable of profitable use. Or it may disfigure the lot, so that it would be worth but little, although the extent of the part remaining might be greater than of the part taken. Another, and often a more serious injury, is in the use to which the land taken is to be appropriated. If for a common highway, the use might be much less injury to the remaining land, than if for a railroad. There are various considerations, applicable to different cases, and to the situation of different lots, which may

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Ammerman (1911) 143 Ky. 209, 136 S. W. 202 (garbage dump); Jacobs v. Seattle (1916) 93 Wash. 171, 160 Pac. 299, L. R. A. 1917B, 329 (garbage incinerator).

properly be regarded in determining the just compensation to the owner. The constitutional provision cannot be carried out, in its letter and spirit, by anything short of a just compensation for all the direct damages to the owner of the lot, confined to that lot, occasioned by the taking of his land. The paramount law intends that such owner, so far as that lot is in question, shall be put in as good a condition, pecuniarily, by a just compensation, as he would have been in if that lot of land had remained entire, as his own property. How much less is that lot, and its erections thereon remaining, worth to the owner, as property to be used or leased or sold the day after the part was taken, to be used for the purpose designed, than the whole lot intact was the day before such taking?

There must be, however, a limit, which will exclude remote, indefinite, or possible damages. The damages must be direct, not such as are general or common to others or to the whole community. They must be such as it may be fairly anticipated will result from the taking of the land, in the form, direction, and use of the track or road taken to the remaining part, and to the erections thereon.

Although it might be difficult to exclude from the enlarged idea of a 'just compensation,' some of those damages which are termed indirect, yet the difficulty of estimating them, and the almost unlimited range which such a discussion must take, and the impossibility of justly giving damages for such indirect, remote, or general injuries, when one man's land is taken, and refusing them to his neighbor who may be an equal sufferer in fact, from the proximity of his premises, no part of which is taken for the road, have led to the conclusion that the only practicable rule is, to confine the award to the direct injuries to the lot in question.

On a careful examination of the rulings of the presiding officer on these points, we see no reason to question their fulness or correctness. The jury were told 'to allow the value of the land taken, and if the remaining land is less valuable by reason of being severed or by any disfigurement on account of the land taken and the use made of it, they should allow such sum as they find the injury to be. And that in determining whether the remaining land was lessened in value, they should consider the use to which the land taken is to be appropriated, and the character, situation, present and probable use of the lands remaining, the distance of the owner's buildings from the location of the road, and any other facts, which, from their view and the testimony, they should find injured the land, by the use of the road in a proper and legal manner.'

The jury were instructed to exclude 'merely speculative conjectural damages, and that they must assume that the corporation will perform its obligations and operate their road in conformity with the requirements of law. The direct depreciation of this land in consequence of the location of the road over it, is to constitute your measure of damages.'

The corporation requested the instruction, that the jury 'are not authorized to assess any damages for all inconvenience arising from the sounding of whistles, the ringing of bells, the rattling of trains, the jarring of the ground and for smoke, which are common to all the inhabitants and proprietors along the line of the railroad.'

The presiding officer instructed the jury that the inconveniences named in the request, to constitute elements of damage in this case, must be the result of the location of the road over the premises in question. That the whistling, ringing of bells, and other matters named, at a distance, and which constituted a common annoyance were not to be considered.

We understand that the fair meaning of this instruction is, that these matters off of the premises in question, at any distance therefrom, must be excluded from consideration. But the jury might consider them, when arising from the use of the land taken, and on that land.

No one can seriously question that many, if not all, the matters specified in the request may be specially annoying to the owner in the use of his property. The track may be so near his house that smoke may enter it every time the engine passes. His house may be at the exact distance from a crossing, which the law designates as the place where the whistle shall be sounded with its shrill cry. If the jury might properly consider the use to be made of the land, then all the natural, usual, and lawful results from that use may be considered, when restricted to the lot itself. A common nuisance, which annoys the whole neighborhood, may also be a private and special nuisance to an individual, beyond that endured by the public.

We see no ground to except to this instruction, qualified as it was in the giving, and also qualified by a reference to the former part of the charge, by which all common and indirect damages were excluded. * * *

Exceptions overruled.[22]

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[22] "The propriety of the rule that just compensation, which the landowner is entitled to receive for his land and damages thereto, must be limited to the tract a portion of which was taken, is apparent. It is solely by his ownership of the tract of land that he is entitled to incidental damages. His ownership of other lands is without legal significance. 'Within the tract thus owned his rights are twofold: (1) He is entitled to be paid the value of the land included in the petition of the condemning agent; and (2) he is entitled to an award of such damages as result to the residue of his tract.'" Alabama Central R. Co. v. Musgrove (1910) 169 Ala. 424, 429, 53 So. 1009. And see this case and the following for the difficulties in determining whether the land, a part of which is taken, is a separate tract or parcel from others owned by the same owner: Sharp v. United States (1903) 191 U. S. 341, 48 L. ed. 211; Lincoln v. Commonwealth (1895) 164 Mass. 368, 379, 41 N. E. 489; Wellington v. Boston & M. R. Co. (1895) 164 Mass. 380, 41 N. E. 652, and cases collected in 2 Nichols, Eminent Domain (2d ed. 1917) § 241.

Bauman v. Ross (1897), 167 U. S. 548, 574-575, 581-582, 583-584, 42 L. ed. 270, sustaining the provision for compensation prescribed in an Act of Congress for opening up streets through private lands in the city of Washington, Gray, J., for the court: The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.

Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened. If, for example, by the widening of a street, the part which lies next the street, being the most valuable part of the land, is taken for the public use, and what was before in the rear becomes the front part, and upon a wider street, and thereby of greater value than the whole was before, it is neither just in itself, nor required by the Constitution, that the owner should be entitled both to receive the full value of the part taken, considered as front land, and to retain the increase in value of the back land, which has been made front land by the same taking.

Of the overwhelming number of decisions in the courts of the several states which support this view, a few of the most important may conveniently be referred to. * * *

The rule upon the subject was expressed by Mr. Justice Brewer, when a member of the supreme court of the state of Kansas, as follows: "Outside of any special constitutional or statutory restrictions, the right of the state to take private property for public use, and the corresponding right of the individual to receive compensation for the property thus taken, may be assumed." "But this compensation is secured if the individual receive an amount which, with the direct benefits accruing, will equal the loss sustained by the appropriation. We, of course, exclude the indirect and general benefits which result to the public as a whole, and therefore to the individual as one of the public; for he pays in taxation for his share of such general benefits. But, if the proposed road or other improvement inure to the direct and special benefit of the individual out of whose property a part is taken, he receives something which none else of the public receive, and it is just that this should be taken into account in determining what is compensation. Otherwise, he is favored above the rest, and, instead of simply being made whole, he profits by the appropriation, and the taxes of the others must be increased for his special advantage. Upon general principles, then, and with due regard to right and justice, it should be held that the public may show what direct and special benefits accrue to an individual claiming road damages, and that these special benefits should be applied to the reduction of the damages otherwise shown to have been sustained * * *." Pottawatomie Commissioners v. O'Sullivan, 17 Kansas, 58-60. * * *

The careful collection and classification of the cases upon this subject in Lewis on Eminent Domain, §§ 465-471, shows that in the greater number of the states, unless expressly forbidden by constitution or statute, special benefits are allowed to be set off, both against the value of the part taken, and against damages to the remainder; that in some of those states general benefits also are allowed to be thus set off; that in comparatively few states both kinds of benefits, or at least special benefits are allowed to be set off against damages to the remainder, but not against the value of the part taken; and that in Mississippi alone benefits are not allowed to be considered at all. See also Cooley Const. Lim. (6th ed.) 697-702; 2 Dillon Mun. Corp. (4th ed.) §§ 624, 625; Randolph on Eminent Domain, §§ 254-273.[23]

The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and, for the reasons and upon the authorities above stated, no such prohibition can be implied; and it is therefore within the authority of congress, in the exercise of the right of eminent domain, to direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken. * * *[24]

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[23] For a more recent and exhaustive exposition of these variant rules in the states, on the set-off of benefits, see 2 Nichols, Eminent Domain (2d ed. 1917) §§ 246-306.

[24] So, where the United States took part of a single tract or parcel of riparian land on a navigable stream in deepening, widening and straightening the navigable channel, it was entitled to set-off against the value of the part taken, the amount that the improvement enhanced the value of the part untaken, for example, the enhanced value of the untaken part as a site for wharves, docks and piers. United States v. River Rouge Imp. Co. (1926) 269 U. S. 411, 70 L. ed. 339.

For the range within which a state may provide that benefits shall be considered as set-offs consistently with the requirements of the Fourteenth Amendment, see McCoy v. Union Elev. R. Co. (1918) 247 U. S. 354, 62 L. ed. 1156.

BROOKS-SCANLON CORPORATION v. UNITED STATES.

1924. Supreme Court of the United States. 265 U. S. 106.

[The plaintiff owned by assignment a contract with a shipbuilder, made March 28, 1916, whereby the latter had promised to build a ship for plaintiff's assignor to be completed on or before February 1, 1918. On August 3, 1917, the United States expropriated the plaintiff's rights or interests in this contract. At that time the ship was 19% finished; the builder had contracted for all the materials, had received about 35% of them ready for use, and the plaintiff had paid about half of the contract price and other sums for plans and architect's fees. The expropriation was made in time of war while the United States was making extensive expropriations of ships and shipbuilding materials. At both the date of expropriation and the date for completion of the ship the market price of such ships was greatly in excess of the contract price. The Fleet Corporation, an official agency of the United States, made an award of compensation to plaintiff. Plaintiff refused the award and sued the United States in the Court of Claims. Both parties appealed from the judgment for plaintiff.]

MR. JUSTICE BUTLER delivered the opinion of the court. * * *

It must be held that the claimant's contract, and its rights and interests thereunder, were expropriated.

Upon what basis is just compensation to be ascertained?

The expropriation enabled the Fleet Corporation to obtain the ship when completed by paying the builder the instalments of the contract price remaining unpaid at the time of the requisition. The builder was not entitled to more, because the Fleet Corporation took over the contract and succeeded to the rights of claimant.

The contract rights of claimant taken are to be distinguished from its expenditures for the production of the ship. The value of property may be greater or less than its cost; and this is true of contract rights and other intangibles as well as of physical things. It is the property and not the cost of it that is protected by the Fifth Amendment. Minnesota Rate Cases, 230 U. S. 352, 454. By the taking, the claimant lost and the United States obtained the right to have the completed ship delivered to it on or before February 1, 1918, upon payment of the instalments remaining to be paid under the contract. It is settled by the decisions of this court that just compensation is the value of the property taken at the time of the taking. Vogelstein & Co. v. United States, 262 U. S. 337, 340; United States v. New River Collieries Co., 262 U. S. 341, 344; Seaboard Air Line Ry. Co. v. United States, 261 U. S. 299, 306; Monongahela Navigation Co. v. United States, 148 U. S. 312, 341. And, if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added. Seaboard Air Line Ry. Co. v. United States, supra; United States v. Benedict, 261 U. S. 294, 298; Brown v. United States, 263 U. S. 78.

Claimant insists that just compensation is the value of the contract and its rights and interests thereunder, and is measured by the difference between the value of the ship, as found by the court, at the time of the taking and on the date specified for delivery, and the amount which claimant was then required under the contract to pay in order to get the ship.

We think it not permissible so to calculate compensation. It is the sum which, considering all the circumstances—uncertainties of the war and the rest—probably could have been obtained for an assignment of the contract and claimant's rights thereunder; that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy. * * *

If the ship had been complete and ready for delivery at the time of requisition, claimant's just compensation would be the value of the ship, less the unpaid balance of the contract price. But the ship was not ready, and the builder was not bound to deliver before February 1, 1918. Claimant had a right to its delivery at that time, and the builder was ready to perform the contract. The Court of Claims, being of opinion that claimant's contract was not taken, did not find its value at the time of taking, and failed to find facts from which such value appears. Determination of just compensation is to be based on the fact that claimant's contract and its rights and interest thereunder were expropriated, and that it is entitled to have their value at the time of the taking. The value of such ships at the time of requisition, and the then probable value at the time fixed for delivery, the contract price, the payments made and to be made, the time to elapse before completion and delivery, the possibility that by reason of the Government's action in control of materials, etc., the contractor might not be able to complete the ship at the date fixed for performance, the loss of use of money to be sustained, the amount of other expenditures to be made between the time of requisition and delivery, together with other pertinent facts, are to be taken into account and given proper weight to determine the amount claimant lost by the taking (Minnesota Rate Cases, supra, 451; United States v. Chandler-Dunbar Co., 229 U. S. 53, 76; Boston Chamber of Commerce v. Boston, 217 U. S. 189, 195; Monongahela Navigation Co. v. United States, supra, 343), that is, the sum which will put it in as good a position pecuniarily as it would have been in if its property had not been taken. United States v. New River Collieries Co., supra, 343; Seaboard Air Line Ry. Co. v. United States, supra, 305.

Reversed and remanded for further proceedings in conformity with this opinion.[25]

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[25] The student can get some idea of the innumerable points in the law of eminent domain that are only touched upon in this chapter or not raised at all by glancing through the leading treatises or the title Eminent Domain in the index volumes of A. L. R. or in Corpus Juris.

CHAPTER IX

RETROSPECTIVE LAWS.

Section 1.—Ex Post Facto[a] Laws.

From Madison's *Debates in the Federal Convention,* 5 Ell. Deb. 462.[1]

[Aug. 22, 1787.] MR. GERRY and MR. M'HENRY moved to insert, after the second section, article 7 [of the Report of the Committee of Detail, 5 Ell. Deb. p. 379], the clause following, to wit:—"The legislature shall pass no bill of attainder, nor any *ex post facto* law." MR. GERRY urged the necessity of this prohibition, which, he said, was greater in the national than the State legislature; because, the number of members in the former being fewer, they were on that account the more to be feared. MR. GOUVERNEUR MORRIS thought the precaution as to *ex post facto* laws unnecessary, but essential as to bills of attainder. MR. ELLSWORTH contended, that there was no lawyer, no civilian, who would not say that *ex post facto* laws were void of themselves. It cannot, then, be necessary to prohibit them. MR. WILSON was against inserting anything in the Constitution as to *ex post facto* laws. It will bring reflections on the Constitution, and proclaim that we are ignorant of the first principles of legislation, or are constituting a government that will be so. The question being divided, the first part of the motion, relating to bills of attainder, was agreed to, *nem. con.* On the second part, relating to *ex post facto* laws, MR. CARROLL remarked, that experience overruled all other calculations. It had proved that, in whatever light they might be viewed by civilians or others, the State legislatures had passed them, and they had taken effect. MR. WILSON.—If these prohibitions in the State constitutions have no effect, it will be useless to insert them in this Constitution. Besides, both sides will agree to the principle, but will differ as to its application. MR. WILLIAMSON.—Such a prohibitory clause is in the Constitution of North Carolina; and, though it has been violated, it has done good there, and may do good here, because the judges can take hold of it. DR. JOHNSON thought the clause unnecessary, and implying an improper suspicion of the national legislature. MR. RUTLEDGE was in favor of the clause. On the question for inserting the prohibition of *ex post facto* laws,—New Hampshire, Massachusetts, Delaware, Maryland, Virginia, South Carolina, Georgia, ay, 7; Connecticut, New Jersey, Pennsylvania, no, 3; North Carolina, divided.

Ibid. 485. [Aug. 28.] MR. KING moved to add, in the words used in the ordinance of Congress establishing new States, a prohibition on the States to interfere in private contracts. MR. GOUVERNEUR MORRIS.—This would be going too far. There are a thousand laws relating to bringing actions, limitations of actions, &c., which affect contracts. The judicial power of the United States will be a protection in cases within their jurisdiction; and within the State itself a majority must rule, whatever may be the mischief done among themselves. MR. SHERMAN.—Why then prohibit bills of credit? MR. WILSON was in favor of Mr. King's motion. MR. MADISON admitted that inconveniences might arise from such a prohibition; but thought on the whole it would be overbalanced by the utility of it. He conceived, however, that a negative on the State laws could alone secure the effect. Evasions might and would be devised by the ingenuity of the legislatures. COL. MASON.—This is carrying the restraint too far. Cases will happen, that cannot be foreseen, where some kind of interference will be proper and essential. He mentioned the case of limiting the period for bringing actions on open account,—that of bonds after a certain lapse of time,—asking, whether it was proper to tie the hands of the States from making provision in such cases. MR. WILSON.—The answer to these objections is, that retrospective *interferences* only are to be prohibited. MR. MADISON.—Is not that already done by the prohibition of *ex post facto* laws, which will oblige the judges to declare such interferences null and void. MR. RUTLEDGE moved, instead of Mr. King's motion, to insert, "nor pass bills of attainder, nor retrospective [in the printed Journal, "*ex post facto*"] laws." On which motion,—New Hampshire, New Jersey, Pennsylvania, Delaware, North Carolina, South Carolina, Georgia, ay, 7; Connecticut, Maryland, Virginia, no, 3.

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[a] *Ex post facto.* . . [med. L. phrase, lit. "from what is done afterwards" (*ex,* from, out of; *postfacto,* abl. of *postfactum,* neut. pa. pple. of *postfacĕre,* f. *post,* after, and *facĕre,* to do). The separation of *postfacto* in current spelling is erroneous.] From an after act or deed; = "after the fact." . . .

Quasi-adj. Done after another thing, and operating retrospectively, *esp.* in *Ex post facto* law. . . . — DR. MURRAY'S *New English Dictionary,* p. 443.—THAYER.

[1] These extracts are reprinted here as they appear in Thayer's Cases on Constitutional Law, pp. 1433-1434. The bracketed note at the end is Professor Thayer's.

Ibid. 488. [Aug. 29.] MR. DICKINSON mentioned to the House, that, on examining Blackstone's Commentaries, he found that the term "*ex post facto*" related to criminal cases only; that they would not, consequently, restrain the States from retrospective laws in civil cases; and that some further provision for this purpose would be requisite.

[On September 14, the Committee of Revision reported a "Revised Draft of the Constitution," which is found in 1 Ell. Deb. 298. Art. I., s. 10, began thus: "No State shall coin money . . . nor pass any bill of attainder, nor *ex post facto* laws, nor laws altering or impairing the obligation of contracts; nor," &c.—ED.]

Ibid. 545. [Sept. 14.] COL. MASON moved to strike out from the clause (article 1, sect. 9) "no bill of attainder, nor any *ex post facto* law, shall be passed," the words "nor any *ex post facto* law." He thought it not sufficiently clear that the prohibition meant by this phrase was limited to cases of a criminal nature; and no legislature ever did or can altogether avoid them in civil cases. MR. GERRY seconded the motion; but with a view to extend the prohibition to "civil cases," which he thought ought to be done. On the question, all the states were, no.

Ibid. 546. [Sept. 14.] The first clause of article 1, sect. 10, was altered so as to read,—"No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility." MR. GERRY entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the States from impairing the obligation of contracts; alleging that Congress ought to be laid under the like prohibitions. He made a motion to that effect. He was not seconded.

[The foregoing passages comprise all in "Madison's Debates" that throws light on the phrases "*ex post facto* laws," and "laws impairing the obligation of contracts." In reading the earlier judicial opinions on questions arising under the Constitution of the United States, it should be remembered that "Madison's Debates" was not made public until 1840. The Convention sat with closed doors. At its dissolution, the "journal and other papers" were intrusted to Washington, the President, with instructions to retain them, "subject to the order of Congress, if ever formed under the Constitution." In 1796 Washington deposited these in the State Department; and in 1819 the Journal was for the first time published, under direction of Congress. This publication gave but a meagre idea of what took place in the Convention. Our chief source of instruction, "Madison's Debates," was first published, by order of Congress, in 1840. This fact may help to account for the views of Mr. Justice Johnson, on *ex post facto* laws, in his note to *Satterlee* v. *Matthewson*, 2 Pet. 380, 681 (1829). See 8 Am. Law Rev. 200.—Ed.]

CALDER v. BULL.

1798. Supreme Court of the United States. 3 Dallas, 386.

[In a contest of the will of Normand Morrison between Bull and his wife, beneficiaries under the will, and Calder and wife who were entitled in case of intestacy, the probate court of Hartford, Connecticut, in 1793, refused probate of the will. Bull and wife became barred of all right of appeal by not taking an appeal within the time allowed. At that time there was no law of the state whereby a new hearing or trial of the will might be had. In 1795 the state legislature by resolution set aside the decree of the probate court and granted a rehearing. On rehearing the probate court held the will valid. On appeal the Supreme Court of Connecticut sustained this decision and this writ of error was taken.]

Chase, J. * * * The counsel for the plaintiffs in error contend that the said resolution or law of the legislature of Connecticut, granting a new hearing in the above case, is an ex post facto law, prohibited by the Constitution of the United States. * * *

The Parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less, punishment. These Acts were legislative judgments; and an exercise of judicial power. Sometimes they respected the crime, by declaring acts to be treason which were not treason when committed;[2] at other times they violated the rules of evidence, to supply a deficiency of legal proof, by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony which the courts of justice would not admit;[3] at other times they inflicted punishments where the party was not by law liable to any punishment;[4] and in other cases they inflicted greater punishment than the law annexed to the offense.[5] The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment, of the offender; as if traitors, when discovered, could be so formidable, or the government so insecure! With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment and vindictive malice. To prevent such, and similar acts of violence and injustice, I believe the federal and state legislatures were prohibited from passing any bill of attainder,[6] or any ex post facto law.

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[2] The case of the Earl of Strafford, in 1640. [This and the following three notes are in the original report.]

The Constitution of the United States, art. 1, s. 9, prohibits the legislature of the United States from passing any ex post facto law; and in sec. 10 lays several restrictions on the authority of the legislatures of the several states; and among them, "that no state shall pass any ex post facto law." * * *

I shall endeavor to show what law is to be considered an ex post facto law, within the words and meaning of the prohibition in the federal Constitution. The prohibition, "that no state shall pass any ex post facto law," necessarily requires some explanation; for naked and without explanation it is unintelligible, and means nothing. Literally it is only that a law shall not be passed concerning, and after the fact, or thing done, or action committed. I would ask, what fact; of what nature or kind; and by whom done? That Charles I., King of England, was beheaded; that Oliver Cromwell was Protector of England; that Louis XVI., late King of France, was guillotined,—are all facts that have happened, but it would be nonsense to suppose that the states were prohibited from making any law after either of these events, and with reference thereto. The prohibition in the letter is not to pass any law concerning and after the fact, but the plain and obvious meaning and intention of the prohibition is this, that the legislatures of the several states shall not pass laws after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights, of either property or contracts. The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any ex post facto law, was to secure the person of the subject from injury or punishment, in consequence of such law. If the prohibition against making ex post facto laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated were unnecessary, and therefore improper, for both of them are retrospective.

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[3] The case of Sir John Fenwick, in 1696.

[4] The banishment of Lord Clarendon, 1669, 19 Car. 2, c. 10; and of Bishop Atterbury, in 1723, 9 Geo. I., c. 17.

[5] The Conventry Act, in 1670, 22 & 23 Car. 2, c. 1.

[6] "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence." Field, J., in Cummings v. Missouri (1867) 4 Wall. (U. S.) 277, 323, 18 L. ed. 356.

I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. In my opinion, the true distinction is between ex post facto laws and retrospective laws. Every ex post facto law must necessarily be retrospective, but every retrospective law is not an ex post facto law; the former only are prohibited. Every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning, and after, the facts committed. But I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the Statute of Limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful, and the making an innocent action criminal, and punishing it as a crime. The expressions "ex post facto laws" are technical; they had been in use long before the Revolution, and had acquired an appropriate meaning by legislators, lawyers, and authors. The celebrated and judicious Sir William Blackstone, in his Commentaries, considers an ex post facto law precisely in the same light I have done. His opinion is confirmed by his successor, Mr. Wooddeson, and by the author of the "Federalist," whom I esteem superior to both, for his extensive and accurate knowledge of the true principles of government. * * *

I am of opinion, that the fact, contemplated by the prohibition, and not to be affected by a subsequent law, was some fact to be done by a citizen or subject.

In 2 Lord Raymond, 1352, Raymond, J., called the stat. 7 Geo. 1, stat. 2, pt. 8, about registering contracts for South Sea stock, an ex post facto law; because it affected contracts made before the statute.

In the present case, there is no fact done by Bull and wife, plaintiffs in error, that is in any manner affected by the law or resolution of Connecticut; it does not concern, or relate to, any act done by them. The decree of the Court of Probate of Hartford, on the 21st March, in consequence of which Calder and wife claim a right to the property in question, was given before the said law or resolution, and in that sense was affected and set aside by it; and in consequence of the law allowing a hearing and a decision in favor of the will, they have lost what they would have been entitled to, if the law or resolution, and the decision in consequence thereof, had not been made. The decree of the Court of Probate is the only fact on which the law or resolution operates. In my judgment, the case of the plaintiffs in error is not within the letter of the prohibition; and, for the reasons assigned, I am clearly of opinion, that it is not within the intention of the prohibition; and if within the intention, but out of the letter, I should not, therefore, consider myself justified to continue it within the prohibition, and therefore that the whole was void.

I believe that but one instance can be found in which a British judge called a statute that affected contracts made before the statute, an ex post facto law; but the judges of Great Britain always considered penal statutes, that created crimes, or increased the punishment of them, as ex post facto laws.

If the term ex post facto law is to be construed to include and to prohibit the enacting any law after a fact, it will greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen. If the prohibition to make no ex post facto law extends to all laws made after the fact, the two prohibitions, not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were improper and unnecessary.

It was further urged, that if the provision does not extend to prohibit the making any law after a fact, then all choses in action, all lands by devise, all personal property by bequest or distribution, by elegit, by execution, by judgments, particularly on torts, will be unprotected from the legislative power of the states; rights vested may be divested at the will and pleasure of the state legislatures; and, therefore, that the true construction and meaning of the prohibition is, that the states pass no law to deprive a citizen of any right vested in him by existing laws. It is not to be presumed that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws; unless for the benefit of the whole community; and on making full satisfaction. The restraint against making any ex post facto laws was not considered, by the framers of the Constitution, as extending to prohibit the depriving a citizen even of a vested right to property; or the provision, "that private property should not be taken for public use, without just compensation," was unnecessary. * * *

I am of opinion that the decree of the Supreme Court of Errors of Connecticut be affirmed, with costs.

[The concurring opinions of JUSTICES PATERSON, IREDELL, and CUSHING are omitted.][7]

ROONEY v. NORTH DAKOTA.

1905. Supreme Court of the United States. 196 U. S. 319.

MR. JUSTICE HARLAN delivered the opinion of the court.

This writ of error brings in question a final judgment of the Supreme Court of the State of North Dakota, affirming the judgment of an inferior court of that state, by which, pursuant to the verdict of a jury, the plaintiff in error, John Rooney, was sentenced to death for the crime of murder in the first degree.

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[7] The historical soundness of the restrictive definition announced in this opinion has been doubted. O. P. Field, Ex Post Facto in the Constitution (1922) 20 Mich. L. Rev. 315. It seems to the present editor that the doubt chiefly is as to the understanding of the delegates in the ratifying conventions. The data is meager. That Blackstone probably was misinterpreted by Dickinson and others, see Hammond's note and Blackstone's own note to the passage in question. 1 Hammond's ed. 75, 132; 1 Jones' ed. 78; Dixon, J., in Moore v. State (1881) 43 N. J. L., 203, 215, 39 Am. Rep. 558.

"It is * * * settled that this prohibition is confined to laws respecting criminal punishments, and has no relation to retrospective legislation of any other description. * * * Calder v. Bull, 3 Dall. 386, 390. * * * We do not question that an act of legislation having the effect to deprive a citizen of his right to vote because of something in his past conduct which was not an offense at the time it was committed would be void as an ex post facto law. Cummings v. Missouri, 4 Wall. 277, 321; Ex parte Garland, 4 Wall. 333, 378." Pitney, J., in Johannessen v. United States (1912) 225 U. S. 227, 242, 56 L. ed. 1066.

The sole question upon which the plaintiff in error seeks the judgment of this court, and the only one that will be noticed, is whether the statute under which he was sentenced was ex post facto and therefore unconstitutional in its application to his case. His counsel agrees that the judgment must stand if the statute be constitutional.

Before as well as after the passage of the statute under which the sentence was pronounced the punishment prescribed by the state for murder in the first degree was death or imprisonment in the penitentiary for life. Rev. Codes, North Dakota, 1899, § 7068. * * *

It appears * * * that the statute in force when the sentence of death was pronounced differed from those in force when the crime was committed and when the verdict was rendered, in these particulars:

1. By the later law, close confinement in the penitentiary for not less than six months and not more than nine months, after judgment and before execution, was substituted for confinement in the county jail for not less than three months nor more than six months after judgment and before execution.

2. By the later law, hanging, within an inclosure at the penitentiary by the warden or his deputy, was substituted for hanging by the sheriff within the yard of the jail of the county in which the conviction occurred.

We are of opinion that in the particulars just mentioned the statute of 1903 is not repugnant to the constitutional provision declaring that no state shall pass an ex post facto law. It did not create a new offense nor aggravate or increase the enormity of the crime for the commission of which the accused was convicted, nor require the infliction upon the accused of any greater or more severe punishment than was prescribed by the law at the time of the commission of the offense. The changes, looked at in the light of reason and common sense and applied to the present case, are to be taken as favorable rather than as unfavorable to him. It may be sometimes difficult to say whether particular changes in the law are or are not in mitigation of the punishment for crimes previously committed. But it must be taken that there is such mitigation when by the later law there is an enlargement of the period of confinement prior to the actual execution of the criminal by hanging. The giving, by the later statute, of three months' additional time to live, after the rendition of judgment, was clearly to his advantage, for the court must assume that every rational person desires to live as long as he may. If the shortening of the time of confinement, whether in the county jail or in the penitentiary before execution, would have increased, as undoubtedly it would have increased, the punishment to the disadvantage of a criminal sentenced to be hung, the enlargement of such time must be deemed a change for his benefit. So that a statute which mitigates the rigor of the law in force at the time a crime was committed cannot be regarded as ex post facto with reference to that crime. Calder v. Bull, 3 Dall. 386, 391, Chase J.; Story's Const. § 1345; Cooley's Const. Lim. *267; Commonwealth v. Gardner, 11 Gray, 438, 443; 1 Bishop's Crim. Law, § 280. Besides, the extension of the time to live, given by the later law, increased the opportunity of the accused to obtain a pardon or commutation from the governor of the state before his execution.

Nor was the punishment, in any substantial sense, increased or made more severe by substituting close confinement in the penitentiary prior to execution for confinement in the county jail. It is contended that "close confinement" means "solitary confinement," and Medley's Case,[8] 134 U. S. 160, is cited in support of the contention that the new law increased the punishment to the disadvantage of the accused. We do not think that the two phrases import the same kind of punishment. Although solitary confinement may involve close confinement, a criminal could be kept in close confinement without being subjected to solitary confinement. It cannot be supposed that any criminal would be subjected to solitary confinement when the mandate of the law was simply to keep him in close confinement.

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[8] In re Medley (1890) 134 U. S. 160, 33 L. ed. 835: change (1) from ordinary confinement in county jail to a qualified solitary confinement in state prison, prior to execution of death sentence, and (2) instead of execution day being fixed by the court, the warden was to select any day within the fourth week and keep his selection secret from all but a few persons,—these changes were held to be an increase of punishment, partly because the second provision increased the anxiety of the prisoner. Three justices dissented.

Sutherland, J., in Shepherd v. People (1862) 25 N. Y. 406, 415-416, 24 How. Prac. 388:

"If it should be held that the Act of 1860 merely diminished the punishment with which the prisoner's crime was punishable when committed, because imprisonment for life at hard labor is generally considered a more lenient punishment than death, or one which the criminal would prefer to suffer, then it could be held that a law changing the punishment of an act from imprisonment for a certain number of days or months to a fine, or from a certain number of stripes to imprisonment for a certain number of days, was not ex post facto, because the court might think the new punishment more lenient than the old, or that the criminal would prefer to suffer the new punishment. Indeed, as I have before said, if you depart from the principle that a law is ex post facto because it punishes the offence in a different manner, or by a different kind of punishment, than it was punishable with when committed, the question whether the law is ex post facto is left to judicial discretion; for a decision of the question must depend upon the opinion of judges, as to whether the new punishment is more severe than the old, or whether the new punishment would or would not generally be preferred by criminals to the old. The construction of constitutional limitations should be left as little as possible to either legislative or judicial discretion."

"The substitution of imprisonment for life, in place of death, is a mitigation in the eye of the law; it is everywhere so regarded; it is on that ground that the executive power of commutation is founded," was said by Shaw, C. J., in Commonwealth v. Gardiner (1858) 11 Gray (77 Mass.) 438, 443. That a statute may validly give such substitution retroactive effect is held in Commonwealth v. Wyman (1853) 12 Cush. (66 Mass.) 237; McGuire v. State (1898) 76 Miss. 504, 25 So. 495.

Malloy v. South Carolina (1915) 237 U. S. 180, 59 L. ed. 905: a retroactive change from hanging to electrocution is valid, because there is "a well-grounded belief that electrocution is less painful and more humane than hanging."

Again, it is said that the law in force when the crime was committed only required confinement, whereas the later statute required *close* confinement. But this difference of phraseology is not material. "Confinement" and "close confinement" equally mean such custody, and only such custody, as will safely secure the production of the body of the prisoner on the day appointed for his execution.

The objection that the later law required the execution of the sentence of death to take place within the limits of the penitentiary rather than in the county jail, as provided in the previous statute, is without merit. However material the place of confinement may be in case of some crimes not involving life, the place of execution, when the punishment is death, within the limits of the state, is of no practical consequence to the criminal. On such a matter he is not entitled to be heard.

The views we have expressed are in accord with those announced by the Supreme Court of North Dakota. State v. Rooney, 12 N. Dak. 144, 152.

We are of opinion that the law of 1903 did not alter the situation to the material disadvantage of the criminal, and, therefore, was not ex post facto when applied to his case in the particulars mentioned.

Judgment affirmed.

HOPT v. UTAH.

1884. Supreme Court of the United States. 110 U. S. 574.

Error to the Supreme Court of the Territory of Utah.

[Hopt was tried and convicted of murder in the territory. From an affirmance by the territorial Supreme Court this writ was taken. One assignment of error in the trial was that a person then under sentence as a convicted felon was permitted to testify. At the time of the homicide convicted felons were not eligible to be witnesses. A territorial statute enacted in 1882, after the homicide had been committed, made them eligible.]

Mr. Justice Harlan delivered the opinion of the court. * * *

It is insisted that the act of 1882 * * * would, as to this case, be an ex post facto law, within the meaning of the Constitution of the United States, in that it permitted the crime charged to be established by witnesses whom the law, at the time the homicide was committed, made incompetent to testify in any case whatever.

The provision of the Constitution which prohibits the states from passing ex post facto laws was examined in Kring v. Missouri, 107 U. S. 221. The whole subject was there fully and carefully considered. The court, in view of the adjudged cases, as well as upon principle, held, that a provision of the Constitution of Missouri denying to the prisoner, charged with murder in the first degree, the benefit of the law as it was at the commission of offence—under which a conviction of murder in the second degree was an acquittal of murder in the first degree, even though such judgment of conviction was subsequently reversed—was in conflict with the Constitution of the United States.

That decision proceeded upon the ground that the state constitution deprived the accused of a substantial right which the law gave him when the offense was committed, and, therefore, in its application to that offence and its consequences, altered the situation of the party to his disadvantage. By the law as established when the offence was committed, Kring could not have been punished with death after his conviction of murder in the second degree, whereas by the abrogation of that law by the constitutional provision subsequently adopted, he could thereafter be tried and convicted of murder in the first degree, and subjected to the punishment of death. Thus the judgment of conviction of murder in the second degree was deprived of all force as evidence to establish his absolute immunity thereafter from punishment for murder in the first degree. This was held to be the deprivation of a substantial right which the accused had at the time the alleged offence was committed.

But there are no such features in the case before us. Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.

The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon ex post facto laws. But alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged.

Judgment reversed.

BEAZELL v. OHIO.

1925. Supreme Court of the United States. **269 U. S. 167.**

Error to the Supreme Court of Ohio.

Mr. Justice Stone delivered the opinion of the court.

Plaintiffs in error were jointly indicted in the Court of Common Pleas of Hamilton County, Ohio, for the crime of embezzlement, a felony. On February 13, 1923, the date of the offense as charged, Ohio General Code, § 13,677, provided: "When two or more persons are jointly indicted for a felony, on application to the court for that purpose, each shall be separately tried." In April of the same year, before the indictment, which was returned on October 25, this section was amended (110 Ohio Laws, 301) so as to provide:

"When two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly, unless the court for good cause shown, on application therefor by the prosecuting attorney, or one or more of said defendants, order that one or more of said defendants shall be tried separately."

By another section, the amended Act was made applicable to trials for offenses committed before the amendment.

The defendants severally made motions for separate trials on the ground that their defenses would be different; that each would be prejudiced by the introduction of evidence admissible against his co-defendant, but inadmissible as to him; and that they were entitled to separate trials as a matter of right, specifically charging that, as applied to their own indictment and trial, "the amendment to the Statutes of Ohio making the granting of said application for a separate trial discretionary with the trial court, is an ex post facto law within the restrictions imposed by Article 1, Section 10 of the Constitution of the United States," which provides that "No state shall * * * pass any * * * ex post facto law."

Both motions were denied; the joint trial and conviction of the defendants followed; and in proceedings duly had in which the constitutional question was raised, their conviction was sustained by the Supreme Court of Ohio. The case comes before this court on motions to dismiss the writs of error or to affirm the judgment below.

It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto. The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment,[9] after the fact, to the disadvantage of the accused.

But the statute of Ohio here drawn in question affects only the manner in which the trial of those jointly accused shall be conducted. It does not deprive the plaintiffs in error of any defense previously available, nor affect the criminal quality of the act charged. Nor does it change the legal definition of the offense or the punishment to be meted out. The quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence, remain the same.

Expressions are to be found in earlier judicial opinions to the effect that the constitutional limitation may be transgressed by alterations in the rules of evidence or procedure. See Calder v. Bull, 3 Dall. 386, 390; Cummings v. State of Missouri, 4 Wall. 277, 326; Kring v. Missouri, 107 U. S. 221, 228, 232. And there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition. Kring v. Missouri, 107 U. S. 221; Thompson v. Utah, 170 U. S. 343. But it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited. A statute which, after indictment, enlarges the class of persons who may be witnesses at the trial, by removing the disqualification of persons convicted of felony, is not an ex post facto law. Hopt v. Utah, 110 U. S. 574. Nor is a statute which changes the rules of evidence after the indictment so as to render admissible against the accused evidence previously held inadmissible. Thompson v. Missouri, 171 U. S. 380; or which changes the place of trial, Gut v. The State, 9 Wall. 35; or which abolishes a court for hearing criminal appeals, creating a new one in its stead. See Duncan v. Missouri, 152 U. S. 377, 382.

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[9] The provision against passing any ex post facto law applies to legislation in the traditional sense and not to changes in the law by judicial decision even though the latter may operate retroactively to the disadvantage of a person accused of crime. Ross v. Oregon (1913) 227 U. S. 150, 57 L. ed. 458, Ann. Cas. 1914C, 224; Frank v. Mangum (1915) 237 U. S. 309, 343-344, 59 L. ed. 969; State of Iowa v. O'Neil, ante, p. 156.

Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see Malloy v. South Carolina, 237 U. S. 180, 183, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance. See Gibson v. Mississippi, 162 U. S. 565, 590; Thompson v. Missouri, supra, 386; Mallett v. North Carolina, 181 U. S. 589, 597.

The legislation here concerned restored a mode of trial deemed appropriate at common law, with discretionary power in the court to direct separate trials. We do not regard it as harsh or oppressive as applied to the plaintiffs in error, or as affecting any right or immunity more substantial than did the statute which changed the qualification of jurors, upheld in Gibson v. Mississippi, supra; or the statute which granted to the state an appeal from an intermediate appellate court, upheld in Mallett v. North Carolina, supra. Obviously the statute here is less burdensome to the accused than those involved in Hopt v. Utah, supra, and Thompson v. Missouri, supra.

The judgment of the Supreme Court of Ohio is

Affirmed.[10]

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[10] Thompson v. Utah (1898) 170 U. S. 343, 352, 355, 42 L. ed. 1061: "It can not therefore be said that the constitution of Utah, when applied to Thompson's case, did not deprive him of a substantial right involved in his liberty, and did not materially alter the situation to his disadvantage. * * * In our opinion, the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is ex post facto in its application to felonies committed before the Territory became a state, because, in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offence, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury."

A change from unanimous verdict of twelve to a verdict upon concurrence of nine out of twelve can not be given retroactive effect. State v. Ardoin (1899)

STATE v. CALLAHAN.

1903. Supreme Court of Louisiana. 109 La. 946.

Breaux, J. The defendant was indicted for selling and retailing liquors without first having obtained a license. The court condemned him to pay a fine of $350 and the costs of the prosecution, and, in default of the payment of the fine, to imprisonment for a period of four months. From the sentence and judgment of the court, the defendant prosecutes this appeal.

The grounds of defendant's complaint on appeal are brought up in a motion in arrest of judgment, setting forth that section 910 of the Revised Statutes, as amended by Act No. 83 of 1886, under which the prosecution was instituted, has been repealed by Act No. 66 of 1902, and that the last statute was enacted after the crime with which he is charged, is alleged to have been committed. The judge of the district court overruled this motion in arrest of judgment, found the accused guilty, and pronounced sentence, as before mentioned.

It is evident that the statute (Act No. 66 of 1902) not only imposes a severer penalty for an offense than was imposed by the law in force when the act is charged to have been committed, but it also imposes a different penalty. Under Act No. 83 of 1886 the punishment was limited to the minimum of $100 and the maximum of $500, and in default of payment the convicted defendant was to be imprisoned not less than 30 days, nor more than 4 months, while under the new law the fine, as to amount, is the same, and, in default of payment of fine and costs, he "shall be imprisoned for a term within the discretion of the court." In the alternative the statute provides another and different penalty than is set forth in Act No. 83 of 1886, as will be seen by the following, viz., "or shall suffer fine and imprisonment as the court may deem proper," which means, under Rev. St. § 982, not exceeding two years.

A change in the element of the punishment from a fine in the old law to the possibility of inflicting a fine and imprisonment in the new law repeals the old. It may then reasonably be inferred that it was the legislative intent to repeal the old law.[11] This relates to the

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51 La. Ann. 163, 169, 24 So. 802, 72 Am. St. 454. Changes in the number of grand jurors are usually held not so substantially prejudicial to the accused as to be inapplicable to prior offenses. See the full discussion by Hook, J., in Hallock v. United States (1911) 185 Fed. 417, (certiorari denied in 1911) 220 U. S. 613, 55 L. ed. 610.) Additional cases are collected in (1928) 53 A. L. R. 719.

Whether change from indictment to information may be given retroactive operation, there is a division in the state decisions. See (1928) 53 A. L. R. 716.

[11] Other courts are opposed to *implying* repeals in such circumstances, holding rather that the inapplicability of the new statute to prior offenses implies a saving of the old statute as to prior offenses. In re Lee (1918) 177 Cal. 690, 699, 171 Pac. 958; State v. Broadway (1911) 157 N. Car. 598, 72 S. E. 987.

maximum penalty, which includes a new element of punishment—"fine and imprisonment." The element being new as to punishment, a stronger case is presented than when the same character of punishment is increased, without changing the element of the penalty. We mean by "new" element of punishment when the punishment is changed from a fine to imprisonment, or from penalty for a misdemeanor to a penalty for a felony.

The further contention is that the penalty inflicted is within the limit of the old and new law. An easy answer to this contention is that it is not the sentence inflicted that is to be considered in matter of repeal, vel non, but the law itself. Even though a penalty is only possible,[12] and not necessary, the law is ex post facto as to past offenses. Commonwealth v. McDonough, 13 Allen, 581.

It only remains for us to enter our decree. For the reasons assigned, verdict, sentence, and judgment are annulled, avoided, and reversed. It is further ordered, adjudged, and decreed that the motion to quash is sustained, and that the accused be discharged.[13]

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[12] Accord (that a statute is bad if it merely makes possible a greater punishment): In re Lambrecht (1904) 137 Mich. 450, 100 N. W. 606; Murphy v. Commonwealth (1899) 172 Mass. 264, 273, 52 N. E. 505, 43 L. R. A. 154, 70 Am. St. 266; State v. Smith (1910) 56 Ore. 21, 107 Pac. 980.

A statute which attempts to take from convicts an opportunity to obtain a parole at the discretion of a board of parole is an ex post facto law. State v. Board of Parole (1924) 155 La. 699, 99 So. 534.

[13] Accord: where the prior punishment is repealed without a "saving clause," State v. Smith (1910) 56 Ore. 21, 107 Pac. 980; State v. French (1915) 32 N. Dak. 362, 155 N. W. 687.

Hartung v. People (1860) 22 N. Y. 95; (1863) 28 N. Y. 400: Mrs. Hartung was convicted in 1859 of the murder of her husband. The sentence pronounced was that prescribed by the law existing at the time her offense was committed. On October 13, 1860 the Court of Appeals reversed and directed a new trial on the ground that an act passed in April, 1860, had repealed the provision for the punishment of murder contained in the prior law, without a saving clause, and the punishment prescribed in the act of 1860 was in the judgment of the Court of Appeals a more severe penalty and therefore inapplicable to past offenses. Before the second trial the legislature by an act passed in 1861 restored the old punishment for all offenses committed before the repeal. At the second trial the accused, among other pleas, pleaded once in jeopardy. The trial court sustained the plea and ordered the prisoner discharged. The Supreme Court reversed. On writ of error the Court of Appeals sustained the trial court and stated that its own order for a new trial was an inadvertence. It also stated that the plea of once in jeopardy was good because its former decision reversing the conviction was on the ground that Mrs. Hartung's act was not a punishable offense under the law as it then stood, and that the reversal in the circumstances was equivalent to an acquittal.

Suppose a person had been brought to trial in New York in 1862, for the first time, charged with committing murder in 1859, could a valid sentence have been imposed? If so, under which one of the statutes? See Commonwealth v. Mott (1839) 21 Pick. (38 Mass.) 492; Commonwealth v. Getchell (1835) 16 Pick. (33 Mass.) 452. Cf. State v. Wish (1884) 15 Nebr. 448, 19 N. W. 686; Ex parte Faltin (1927) 31 Ariz. 465, 254 Pac. 477, 55 A. L. R. 436.

HAWKER v. NEW YORK.

1898. Supreme Court of the United States. 170 U. S. 189.

[In 1878 Hawker was convicted in New York of the felony of abortion and sentenced to ten years imprisonment. In 1893 the state passed an act: "Any person who * * * after conviction of a felony shall attempt to practice medicine, or shall so practice, shall be guilty of a misdemeanor * * *". Hawker was indicted under this statute, and convicted on charges of practicing medicine in 1896. On affirmance by the Court of Appeals this writ of error was taken.]

MR. JUSTICE BREWER delivered the opinion of the court.

The single question presented is as to the constitutionality of this statute when applied to one who had been convicted of a felony prior to its enactment. * * *

On the one hand, it is said that defendant was tried, convicted, and sentenced for a criminal offense. He suffered the punishment pronounced. The legislature has no power to thereafter add to that punishment. The right to practice medicine is a valuable property right. To deprive a man of it is in the nature of punishment, and, after the defendant has once fully atoned for his offense, a statute imposing this additional penalty is one simply increasing the punishment for the offense, and is ex post facto.

On the other, it is insisted that, within the acknowledged reach of the police power, a state may prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine. It may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the state is not possessed of sufficient good character, it can deny to such a one the right to practice medicine; and, further, it may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law, and of the absence of the requisite good character. In support of this latter argument, counsel for the state, besides referring to the legislation of many states prescribing in a general way good character as one of the qualifications of a physician, has made a collection of special provisions as to the effect of a conviction of felony. * * *

We are of opinion that this argument is the more applicable, and must control the answer to this question. No precise limits have been placed upon the police power of a state, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for the public health is something confessedly belonging to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting, not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished. These propositions have been often affirmed. In Dent v. West Virginia, 129 U. S. 114, 122, it was said in respect to the qualifications of a physician: "The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud." * * *

But if a state may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidences of that character. We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test. County Seat of Linn Co., 15 Kansas, 500, 528. Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the legislature as conclusive evidence thereof. It is not the province of the courts to say that other tests would be more satisfactory, or that the naming of other qualifications would be more conducive to the desired result. These are questions for the legislature to determine. "The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity." Dent v. West Virginia, supra, p. 122.

It is not open to doubt that the commission of crime—the violation of the penal laws of a state—has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character, it is not laying down an arbitrary or fanciful rule, one having no relation to the subject-matter, but is only appealing to a well-recognized fact of human experience; and, if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the state? The conviction is, as between the state and the defendant, an adjudication of the fact. So, if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of res judicata, and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care.

That the form in which this legislation is cast suggests the idea of the imposition of an additional punishment for past offenses is not conclusive. We must look at the substance, and not the form; and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the state should be deemed of such bad character as to be unfit to practice medicine, and that the record of a trial and conviction should be conclusive evidence of such violation. All that is embraced in these propositions is condensed into the single clause of the statute, and it means that, and nothing more. The state is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction, but the violation of law. The former is merely the prescribed evidence of the latter. Suppose the statute had contained only a clause declaring that no one should be permitted to act as a physician who had violated the criminal laws of the state, leaving the question of violation to be determined according to the ordinary rules of evidence; would it not seem strange to hold that that which conclusively established the fact effectually relieved from the consequences of such violation?

It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform, and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist. Illustrations of this are abundant. At common law, one convicted of crime was incompetent as a witness; and this rule was in no manner affected by the lapse of time since the commission of the offense, and could not be set aside by proof of a complete reformation. So, in many states a convict is debarred the privileges of an elector, and an act so debarring was held applicable to one convicted before its passage. Washington v. State, 75 Ala. 582. In Foster v. Police Commissioners, 102 Cal. 483, 492, the question was as to the validity of an ordinance revoking a license to sell liquor on the ground of misconduct prior to the issue of the license, and the ordinance was sustained. In commenting upon the terms of the ordinance the court said: "Though not an ex post facto law, it is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are also excluded from obtaining such a license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons as a class; nor can we perceive why such evidence should be more conclusive of unfitness were the act done after the passage of the ordinance than if done before."

In a certain sense such a rule is arbitrary, but it is within the power of a legislature to prescribe a rule of general application based upon a state of things which is ordinarily evidence of the ultimate fact sought to be established. "It was obviously the province of the state legislature to provide the nature and extent of the legal presumption to be deduced from a given state of facts, and the creation by law of such presumptions is, after all, but an illustration of the power to classify." Jones v. Brim, 165 U. S. 180, 183.

Judgment affirmed.[14]

[HARLAN, J., delivered a dissenting opinion in which PECKHAM and McKENNA, JJ., concurred.]

Section 2.—Impairing the Obligation of Contracts.

This

FLETCHER v. PECK.

1810. Supreme Court of the United States.
6 Cranch 87.

[See the statement of facts, ante, p. 60. The following part of the opinion was addressed to the issue raised by the pleading with reference to the fourth covenant, ante, p. 63.]

MR. CHIEF JUSTICE MARSHALL. * * * In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferable; and those who purchased parts of it were not stained by that guilt which infected the original transaction. Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well-known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

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[14] Where persons have entered into an agreement to do a specified act and later a statute is passed making such agreements criminal conspiracies, these persons are punishable for conspiracy if they continue to observe their agreement. United States v. Trans-Missouri Freight Assn. (1897) 166 U. S. 290, 342, 41 L. ed. 1007; Waters-Pierce Oil Co. v. Texas (1909) 212 U. S. 86, 107, 53 L. ed. 417; and see Samuels v. McCurdy, ante, p, 662.

A statute making second offenders punishable more heavily than first is not an ex post facto law as to second offenses committed after its enactment, even though the first offense was committed prior to its enactment, because the first offense is taken into consideration only to fix the punishment for the subsequent offense. McDonald v. Massachusetts (1901) 180 U. S. 311, 45 L. ed. 542; Carlesi v. New York (1914) 233 U. S. 51, 58 L. ed. 843; and cases collected in (1929) 58 A. L. R. 20.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seised without compensation.

To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the Constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding Act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own Constitution.

The Constitution of the United States declares that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. Does the case now under consideration come within this prohibitory section of the Constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract? A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and ~~since the Constitution~~ uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the Constitution, grants are comprehended under the term contract, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed. Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each state.

No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both. In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the state may enter?

The state legislatures can pass no ex post facto law. An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making that distinction. This rescinding act would have the effect of an ex post facto law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an ex post facto law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

The argument in favor of presuming an intention to except a case, not excepted by the words of the Constitution, is susceptible of some illustration from a principle originally engrafted in that instrument, though no longer a part of it. The Constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual states. A state, then, which violated its own contract, was suable in the courts of the United States for that violation. Would it have been a defence in such suit to say that the state had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defence could be set up. And yet, if a state is neither restrained by the general principles of our political institutions, nor by the words of the Constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. This feature is no longer found in the Constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void. * * *

Judgment affirmed.[1]

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[1] Johnson, J., dissenting in part said: "I do not hesitate to declare that a State does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity. A contrary opinion can only be maintained upon the ground that no existing legislature can abridge the powers of those which will succeed it. To a certain extent this is certainly correct; but the distinction lies between power and interest, the right of jurisdiction and the right of soil.

"The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. In fact, a power to produce its own annihilation is an absurdity in terms. It is a power as utterly incommunicable to a political as to a natural person. But it is not so with the interests or property of a nation. Its possessions nationally are in nowise necessary to its political existence; they are entirely accidental, and may be parted with in every respect similarly to those of the individuals who compose the community. When the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon; it has passed from them; is vested in the individual. * * *

"I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the Constitution of the United States, relative to laws impairing the obligation of contracts. It is much to be regretted that words of less equivocal signification had not been adopted in that article of the Constitution. * * * Whether the words, 'Acts impairing the obligation of contracts,' can be construed to have the same force as must have been given to the words 'obligation and *effect* of contracts,' is the difficulty in my mind.

"There can be no solid objection to adopting the technical definition of the word 'contract,' given by Blackstone. The etymology, the classical signification, and the civil-law idea of the word, will all support it. But the difficulty arises on the word 'obligation,' which certainly imports an existing moral or physical necessity. Now a grant or conveyance by no means necessarily implies the continuance of an obligation beyond the moment of executing it. It is most generally but the consummation of a contract, is *functus officio* the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done."

McLean, J., in Charles River Bridge v. Warren Bridge (1837) 11 Pet. (U. S.) 420, 572-573, 9 L. ed. 773, said: "What was the evil against which the Constitution intended to provide, by declaring that no State shall pass any law impairing the obligation of contracts? What is a contract, and what is the obligation of a contract?

"A contract is defined to be an agreement between two or more persons to do or not to do a particular thing. The obligation of a contract is found in the terms of the agreement, sanctioned by moral and legal principles. * * * If it had not been otherwise laid down in the case of *Fletcher v. Peck*, 6 Cranch, 125, I should have doubted whether the inhibition did not apply exclusively to executory contracts. This doubt would have arisen as well from the consideration of the mischief against which this provision was intended to guard, as from the language of the provision itself.

"An executed contract is the evidence of a thing done; and it would seem,

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In Trustees of Dartmouth College v. Woodward (1819) 4 Wheat. 518, 4 L. ed. 629, the Supreme Court held that a grant by the Crown in 1769, to twelve trustees, of the privilege of incorporation, with power to appoint successors, conferring upon them all usual corporate powers to control and manage the college, was protected by the provision of the Constitution against state legislative impairment. It also held that a prohibited impairment would result if effect were given to certain statutes of New Hampshire, enacted in 1816. The statutes attempted to change the name to Dartmouth University, to increase the number of trustees to twenty-one, and to create an additional board of twenty-five, called a board of overseers, which should have power to veto all proceedings of the trustees relating to the appointment or removal of the president, professors and other permanent officers, to the establishment of colleges in the university or professorships and the erection of new buildings. The statutes attempted to make the president of the senate and the speaker of the house of representatives, of New Hampshire, and the governor and lieutenant-governor of Vermont ex-officio members of the board of overseers, the other

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does not necessarily impose any duty or obligation on either party to do any act or thing. If a State convey land which it had previously granted, the second grant is void; not, it would seem to me, because the second grant impairs the obligation of the first, for in fact it does not impair it: but because, having no interest in the thing granted, the State could convey none. The second grant would be void in this country, on the same ground that it would be void in England, if made by the king. This is a principle of the common law; and is as immutable as the basis of justice. It derives no strength from the above provision of the Constitution; nor does it seem to me to come within the scope of that provision."

Where the United States made a statutory offer to a corporation that if it should build a railroad it would be granted a specified quantity of land to be selected within a certain area, it was held that the United States could not defeat this selection by setting aside the area as a forest reservation. The court said: "The company accepted the proposal and at enormous cost constructed the road and put the same in operation; and the road was accepted by the President. Thus the proposal was converted into a contract, as to which the company by performing its part became entitled to performance by the Government. Burke v. Southern Pacific R. R. Co., 234 U. S. 669, 679-680. * * * Such rights are within the protection of the due process clause of the Constitution, Sinking Fund Cases, 99 U. S. 700, 718." United States v. Northern Pac. R. Co. (1921) 256 U. S. 51, 65 L. ed. 825.

An act of Congress was construed as making illegal further performance by a railroad of its promise in a contract previously made with an individual, in consideration of his release of a tort claim, to carry him without further charge during his life, and further construed to deprive him of all right of action on the contract, and as thus construed the act was held not to violate the Constitution. The court said: "The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable." Louisville &c. N. R. Co. v. Mottley (1911) 219 U. S. 467, 55 L. ed. 297, 34 L. R. A. (N. S.) 671. And see New York v. United States (1922) 257 U. S. 591, 601, 66 L. ed. 385.

members of this board and the additional members of the board of trustees to be appointed by the state governor and legislative council, of New Hampshire.

Accordingly, the court held that the Constitution made these statutes inoperative.

Marshall, C. J., devoted a single paragraph of his long opinion to a finding that the facts gave rise to a contract: "It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the Crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found."

He then stated: "The points for consideration are, 1. Is this contract protected by the Constitution of the United States? 2. Is it impaired by the" legislation in question? The discussion of the first point was introduced as follows: "1. On the first point it has been argued that the word 'contract,' in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the Constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the Constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term 'contract' must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt, and to restrain the legislature in future from violating the right to property. That anterior to the formation of the Constitution, a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the state legislatures were forbidden 'to pass any law impairing the obligation of contracts,' that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the Constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

"The general correctness of these observations cannot be controverted. * * *

"It becomes then the duty of the court most seriously to examine this charter, and to ascertain its true character."

Marshall continued, "this is the point on which the cause essentially depends." Admitting that education could be made a function of government, and public corporations created to discharge the function, it was a private function when performed by private individuals and mere incorporation did not make the incorporated persons public officers; that a corporation could be a private one though it was created to perform a service to members of the public,—concluding that this incorporated board of trustees was a private corporation, this conclusion being strongly impelled by the fact that the corporation's funds were derived from private sources.

An argument of expediency was added. Sound policy did not require an interpretation that would subject trusts for education to legislative alteration but on the contrary prospective donors should be encouraged by giving them assurance that their arrangements for the management of the trusts would be respected.

On the second point he found the attempted impairment in the attempted alteration of the board of trustees. "This is not an immaterial change. * * * The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the state. The will of the state is substituted for the will of the donors in every essential operation of the college. The founders of the college contracted, not merely for the perpetual application of the funds which they gave to the objects for which those funds were given, they contracted also to secure that application by the constitution of the corporation."

Concurring opinions were written by Washington, J., and by Story, J. Johnson, J., concurred in the opinion of Marshall, C. J.; Livingston, J., concurred with all the opinions and Duvall, J., dissented.—Digest by the editor.[2]

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[2] A thoroughgoing re-examination of the foundations of Fletcher v. Peck and Dartmouth College v. Woodward make a profitable incursion into jurisprudence. A reading of Warren B. Hunting (1919) The Obligation of Contracts Clause is recommended. The principal discussions of the Dartmouth College case are

TRENTON v. STATE OF NEW JERSEY.

1923. Supreme Court of the United States. 262 U. S. 182.

Error to the Supreme Court of New Jersey.

[By statutes in 1804 and 1852 the legislature of New Jersey granted to a private corporation the privilege of taking water from the Delaware River to supply the inhabitants of Trenton. Under authority of statutes passed in 1855 and 1859 the city bought from this water company all of its property, franchises and privileges. A statute of 1907 required every municipality, corporation or person that thereafter diverted more than specified amounts of water from any stream to pay a license fee to the state in a stated proportion to the excess taking. This was a suit by the state against the city for $14,310 claimed to be due under this statute. The city claimed a right to take without limit and without payment. From affirmance of a judgment for the state this writ was taken.]

MR. JUSTICE BUTLER delivered the opinion of the court. * * *

The only way the city could acquire the right to take the water of the Delaware River was by grant from the state or by authorized purchase or condemnation from one to whom the right had been granted by the state. State v. Jersey City, 94 N. J. L. 431, 433. The power to determine the conditions upon which waters may be so diverted is a legislative function. The state may grant or withhold the privilege as it sees fit. Assuming in favor of the city, that its grantor received a perpetual right, unburdened by license fee or other charge, to divert all the water required for the use of the city and its inhabitants, does it follow that the state as against the city is bound by contract and is without power to impose a license fee as provided in the act?

The relations existing between the state and the water company were not the same as those between the state and the city. The company was organized and carried on its business for pecuniary profit. Its rights and property were privately owned and therefore safeguarded by the constitutional provisions here sought to be invoked by the city against the legislation of the state. The city is a political subdivision of the state, created as a convenient agency for the exercise of such of the governmental powers of the state as may be entrusted to it. The diversion of waters from the sources of supply for the use of the inhabitants of the state is a proper and legitimate function of the state. This function may be left to private enterprise, subject to regulation by the state; it may be performed directly; or it may be delegated to bodies politic created for that purpose, or to the municipalities of the state. Power to own,

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therein cited at page 18. For discussion by historians see Beveridge, Life of John Marshall, IV, Ch. V; Warren, The Supreme Court in United States History, I, 475.

maintain and operate public utilities, such as waterworks, gas and electric plants, street railway systems, public markets, and the like is frequently conferred by the states upon their cities and other political subdivisions. For the purpose of carrying on such activities, they are given power to hold and manage personal and real property.

As said by this court, speaking through Mr. Justice Moody, in Hunter v. Pittsburgh, 207 U. S. 161, 178, 179:

"The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the federal Constitution. The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. * * * The power is in the state and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

In New Jersey it has been held that within the limits prescribed by the state constitution, the legislature may delegate to municipalities such portion of political power as they may deem expedient, withholding other powers, and may withdraw any part of that which has been delegated. Van Cleve v. Passaic Valley Sewerage Commissioners, 71 N. J. L. 183, 198.

In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will. See Barnes v. District of Columbia, 91 U. S. 540, 544, 545.

In Mount Pleasant v. Beckwith, 100 U. S. 514, 524, 525, it was held that where a municipal corporation is legislated out of existence and its territory annexed to other corporations, the latter, unless the legislature otherwise provides, become entitled to all its property and immunities. In the opinion it is said (pp. 524, 525):

"Institutions of the kind, whether called cities, towns, or counties, are the auxiliaries of the state in the important business of municipal rule; but they cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between themselves and the legislature of the state, because there is not and cannot be any reciprocity of stipulation between the parties, and for the further reason that their objects and duties are utterly incompatible with everything partaking of the nature of compact."

The power of the state, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for "governmental purposes" cannot be questioned. In Hunter v. Pittsburgh, supra, 179, reference is made to the distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private or proprietary capacity, and decisions of this court which mention that distinction are referred to. In none of these cases was any power, right or property of a city or other political subdivision held to be protected by the contract clause or the Fourteenth Amendment. This court has never held that these subdivisions may invoke such restraints upon the power of the state.

In East Hartford v. Hartford Bridge Co., 10 How. 511, 533, 534, 536, it appeared that for many years a franchise to operate a ferry over the Connecticut River belonged to the town of Hartford; that upon the incorporation of East Hartford, the legislature granted to it one-half of the ferry during the pleasure of the General Assembly, and that subsequently, after the building of a bridge across the river, the legislature discontinued the ferry. It was held that this was not inconsistent with the contract clause of the federal Constitution. The reasons given in the opinion (pp. 533, 534) support the contention of the state here made that the city cannot possess a contract with the state which may not be changed or regulated by state legislation. * * *

The distinction between the municipality as an agent of the state for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations. The most numerous illustrations are found in cases involving the question of liability for negligent acts or omissions of its officers and agents. See Harris v. District of Columbia, 256 U. S. 650, and cases cited. It has been held that municipalities are not liable for such acts and omissions in the exercise of the police power, or in the performance of such municipal faculties as the erection and maintenance of a city hall and courthouse, the protection of the city's inhabitants against disease and unsanitary conditions, the care of the sick, the operation of fire departments, the inspection of steam boilers, the promotion of education and the administration of public charities. On the other hand, they have been held liable when such acts or omissions occur in the exercise of the power to build and maintain bridges, streets and highways, and waterworks, construct sewers, collect refuse and care for the dump where it is deposited. Recovery is denied where the act or omission occurs in the exercise of what are deemed to be governmental powers, and is permitted if it occurs in a proprietary capacity. The basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations. But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey. They do not apply as against the state in favor of its own municipalities. We hold that the city cannot invoke these provisions of the federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question. In view of former opinions of this court, no substantial federal question is presented. Pawhuska v. Pawhuska Oil & Gas Co., supra, and cases cited.

The writ of error is dismissed.[3]

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[3] "We are clear that marriage is not a contract within the meaning of the prohibition." Maynard v. Hill (1888) 125 U. S. 190, 210, 31 L. ed. 654 (holding that a territorial legislature could grant a divorce without assignment of cause, saying that this would be true even on the assumption that a territorial legislature is bound by the obligation of contracts clause.) The provision does not forbid state legislative divorce. Starr v. Pease (1831) 8 Conn. 541; In re Opinion of Justices (1840) 16 Maine 479. A state legislative may authorize divorce by judicial proceeding for causes which have occurred before the statute is passed. Carson v. Carson (1866) 40 Miss. 349; Hurry v. Hurry (1917) 141 La. 954, 76 So. 160 (See 144 La. 878, 884). Cf. Clark v. Clark (1839) 10 N. H. 380, 384-385. Additional cases are collected in L. R. A. 1917C, 160.

A public "officer" though elected or appointed for a definite term at a salary then fixed by law is not in a contract relation, hence a legislative abolition of an office or the abolition or decrease of the salary, within the term, is not prohibited by Art. I, Sec. 10. Butler v. Pennsylvania (1850) 10 How. (U. S.) 402, 13 L. ed. 472; and see Taylor v. Beckham (1900) 178 U. S. 548, 576, 44 L. ed. 1187. Many state "employees" stand in a contract relation, and are protected. Hall v. Wisconsin (1880) 103 U. S. 5, 26 L. ed. 302, and see Shinn v. Cunningham (1903) 120 Iowa 383, 94 N. W. 941; Cramer v. New Brunswick Water Comrs. (1895) 57 N. J. L. 478, 31 Atl. 384. An "officer" has a contractual claim for salary accrued which is protected against impairment by state legislation. Fisk v. Jefferson Police Jury (1885) 116 U. S. 131, 29 L. ed. 587; Robertson v. Miller (1928) 276 U. S. 174, 72 L. ed. 517.

The obligation of a judgment based upon a tort is not an "obligation of contract," notwithstanding a judgment is sometimes classified as a quasi-contract. Louisiana v. Mayor (1883) 109 U. S. 285, 27 L. ed. 936; Freeland v. Williams (1888) 131 U. S. 405, 413, 33 L. ed. 193. A statutory duty to pay interest on a judgment may be abolished by statute even as to an existing contract judgment. Morley v. Lake Shore &c. R. Co. (1892) 146 U. S. 162, 36 L. ed. 925. So a purely statutory right to compensation from a city for this

VON HOFFMAN v. QUINCY.

1866. Supreme Court of the United States.
4 Wall. 535.

[Error to review a judgment of the Circuit Court of the United States which had refused to issue a mandamus to the city ordering it to levy and collect a certain tax and to pay petitioner sufficient of the proceeds to satisfy a judgment he held against the city. The unsatisfied judgment was for interest on bonds issued by the city under statutes which authorized the city to levy a special annual tax, sufficient to pay the annual interest on these bonds, and to hold the proceeds of this tax as a separate fund for this purpose. The city answered that a subsequent statute had repealed this special tax law and reduced its power to tax so that after paying current expenses nothing was left to pay interest on the bonds. Petitioner demurred on the ground that the repeal was inoperative to take away his right to have the city levy the special tax.]

MR. JUSTICE SWAYNE. * * * It is * * * settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. Illustrations of this proposition are found, in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and indorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement. Green v. Biddle, 8 Wheat. 92; Bronson v. Kinzie, 1 How. 319; McCracken v. Hayward, 2 How. 612; People v. Bond, 10 Cal. 570; Ogden v. Saunders, 12 Wheat. 231.

In Green v. Biddle, the subject of laws which affect the remedy was elaborately discussed. The controversy grew out of a compact between the states of Virginia and Kentucky. It was made in contemplation of the separation of the territory of the latter from the former, and its erection into a state, and is contained in an act of the legislature of Virginia, passed in 1789, whereby it was provided "that all private rights and interests within" the district of Kentucky "derived from the laws of Virginia prior to such separation

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damages to property is not protected against impairment by subsequent legislation. Crane v. Hahlo (1922) 258 U. S. 142, 66 L. ed. 514, where the court said: "It has long been settled * * * that the word 'contracts' in § 10 of Article I * * * is used in its usual or popular sense as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. 'Mutual assent' [express or implied] 'to its terms is of its very essence'."

shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state." By two acts of the legislature of Kentucky, passed respectively in 1797 and 1812, several new provisions relating to the consequences of a recovery in the action of ejectment—all eminently beneficial to the defendant, and onerous to the plaintiff—were adopted into the laws of that state. So far as they affected the lands covered by the compact, this court declared them void. It was said: "It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much violation of the compact as if they overturned his rights and interests."

In Bronson v. Kinzie, 1 How. 311, the subject was again fully considered. A mortgage was executed in Illinois containing a power of sale. Subsequently, an act of the legislature was passed which required mortgaged premises to be sold for not less than two-thirds of their appraised value, and allowed the mortgagor a year after the sale to redeem. It was held that the statute, by thus changing the pre-existing remedies, impaired the obligation of the contract, and was therefore void.[4]

In McCracken v. Hayward, 2 How. 608, the same principle, upon facts somewhat varied, was again sustained and applied. A statutory provision that personal property should not be sold under execution for less than two-thirds of its appraised value was adjudged, so far as it affected prior contracts, to be void, for the same reason.

* * *

A statute of frauds embracing a pre-existing parol contract not before required to be in writing would affect its validity. A statute declaring that the word "ton" should thereafter be held, in prior as well as subsequent contracts, to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtment may be extinguished by a process of bankruptcy would involve its discharge, and a statute forbidding the sale of any of the debtor's property, under a judgment upon such a contract, would relate to the remedy.

It cannot be doubted, either upon principle or authority, that each of such laws passed by a state would impair the obligation of the contract, and the last-mentioned not less than the first. Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of, the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract "is the law which binds the parties to perform their agreement." Sturges v. Crowninshield, 4 Wheat. 122, 197. The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. In Green v. Biddle, 8 Wheat. 84, it was said: "The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. Upon this principle it is that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his advantage."

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[4] It should be noted that the court discusses without discrimination cases involving changes of remedies for the enforcement of wholly private contracts while disposing of an issue with regard to a public contract. The expression public contract may be used to include any contract at least one party to which is a governmental unit, whether the United States, a state, a municipality, county or other subordinate governmental agency. Consider throughout this section whether private and public contracts stand on exactly the same footing with regard to the amount of protection afforded by the contracts clause? Also consider the difference between contracts with a state and contracts with a subordinate public corporation of the state.

"One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching, in any respect, on its obligation—dispensing with any part of its force." Planters' Bank v. Sharp et al., 6 How. 327.

This has reference to legislation which affects the contract directly, and not incidentally or only by consequence.

The right to imprison for debt is not a part of the contract. It is regarded as penal rather than remedial. The states may abolish it whenever they think proper. Beers v. Haughton, 9 Pet. 359; Ogden v. Saunders, 12 Wheat. 230; Mason v. Haile, 12 Wheat. 373; Sturges v. Crowninshield, 4 Wheat. 122, 200. They may also exempt from sale, under execution, the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture. It is said: "Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised by every sovereignty according to its own views of policy and humanity."[5]

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[5] This quotation as applied to the facts in the sentence preceding it is a dictum by Taney, C. J. in Bronson v. Kinzie (1843) 1 How. (42 U. S.) 311, 315, 11 L. ed. 143. In Edwards v. Kearzey (1878) 96 U. S. 595, 604, 24 L. ed. 793, commenting upon this dictum, Swayne, J., said: "The learned Chief Justice seems to have had in his mind the maxim *de minimis,* etc. Upon

It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the Constitution, and to that extent void. Bronson v. Kinzie, 1 How. 311; McCracken v. Hayward, 2 How. 608.

If these doctrines were res integræ the consistency and soundness of the reasoning which maintains a distinction between the contract and the remedy—or, to speak more accurately, between the remedy and the other parts of the contract—might perhaps well be doubted. 1 Kent's Commentaries, 456; Sedgwick on Stat. and Cons. Law, 652; Mr. Justice Washington's dissenting opinion in Mason v. Haile, 12 Wheat. 379. But they rest in this court upon a foundation of authority too firm to be shaken; and they are supported by such an array of judicial names that it is hard for the mind not to feel constrained to believe they are correct. The doctrine upon the subject established by the latest adjudications of this court renders the distinction one rather of form than substance.

When the bonds in question were issued, there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist.

It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. New Jersey v. Wilson, 7 Cranch, 166; Dodge v. Woolsey, 18 How. 331; Piqua Branch

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no other ground can any exemption be justified." Yet he says of the quotation in the principal case from Planters Bank v. Sharp et al., "It must be understood that the encroachment thus denounced must be material." He sums up his opinion (p. 607) thus, "The remedy subsisting in a state when and where a contract is made * * * is a part of its obligation and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden." The ambiguity of this discussion led Clifford and Hunt, JJ., concurring in separate opinions, to reaffirm the dictum of Taney, C. J. The remarks of all the judges on the dictum are likewise dicta, for all of them agreed that the retrospective exemption law before them substantially enlarged the exemption existing when the contract was made and was accordingly inoperative as to it,—except Harlan, J., who dissented. The state courts have divided upon the issue whether the Supreme Court considers this a matter of degree. The state decisions are collected in Ann. Cas. 1912B, 259.

v. Knoop, 16 How. 369. It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other.

The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract but an abstract right—of no practical value—and render the protection of the Constitution a shadow and a delusion.

The Circuit Court erred in overruling the application for a mandamus. * * *

Judgment reversed.[6]

BANK OF MINDEN ET AL. v. CLEMENT, ADMINISTRATRIX OF CLEMENT.

1921. Supreme Court of the United States. 256 U. S. 126.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

By Act No. 189 of 1914, the Louisiana legislature undertook to exempt from debts of the assured the avails of insurance upon his life when payable to his estate.

Before passage of that act and while indebted to plaintiffs in error banks, by notes which were renewed from time to time until his death, O. P. Clement took out two policies upon his life with loss payable to his executors, administrators or assigns. He died in 1917 and his administratrix collected the stipulated sums amounting to $4,433.33. The succession was insolvent, and the banks sought to subject the insurance money to their claims, maintaining that if construed and applied so as to exempt such funds the Act of 1914 would impair the obligations of their contracts and violate § 10, Article I, federal Constitution. The Supreme Court of the state held that acceptance of the renewal notes did not operate as novations, but that the statute protected the insurance money without violating the federal Constitution since the exemption "impaired the obligation of the preexisting contract very slightly and remotely." 146 Louisiana, 385.

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[6] The substantive law of the constitution being as laid down in the case above the inferior federal courts exerted themselves to the limit of their powers, in some instances even further as was subsequently held, to enforce it against municipal corporations determined to repudiate bonds and other debts, often abetted by state legislatures and the connivance of resigning officials. This interesting chapter in the law is written in the cases discussed in 4 Dillon, Municipal Corporations (1911, 5th ed.) §§ 1506-1525. See especially Heine v. Levee Comrs. (1873) 19 Wall. (U. S.) 655, 22 L. ed. 223; Thompson v. Allen County (1885) 115 U. S. 550, 29 L. ed. 472.

Section 10, Article I, of the Constitution—"No state shall * * * pass any * * * law impairing the obligation of contracts"—has been much considered by this court and often applied to preserve the integrity of contractual obligations.

When the deceased took out the policies of insurance upon his life they became his property subject to claims of his creditors. New York Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591, 597; Central Bank of Washington v. Hume, 128 U. S. 195, 204; Burlingham v. Crouse, 228 U. S. 459, 471, 472; In re Coleman, 136 Fed. Rep. 818; In re Vonvillain, 232 Fed. Rep. 372; Blinn v. Dame, 207 Massachusetts, 159; In re Heilbron's Estate, 14 Washington, 536; Rice v. Smith, 72 Mississippi, 42; Skinner v. Holt, 9 S. Dak. 427; Joyce on Insurance, § 2341.

In Sturges v. Crowninshield, 4 Wheat. 122, 197, 198, opinion by Mr. Chief Justice Marshall, it was said: "What is the obligation of a contract? and what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. * * * Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. * * * But it is not true, that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents and integrity constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation." And, in Planters' Bank v. Sharp, 6 How. 301, 327, opinion by Mr. Justice Woodbury: "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force." Ogden v. Saunders, 12 Wheat. 213, 257; McCracken v. Hayward, 2 How. 608, 612; Edwards v. Kearzey, 96 U. S. 595, 600.

So far as the statute of 1914 undertook to exempt the policies and their proceeds from antecedent debts it came into conflict with the federal Constitution. See Lessley v. Phipps, 49 Mississippi, 790; Johnson v. Fletcher, 54 Mississippi, 628; Rice v. Smith, 72 Mississippi, 42; In re Heilbron's Estate, 14 Washington, 536; Skinner v. Holt, 9 S. Dak. 427; The Homestead Cases, 22 Grattan, 266.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.[7]

MR. JUSTICE CLARKE dissents.

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[7] "The distinction was well expressed by Mr. Justice Harlan, speaking for this court, as follows: 'It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract.' Oshkosh Water Works Co. v. Oshkosh, 187 U. S. 437, 439; citing many previous cases.

"In Bernheimer v. Converse, 206 U. S. 516, this court held that a statute of Minnesota, enacted for the purpose of giving a more efficient remedy to enforce the contractual liability of stockholders to creditors, by enabling a receiver to maintain an action for the benefit of creditors outside of the jurisdiction of the court appointing him,—a remedy that by the laws of Minnesota was not available at the time the stock liability in question arose,—did not impair the obligation of the contract. Mr. Justice Day, speaking for the court, said, (at p. 530): ' * * * There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made'." Pitney, J., in National Surety Co. v. Architectural Decorating Co. (1912) 226 U. S. 276, 283-284, 57 L. ed. 221.

A state statute making wages subject to execution of judgments obtained at a time when execution of such judgments could not be issued against wages was sustained, the court saying: "The statutory authorization for its issuance does not impair the obligation of any contract, or affect any vested right; it merely furnished the judgment creditor with a broader and more effective remedy than the law gave him before." Laird v. Carton (1909) 196 N. Y. 169, 89 N. E. 822, 25 L. R. A. (N. S.) 189. So, where debtors' homesteads had been exempt from judgment liens, a statute abolishing the exemption was sustained as to judgments previously obtained and the court said: "Statutory privileges and exemptions * * * are granted subject to the power of the general assembly to repeal or modify the act that gives them. * * * A creditor has the constitutional right to demand that his lien shall not be destroyed, or his remedy in any other way impaired, but the debtor can claim no vested right of exemption." Leak v. Gay (1890) 107 N. Car. 468, 12 S. E. 312.

A statute which lessened the amount of a debtor's property that was exempt from execution was held operative upon prior contracts because it did not impair creditors' rights and the effect upon debtors was imposed consistently with the requirements of the due process clause. Brearly School v. Ward (1911) 201 N. Y. 358, 94 N. E. 1001, 40 L. R. A. (N. S.) 1215, Ann. Cas. 1912B, 251, 261 (collecting cases).

Where the promises in a bilateral contract between a city and a street railway company were still not wholly executed on either side, the city promising to permit the company to serve a given area and the company promising to serve that area at a five cent fare, subsequent legislation attempting to compel the company to serve a larger area at that rate was held invalid, the court saying that the statute would "substantially impair the obligation of the contract by adding to its burdens." Georgia R. &c. Co. v. Decatur (1923) 262 U. S. 432,

PENNOYER v. McCONNAUGHY.

1891. Supreme Court of the United States. 140 U. S. 1.

[An Oregon statute of October 26, 1870, provided for the sale to private persons of swamp lands belonging to the state. Henry C. Owen applied for certain swamp lands in 1881 and 1884, and in accordance with the statute paid 20% of the purchase price. The statute provided that no patent should be issued until a buyer should satisfy the state land commissioner that the land had been drained and made suitable for cultivation and pay the balance of the purchase price. The statute gave a buyer ten years from date of payment of the 20% to do these further acts. Owen sold his rights to Felton who sold to the plaintiff, McConnaughy. By statute of Feb. 16, 1887, all certificates of sale, such as Owen had obtained, upon which the payment of the 20% had not been made prior to January 17, 1879, were declared void. The state board of land commissioners acting under the act of 1887 cancelled the certificates issued to Owen and were proceeding to offer the lands in-

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67 L. ed. 1065. [In effect the statute said to the company, pay more than you promised or you will not get what the city promised you. The company's creditor-right to performance by the city was impaired.]

See also Columbia R., Gas &c. Co. v. South Carolina (1923) 261 U. S. 236, 251, 67 L. ed. 629, where in analogous facts it is again said that "impairment of a contract may consist in increasing its burdens."

Statutes which improve the creditor's position by extending the time for the bringing of actions upon claims not yet barred are not objectionable. See cases collected in (1927) 46 A. L. R. 1101. What is the constitutional objection, if any, to a statute which revives a contract claim after it is barred? See Campbell v. Holt, ante, p. 653. The state decisions are not all in accord. They are collected in (1925) 36 A. L. R. 1319. See also (1922) 16 A. L. R. 1346 ff.

"The passage of a new statute of limitations, giving a shorter time for the bringing of actions than existed before, even as applied to actions which had accrued, does not necessarily affect the remedy to such an extent as to impair the obligation of the contract within the meaning of the Constitution, provided a reasonable time is given for the bringing of such actions." In re Brown (1890) 135 U. S. 662, 701, 705, 34 L. ed. 304. On what has been deemed reasonable time in various cases, see notes in 1 L. R. A. (N. S.) 528, 529, 21 L. R. A. (N. S.) 157.

A state statute prolonging the time for redemption of property sold at prior tax sales or prior mortgage foreclosure sales would work a forbidden impairment of purchasers' rights. Cases are collected in (1919) 1 A. L. R. 143; (1925) 38 A. L. R. 229.

State stay laws or moratory statutes for the protection of all debtors (suspending existing rights of action) have usually been held invalid, though enacted in war time, cases in (1920) 9 A. L. R. 7; but valid when limited to debtors in military service, ibid. p. 11. It has been denied that the states passed the latter type of statute in exercise of a "so-called war power" of the state. Konkel v. State (1919) 168 Wis. 335, 170 N. W. 715. Are the statutes "police" measures and justified by the circumstances?

The federal Soldiers' and Sailors' Civil Relief Act of March 8, 1918, providing for suspension of proceedings in courts, federal and state, against persons in the military service of the United States during the war with Germany was a valid exercise by Congress of power included in its grant of war powers. Hoffman v. Charleston Five Cents Sav. Bank (1918) 231 Mass. 324, 121 N. E. 15.

volved for sale. The plaintiff, a citizen of California, filed this bill in the United States Circuit Court for the District of Oregon against the persons who were governor, secretary of state and state treasurer, of Oregon, constituting the state board of land commissioners, to enjoin them from selling the lands in question. The court granted the decree and defendants appealed.]

MR. JUSTICE LAMAR delivered the opinion of the court. * * *

The complainant below bases his claim for the relief prayed for upon that clause of section 10, article I, which provides that "no state shall pass any law impairing the obligation of contracts;" whilst the defendants below, the appellees, rely upon the Eleventh Amendment to the Constitution, which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against any of the United States by citizens of another state, or by citizens or subjects of a foreign state." * * *

It is well settled that no action can be maintained in any federal court by the citizens of one of the states against a state, without its consent, even though the sole object of such suit be to bring the state within the operation of the constitutional provision which provides that "no state shall pass any law impairing the obligation of contracts." This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court.[8] Accordingly, it is equally well settled that a suit

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[8] See In re Ayers (1887) 123 U. S. 443, especially pp. 502-506, 31 L. ed. 216; Louisiana v. Jumel (1882) 107 U. S. 711, 27 L. ed. 448 (here there had been subsequent legislation impairing the obligation, the federal question existed, but no federal court could take jurisdiction); Murray v. Wilson Distilling Co. (1909) 213 U. S. 151, 53 L. ed. 742 (attempts to recover for whiskey sold to the state) where White, J., for the court said: "Even if a state has consented to be sued in its own courts by one of its creditors, a right would not exist in such creditor to sue the state in a court of the United States. Smith v. Reeves, 178 U. S. 436, and cases cited; Chandler v. Dix, 194 U. S. 590."

A state stands differently where its creditor is another state. Virginia v. West Virginia (1918) 246 U. S. 565, 62 L. ed. 883.

Can a state effectively withdraw consent to be sued in its own courts by private persons as creditors on contracts made by it while it was consenting so to be sued? Is that remedy an irrepealable part of the obligation of the contract? That consent may be withdrawn in such circumstances see McDowell v. Warden (1912) 169 Mich. 332, 135 N. W. 265; McDowell v. Fuller (1915) 183 Mich. 639; 150 N. W. 353; State v. Jumel (1886) 38 La. Ann. 337. The Supreme Court of the United States seems not to have gone so far. See In re Ayers (1887) 123 U. S. 443 (dictum at p. 505), 31 L. ed. 216; Baltzer v. North Carolina (1896) 161 U. S. 240, 246, 40 L. ed. 684, and cases there cited; Beers v. Arkansas (1857) 20 How. (U. S.) 527, 15 L. ed. 991.

"Nothing heretofore said by this court justifies the contention that a state may not give its consent to be sued in its own courts by private persons or by corporations, in respect of any cause of action against it and at the same time exclude the jurisdiction of the federal courts—subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the state in any action brought against it with its consent may be reviewed or reexamined, as prescribed by the act of Congress, if it denies to the plaintiff against the officers of a state, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself.

In the application of this latter principle two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented.

The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. In re Ayers, 123 U. S. 443; Louisiana v. Jumel, 107 U. S. 711; Antoni v. Greenhow, 107 U. S. 769; Cunningham v. Macon & Brunswick Railroad, 109 U. S. 446; Hagood v. Southern, 117 U. S. 52.

The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the state. [A number of cases are here cited and discussed, similar in general character to Ex parte Young, ante, p. 79.]

The case of McGahey v. Virginia, 135 U. S. 662, 684, was a suit instituted in the Circuit Court of Alexandria, Virginia, in the name of the commonwealth, against the defendant, under the act of May 12, 1887, for the recovery of taxes due from him, in payment of which coupons cut from the bonds of the state had been tendered and not accepted. Judgment for the state was rendered by the circuit court, which, on appeal, was affirmed by the supreme court of the state. Brought before this court on a writ of error, the judgment of the state court was reversed. This case, with seven others, reported under this title, grew out of the legislation of the state regarding coupons of the same character as those involved in the Virginia coupon cases. Mr. Justice Bradley, delivering the unanimous opinion of the court, after a full and exhaustive review and analysis of the decisions in those cases and others like them,

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any right, title, privilege or immunity secured to him and specially claimed under the Constitution or laws of the United States." Harlan, J., in Smith v. Reeves (1900) 178 U. S. 436, 445, 44 L. ed. 1140.

presented a summary of the propositions established by those decisions which cannot be well abridged, as follows:

"First, That the provisions of the act of 1871 constitute a contract between the State of Virginia and the lawful holders of the bonds and coupons issued under and in pursuance of said statute;

"Second, That the various acts of the General Assembly of Virginia passed for the purpose of restraining the use of said coupons for the payment of taxes and other dues to the state, and imposing impediments and obstructions to that use, and to the proceedings instituted for establishing their genuineness, do in many respects impair the obligation of that contract, and cannot be held to be valid or binding in so far as they have that effect;

"Third, That no proceedings can be instituted by any holder of said bonds or coupons against the Commonwealth of Virginia, either directly by suit against the commonwealth by name, or indirectly against her executive officers to control them in the exercise of their official functions as agents of the state;

"Fourth, That any lawful holder of the tax-receivable coupons of the state, issued under the act of 1871 or the subsequent act of 1879, who tenders such coupons in payment of taxes, debts, dues and demands due from him to the state, and continues to hold himself ready to tender the same in payment thereof, is entitled to be free from molestation in person or goods on account of such taxes, debts, dues or demands, and may vindicate such right in all lawful modes of redress,—by suit to recover his property, by suit against the officer to recover damages for taking it, by injunction to prevent such taking where it would be attended with irremediable injury, or by a defence to a suit brought against him for his taxes or the other claims standing against him." * * *

Little remains to be done or said by us in this connection, except to apply the principles announced in the cases we have attempted to review to the facts in the case before us, * * *. In this connection it must be borne in mind that this suit is not nominally against the governor, secretary of state, and treasurer, as such officers, but against them collectively, as the board of land commissioners. It must also be observed that the plaintiff is not seeking any affirmative relief against the state or any of its officers. He is not asking that the state be compelled to issue patents to him for the land he claims to have purchased, nor is he seeking to compel the defendants to do and perform any acts in connection with the subject matter of the controversy requisite to complete his title. All that he asks is, that the defendants may be restrained and enjoined from doing certain acts which he alleges are violative of his contract made with the state when he purchased his lands. He merely asks that an injunction may issue against them to restrain them from acting under a statute of the state alleged to be unconstitutional, which acts will be destructive of his rights and privileges, and will work irreparable damage and mischief to his property rights. * * *

The position of the complainant below is, that, as the swamp lands of the state were for sale upon the terms and conditions mentioned in the act of 1870, a valid contract, binding upon both parties to it, was completed between the state and the applicant the moment a legal application to purchase was filed with the proper officer of the state and accepted by him. This was the view taken by the Circuit Court. * * *

But we do not deem it necessary to determine whether the court was correct in that view of the case, for, in our opinion, another element of the case is of sufficient importance to control its disposition. Even if no vested right accrued to the applicant immediately upon the filing of his application and its acceptance by the authorities of the state, it is conceded on all hands that he acquired such a right upon the payment of the twenty per centum of the purchase price of the lands embraced in his application, if such payment was made in accordance with law. [Here the court discussed a contention of appellants that an Oregon statute of 1878 had rendered Owen's application void before he made his 20% payments.]

We therefore accept the construction of the act of 1878 adopted by the board of land commissioners, and acted upon for so long a period of time in the administration of the swamp land grant, and hold that the application of Owen, in this case, was not rendered void by the act of 1878; and that, by the subsequent payment of the first instalment of the purchase price of the land embraced in his application, he acquired a vested right to those lands. In other words, by such payment, this contract with the state became so far executed as to be embraced in the class of contracts protected by § 10 of Art. 1 of the Constitution of the United States, which declares that "no state shall pass any law impairing the obligation of contracts."

Does the statute of 1887, above quoted, impair such a contract? We think it does, beyond all doubt. It, in so many words, authorizes the board of commissioners to cancel the certificates of sale where the twenty per centum of the purchase price of the land had not been paid prior to January 17, 1879, and treats the lands embraced in such certificates as reverted to the state. That legislation surely impaired the obligation of the contract Owen had with the state, for its effect was to destroy valuable property, rights and privileges belonging to him. It was, therefore, violative of the Constitution of the United States. Art. 1, § 10.

That statute being the one under which the appellants assumed to act, affords them no security or immunity for the acts complained of; and it cannot be said, therefore, that this is a suit against the state, within the meaning of the Eleventh Amendment.

Decree affirmed.

PIQUA BRANCH OF STATE BANK OF OHIO v. KNOOP.

1853. Supreme Court of the United States. 16 How. 369.

[Error to the Supreme Court of Ohio. A statute of Ohio of 1845 authorized any five or more persons to incorporate for the purpose of carrying on a bank in the state, subject to the terms of the statute. The Piqua bank was organized in 1847 under this statute. By Act of March 21, 1851 the legislature enacted that banks incorporated under the laws of the state should pay a tax on their capital at the rate levied on other personal property. The bank refused to pay this tax, relying upon Sec. 60 of the statute of 1845, quoted in the opinion. In an action in a state court to collect the tax, judgment went against the bank. On appeal the state Supreme Court affirmed the judgment and the bank took this writ of error.]

M'Lean, J., delivered the opinion of the court. * * *

We will first consider whether the specific mode of taxation, provided in the 60th section of the charter, is a contract.

The operative words are, that the bank shall, "semiannually, on the days designated in the 59th section for declaring dividends, set off to the state six per cent. on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding, which sum or amount so set off shall be in lieu of all taxes to which such company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject."

This sentence is so explicit, that it would seem to be susceptible of but one construction. * * *

The 60th section is not found in a general law, as is intimated by the supreme court of the state. The act of 1845 is general only in the sense, that all banking associations were permitted to organize under it; but the act is as special to each bank as if no other institution were incorporated by it. We suppose this cannot be controverted by any one. This view is so clear in itself that no illustration can make it clearer.

Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract which cannot be changed by the legislature, where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise, and necessary to the business of the bank, cannot, without its consent, become a subject for legislative action.

A municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the legislature. Such is a public corporation, used for public purposes. But a bank, where the stock is owned by individuals, is a private corporation. * * *

It by no means follows that because the action of a corporation may be beneficial to the public, therefore it is a public corporation. This may be said of all corporations whose objects are the administration of charities. But these are not public, though incorporated by the legislature, unless their funds belong to the government. * * *

The assumption that a state, in exempting certain property from taxation, relinquishes a part of its sovereign power, is unfounded. The taxing power may select its objects of taxation; and this is generally regulated by the amount necessary to answer the purposes of the state. Now the exemption of property from taxation is a question of policy and not of power. A sound currency should be a desirable object to every government; and this in our country is secured generally through the instrumentality of a well-regulated system of banking. To establish such institutions as shall meet the public wants and secure the public confidence, inducements must be held out to capitalists to invest their funds. They must know the rate of interest to be charged by the bank, the time the charter shall run, the liabilities of the company, the rate of taxation, and other privileges necessary to a successful banking operation.

These privileges are proffered by the state, accepted by the stockholders, and in consideration funds are invested in the bank. Here is a contract by the state and the bank, a contract founded upon considerations of policy required by the general interests of the community, a contract protected by the laws of England and America, and by all civilized states where the common or the civil law is established. * * *

There is no constitutional objection to the exercise of the power to make a binding contract by a state. It necessarily exists in its sovereignty, and it has been so held by all the courts in this country. A denial of this is a denial of state sovereignty. It takes from the state a power essential to the discharge of its functions as sovereign. If it do not possess this attribute, it could not communicate it to others. There is no power possessed by it more essential than this. Through the instrumentality of contracts, the machinery of the government is carried on. Money is borrowed, and obligations given for payment. Contracts are made with individuals, who give bonds to the state. So in the granting of charters. If there be any force in the argument, it applies to contracts made with individuals, the same as with corporations. But it is said the state cannot barter away any part of its sovereignty. No one ever contended that it could.

A state, in granting privileges to a bank, with a view of affording a sound currency, or of advancing any policy connected with the public interest, exercises its sovereignty, and for a public purpose, of which it is the exclusive judge. Under such circumstances, a contract made for a specific tax, as in the case before us, is binding. This tax continues, although all other banks should be exempted from taxation. Having the power to make the contract, and rights becoming vested under it, it can no more be disregarded nor set aside by a subsequent legislature, than a grant for land. This act, so far from parting with any portion of the sovereignty, is an exercise of it. Can any one deny this power to the legislature? Has it not a right to select the objects of taxation and determine the amount? To deny either of these, is to take away state sovereignty.

It must be admitted that the state has the sovereign power to do this, and it would have the sovereign power to impair or annul a contract so made, had not the Constitution of the United States inhibited the exercise of such a power. The vague and undefined and indefinable notion, that every exemption from taxation or a specific tax, which withdraws certain objects from the general tax law, affects the sovereignty of the state, is indefensible.

There has been rarely, if ever, it is believed, a tax law passed by any state in the Union, which did not contain some exemptions from general taxation. * * *

The federal government enters into an arrangement with a foreign state for reciprocal duties on imported merchandise, from the one country to the other. Does this affect the sovereign power of either state? The sovereign power in each was exercised in making the compact, and this was done for the mutual advantage of both countries. Whether this be done by treaty, or by law, is immaterial. The compact is made, and it is binding on both countries.

The argument is, and must be, that a sovereign state may make a binding contract with one of its citizens, and, in the exercise of its sovereignty, repudiate it. The Constitution of the Union, when first adopted, made states subject to the federal judicial power. Could a state, while this power continued, being sued for a debt contracted in its sovereign capacity, have repudiated it in the same capacity? In this respect the Constitution was very properly changed, as no state should be subject to the judicial power generally.

Much stress was laid on the argument, and in the decisions of the Supreme Court, on the fact that the banks paid no bonus for their charters, and that no contract can be binding which is not mutual. This is a matter which can have no influence in deciding the legal question. The state did not require a bonus, but other requisitions are found in the charter, which the legislature deemed sufficient, and this is not questionable by any other authority. The obligation is as strong on the state, from the privileges granted and accepted, as if a bonus had been paid.[9] * * *

Judgment reversed.

[Brief concurring opinion of TANEY, C. J., is here omitted. CATRON, DANIEL and CAMPBELL, JJ., dissented.]

CATRON, J. * * * The next question decided by the state court is of most grave importance; I give it in the language of the state court: "Had the general assembly power, under the [state] constitution then in force, permanently to surrender, by contract, within the meaning and under the protection of the Constitution of the United States, the right of taxation over any portion of the property of individuals, otherwise subject to it?" * * *

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[9] Miller, J., sixteen years later, dissenting in Washington University v. Rouse (1869) 8 Wall. (U. S.) 439, 443-444, 19 L. ed. 498, said: "We do not believe that any legislative body, sitting under a state constitution of the usual character, has a right to sell, to give, or to bargain away the taxing power of the state. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society."

In Home of the Friendless v. Rouse (1869) 8 Wall. (U. S.) 430, 438, 19 L. ed. 495, the court held that a declaration in a special charter incorporating a charitable institution, "that all property of said corporation shall be exempt from taxation" became contractually binding upon the state by the acceptance of the charter and acting under it. "It is settled by the repeated adjudications of this court, that a state may by contract based upon a consideration exempt the property of an individual or corporation from taxation, either for a specified period or permanently. And it is equally well settled that the exemption is presumed to be on sufficient consideration and binds the state if the charter containing it is accepted."

Cf. Grand Lodge F. & A. Masons v. New Orleans (1897) 166 U. S. 143, 41 L. ed. 951. The lodge was incorporated by the legislature of Louisiana in 1816. Its charter contained no tax exemption. In 1853 it acquired by deed land and a building to be used partly for a lodge hall and partly to produce income from rentals, the deed reciting a resolution of the lodge that it would use the income for the charitable purposes of the lodge. In 1855 the legislature enacted that this building, specifically mentioning it by description, should be exempt from state and parish taxes so long as it should be occupied by the lodge. The state constitution of 1879 prohibited exemptions of property of charitable institutions used or leased for purposes of private or corporate profit or income. The Supreme Court of Louisiana held that so much of the building as was used to produce income thereby became taxable. The United States Supreme Court sustained this decision, saying that there was no consideration for the exemption in the act of 1855; that in these circumstances the exemption was a "mere gratuity or bounty" which the state could withdraw at any time.

For statutes construed as having created contract rights to exemption from taxation, or from taxes other than those agreed upon, see Powers v. Detroit Grand Haven &c. R. Co. (1906) 201 U. S. 543, 50 L. ed. 860; Wright v. Georgia R. & Banking Co. (1910) 216 U. S. 420, 54 L. ed. 544.

"To all claims of contract exemption from taxation must be applied the well settled rule that, as the power to tax is an exercise of the sovereign authority of the state, essential to its existence, the fact of its surrender in favor of a corporation or an individual must be shown in language which cannot be otherwise reasonably construed, and all doubts which arise as to the intent to make such contract are to be resolved in favor of the state." Seton Hall College v. South Orange (1916) 242 U. S. 100, 106, 61 L. ed. 170. Compare University [Northwestern] v. People (1878) 99 U. S. 309, 25 L. ed. 387.

Her [Ohio] supreme court holds that the state constitution of 1802 expressly prohibited one legislature from restraining its successors by the indirect means of contracts exempting certain property, from taxation. The court says: Power to exempt property, was reserved to the people; they alone could exempt, by an organic law. That is to say, by an amended constitution. The clause mainly relied on declares "that all powers not delegated, remain with the people." Now it must be admitted that this clause has a meaning; and it must also be conceded, as I think, that the supreme court of Ohio, has the uncontrollable right to declare what that meaning is; and that this court has just as little right to question that construction as the supreme court of Ohio has to question our construction of the Constitution of the United States. * * *

The refusal of some fifty banks to pay their assessed portion of the revenue for the year 1851 raised the question for the first time in the State of Ohio; since then the doctrine has been maintained in various cases, supported unanimously by all the judges of the supreme court of that state, in opinions deeply considered, and manifesting a high degree of ability in the judges, as the extract from one of them, above set forth, abundantly shows. If the construction of the state constitution is not settled, it must be owing to the recent date of the decisions. An opinion proceeding on this hypothesis will, as I think, involve our judgment now given in great peril hereafter; for if the courts of Ohio do not recede, but firmly adhere to their construction until the decisions, now existing, gain maturity and strength by time, and the support of other adjudications conforming to them, then it must of necessity occur that this court will be eventually compelled to hold that the construction is settled in Ohio; when it must be followed to avoid conflict between the judicial powers of that state and the Union, an evil that prudence forbids. * * *

WISCONSIN AND MICHIGAN R. CO. v. POWERS.

1903. Supreme Court of the United States. 191 U. S. 379.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree of the United States Circuit Court dismissing the plaintiff's bill on demurrer. The bill seeks to enjoin the auditor general of the State of Michigan from collecting a tax, on the ground that the law imposing the tax is contrary to the Constitution of the United States as impairing the obligation of contracts. * * *

The alleged contract is contained in a law of May 27, 1893, § 3, which, after levying a specific tax on railroads, provided "that the rate of taxation fixed by this act or any other law of this state shall not apply to any railway or railroad company hereafter building and operating a line of railroad within this state north of parallel forty-four of latitude until the same has been operated for the full period of ten years, unless the gross earnings shall equal four thousand dollars per mile, except," etc. Afterwards, on October 23, 1893, the Menominee and Northern Railroad Company was incorporated under the laws of the state, and forthwith conveyed all its property, rights and franchises to the plaintiff, a Wisconsin corporation, which is assumed to stand in the shoes of the Michigan company. The plaintiff thereupon constructed the road. This road is north of parallel forty-four, its gross earnings never have been equal to four thousand dollars per mile, and it would be entitled to the exemptions just stated if the law of 1893 still were in force. But on June 4, 1897, the state passed a law amending the act of 1893, and levying a "specific tax upon the property and business of [every] railroad corporation operated within the state," [and repealed the act of May 27, 1893.] * * *

The first and main question, then, is whether the act of 1893 purported to make an irrevocable contract with such railroad as might thereafter comply with its terms. The question is pretty well answered by a series of decisions in this court. A distinction between [1] an exemption from taxation contained in ~~a special~~ charter, and [2] general encouragement to all persons to engage in a certain class of enterprise, is pointed out in East Saginaw Mfg. Co. v. East Saginaw, 13 Wall. 373 ("Salt Co. v. East Saginaw"); S. C., 19 Michigan, 259. In earlier and later cases it was mentioned that there was no counter-obligation, service, or detriment incurred, that properly could be regarded as a consideration for the supposed contract. Rector, etc., of Christ Church v. Philadelphia County, 24 How. 300; Tucker v. Ferguson, 22 Wall. 527; Grand Lodge, etc., of Louisiana v. New Orleans, 166 U. S. 143. See Tomlinson v. Jessup, 15 Wall. 454, 459. But whatever the ground, thus far attempts like the present to make a contract out of the clauses in a scheme of taxation which happen to benefit certain parties have failed. See further, Welch v. Cook, 97 U. S. 541, and Manistee & Northeastern Railroad Co. v. Commissioner of Railroads, 118 Michigan, 349, in which the state court deals with this very act.

It may be that a state, by sufficient words, might bind itself without consideration, as a private individual may bind himself by recognizance or by affixing a seal. A state might abolish the requirement of consideration altogether for simple contracts by private persons, and, it may be that it equally might dispense with the requirement for itself. But the presence or absence of consideration is an aid to construction in doubtful cases—a circumstance to take into account in determining whether the state has purported to bind itself irrevocably or merely has used words of prophecy, encouragement or bounty, holding out a hope but not amounting to a covenant.

In the case at bar, of course the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting. If we are to deal with this proviso in a general tax law as we should deal with an alleged simple contract, while no doubt in some cases between private persons the above distinctions have not been kept very sharply in mind, Martin v. Meles, 179 Massachusetts 114, 117, it is clear that we should require an adequate expression of an actual intent on the part of the state to set change of position against promise before we hold that it has parted with a great attribute of sovereignty beyond the right of change. See Vicksburg, Shreveport & Pacific Railroad v. Dennis, 116 U. S. 665, 668. Looking at the case in this way, then, we find no such adequate expression. No doubt the state expected to encourage railroad building, and the railroad builders expected the encouragement, but the two things are not set against each other in terms of bargain. See Covington v. Kentucky, 173 U. S. 231, 238, 239.

But this is a somewhat narrow and technical mode of discussion for the decision of an alleged constitutional right. The broad ground in a case like this is that, in view of the subject matter, the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefore it makes no promise to them. It simply indicates a course of conduct to be pursued, until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in and action on the faith of a statute, merely because their interest was obvious and their action likely on the face of the law. What we have said is enough to show that in our opinion the plaintiff never had a contract, and therefore makes it unnecessary to consider the usual power to alter, amend or repeal charters, etc., contained in the constitution of Michigan, Tomlinson v. Jessup, 15 Wall. 454; Covington v. Kentucky, 173 U. S. 231; Citizens' Savings Bank v. Owensboro, 173 U. S. 636, or a similar power in the general railroad law of 1873, of which the above acts of 1893 and 1897 were amendments through intervening amending acts. * * *

Decree affirmed.

FLEMING v. FLEMING.

1924. Supreme Court of the United States. 264 U. S. 29.

Mr. Chief Justice Taft delivered the opinion of the court.

This is a writ of error to the Supreme Court of Iowa. The suit was begun in Polk County District Court by Anna B. Fleming, widow of Charles Fleming, against three brothers of her husband, one of whom had become his administrator, to secure her dower rights under the state statute in the share of her husband in the property of a partnership of the four brothers, in the business of soliciting and placing life insurance. The defendants' claim was that Charles lost all interest in the partnership upon his death, that by virtue of three contracts the property passed to the survivors, and the partnership of the three continued in possession and title free from any claim by heirs, next of kin, or the widow of Charles. The Supreme Court of Iowa held that these contracts constituted a contract by each partner to make a will to his survivors, were testamentary in character, and were avoided by § 3376 of the Code of Iowa, providing that as between husband and wife the survivor's share can not be affected by any will of the spouse without previous consent of the survivor.

It is assigned for error that in this ruling the Supreme Court of the state reversed its former rulings, under which such a contract of partnership had been held to be valid and not avoided by § 3376 or any other section of the Code; that on the faith of these rulings, the partnership contracts herein had been entered into, and that the new construction of the statute was an impairment of the contracts of partnership in violation of Article I, § 10, of the federal Constitution. This objection was made in the Supreme Court of the state on the application for a second rehearing, and the court held in its opinion that the point was not well taken because no prior decisions had in fact been overruled. This is a sufficient consideration of the point by the state Supreme Court before its judgment, to justify an assignment of error raising the federal question, if in fact and in law it be one.

In Tidal Oil Co. v. Flanagan, 263 U. S. 444, we had occasion to consider the same issue. After a somewhat full examination, we held that, by a score of decisions of this court, a judicial impairment of a contract obligation was not within § 10, Article I, of the Constitution, since the inhibition was directed only against impairment by legislation, and that such judicial action presented no federal question of which this court could take jurisdiction on a writ of error from a state court.

It is urged upon us that the impairment here is legislative, in that the case turned on the effect of § 3376 of the Iowa Code; that the subsequent judicial construction of it became part of the statute and gave it a new effect as a law. In other words, the contention is that the same statute was one law when first construed, before the making of the contract, and has become a new and different act of the legislature by the later decision of the court. This is ingenious but unsound. It is the same law. The effect of the subsequent decisions is not to make a new law but only to hold that the law always meant what the court now says it means. The court has power to construe a legislative act, but it has no power by change in construction to date its passage as a law from the time of the later decision. A statute in force when a contract was made can not be made a subsequent statute through new interpretation by the courts. Any different view would be at variance with the many decisions of this court cited in the Flanagan Case.

For these reasons, we must hold that the claim of plaintiffs in error does not raise a substantial federal question, and dismiss the writ of error for lack of jurisdiction.

Writ of error dismissed.[10]

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[10] "It has been settled by a long line of decisions, that the provision of § 10, Article I, of the federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts. The language—'No State shall * * * *pass any* * * * *law* impairing the obligation of contracts'—plainly requires such a conclusion. However, the fact that it has been necessary for this court to decide the question so many times is evidence of persistent error in regard to it. Among the cases relied on to sustain the error, are Gelpcke v. Dubuque, 1 Wall. 175; Butz v. Muscatine, 8 Wall. 575; Douglass v. Pike County, 101 U. S. 677; Anderson v. Santa Anna, 116 U. S. 356; German Savings Bank v. Franklin County, 128 U. S. 526; Rowan v. Runnels, 5 How. 134, 139, and Los Angeles v. Los Angeles City Water Co., 177 U. S. 558. These cases were not writs of error to the supreme court of a state. They were appeals or writs of error to federal courts where recovery was sought upon municipal or county bonds or some other form of contracts, the validity of which had been sustained by decisions of the supreme court of a state prior to the execution, and had been denied by the same court after their issue or making. In such cases the federal courts exercising jurisdiction between citizens of different states held themselves free to decide what the state law was, and to enforce it as laid down by the state supreme court before the contracts were made rather than in later decisions. They did not base this conclusion on Article I, § 10, of the federal constitution, but on the state law as they determined it, which, in diverse citizenship cases, under the third Article of the federal Constitution they were empowered to do. Burgess v. Seligman, 107 U. S. 20. In such cases, as a general rule, they, in the interest of comity and uniformity, followed the de-

GRAY, J., in NEW ORLEANS WATERWORKS CO. v. LOUISIANA SUGAR REFINING CO. (1888) 125 U. S. 18, 30-32, 31 L. ed. 607, (holding that the action of the city council of New Orleans in determining that defendant's premises were contiguous to the Mississippi River and permitting him to draw water from the river was not an unconstitutional impairment of the charter to supply the inhabitants of the city with water from that river, which had been granted to plaintiff in error by the Louisiana legislature):

"In order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative[11] or executive boards or officers, or the doings of corporations or individuals. This court, therefore, has no jurisdiction to review a judgment of the highest court of a state, on the ground that the obligation of a contract has been impaired, unless some legislative act of the state has been upheld by the

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cisions of state courts as to the state law, but where gross injustice would be otherwise done, they followed the earlier rather than the later decisions as to what it was. Had such cases been decided by the state courts, however, and had it been attempted to bring them here by writ of error to the state supreme court, they would have presented no federal question, and this court must have dismissed the writs for lack both of power and jurisdiction. This is well illustrated by the cases of Gelpcke v. Dubuque, 1 Wall. 175, and Railroad Co. v. McClure, 10 Wall. 511. In the former, bonds sued on in the Circuit Court of the United States, were collected under judgment of this court. In the latter, like bonds sued on in a state court were held invalid, and a writ of error to the state supreme court was dismissed." Taft, C. J., for the court, in Tidal Oil Co. v. Flanagan (1924) 263 U. S. 444, 451-452, 68 L. ed. 382.

"This clause, as its terms disclose, is not directed against all impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the state. It does not reach mere errors committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a federal question. But when the state court, either expressly or by necessary implication, gives effect to a subsequent law of the state whereby the obligation of the contract is alleged to be impaired, a federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine the existence and validity of the contract, what obligations arose from it, and whether they are impaired by the subsequent law. But if there be no such law, or if no effect be given to it by the state court, we cannot take jurisdiction, no matter how earnestly it may be insisted that the court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired." Cross Lake Shooting &c. Club v. Louisiana (1912) 224 U. S. 632, 638-639, 56 L. ed. 924.

[11] But a resolution of a board of county commissioners may be legislative in character and within the prohibition, Northern Ohio Traction &c. Co. v. Ohio (1918) 245 U. S. 574, 62 L. ed. 481, L. R. A. 1918E, 865, and likewise a rule or regulation of a state administrative board, which has the force of law, Grand Trunk Western R. Co. v. Railroad Comm. (1911) 221 U. S. 400, 403, 55 L. ed. 786, or a state commission rate-fixing order, which is legislative in character. Prentis v. Atlantic Coast Line Co., ante, p. 1016.

judgment sought to be reviewed. The general rule, as applied to this class of cases, has been clearly stated in two opinions of this court, delivered by Mr. Justice Miller: 'It must be the Constitution or some law of the state which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States; and the decision of the state court must sustain the law or Constitution of the state, in the matter in which the conflict is supposed to exist; or the case for this court does not arise.' Railroad Co. v. Rock, 4 Wall. 177, 181, 18 L. Ed. 381. 'We are not authorized by the judiciary act to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held.' Knox v. Bank, 12 Wall. 379, 383.

"As later decisions have shown, it is not strictly and literally true that a law of a state, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the legislature in the ordinary course of legislation, or in the form of a Constitution established by the people of the state as their fundamental law. In Williams v. Bruffy, 96 U. S. 176, 183, it was said by Mr. Justice Field, delivering judgment: 'Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of the clause cited relating to the jurisdiction of this court,' (Rev. Stat. § 709;) and it was therefore held that a statute of the so-called Confederate States, if enforced by one of the states as its law, was within the prohibition of the Constitution.

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States. For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power. U. S. v. New Orleans, 98 U. S. 381; Meriwether v. Garrett, 102 U. S. 472.

* * *

"But the ordinance now in question involved no exercise of legislative power. The legislature, in the charter granted to the plaintiff, provided that nothing therein should 'be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his or their own use.' The legislature itself thus defined the class of persons to whom, and the object for which, the permission might be granted. All that was left to the city council was the duty of determining what persons came within the definition, and how and where they might be permitted to lay pipes, for the purpose of securing their several rights to draw water from the river, without unreasonable interfering with the convenient use by the public of the lands and highways of the city. The rule was established by the legislature, and its execution only committed to the municipal authorities. The power conferred upon the city council was not legislative, but administrative, and might equally well have been vested by law in the mayor alone, or in any other officer of the city. Railroad Co. v. Ellerman, 105 U. S. 166, 172; Day v. Green, 4 Cush. 433, 438. The permission granted by the city council to the defendant company, though put in the form of an ordinance, was in effect but a license, and not a by-law of the city, still less a law of the state. If that license was within the authority vested in the city council by the law of Louisiana, it was valid; if it transcended that authority, it was illegal and void. But the question whether it was lawful or unlawful depended wholly on the law of the state, and not at all on any provision of the Constitution or laws of the United States." * * *

ST. PAUL GAS LIGHT CO. v. ST. PAUL.

1901. Supreme Court of the United States. 181 U. S. 142.

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Error to the Supreme Court of the State of Minnesota.

The charter of the St. Paul Gas Light Company was granted in 1856, and it expires in 1907. The corporation was empowered to construct a plant to supply the city of St. Paul and its inhabitants with illuminating gas. It may be assumed, for the purposes of the question arising on this record, that the corporation discharged its duties properly under its charter, and that from the time the charter became operative the company has lighted the city in accordance with the contracts made for that purpose from time to time with the municipal authorities. The charter did not purport to engage permanently with the company for lighting the city, but provided for agreements to be entered into on that subject with the city for successive periods, and from the beginning of the charter the parties did so stipulate for a specified time, a new contract supervening upon the termination of an expired one. It may also be assumed for the purposes of this case that the rights which the corporation asserts on this record were not foreclosed by any of the contracts which it made, at different periods, with the city. The question which here arises concerns only section 9 of the charter, which is as follows:

Sec. 9. * * * Whenever the corporation of the city of St. Paul shall, by resolution of the board of aldermen, direct lamps to be erected and lighted in the streets of the city, the company shall make contract therefor, and furnish and provide, lay, set up and keep in good repair, at their own proper expense and charge, the street posts and lamps, and their pipes and meters, all to be of the best quality of work and material now in use. In consideration whereof, the said corporation of the city shall pay quarterly to the St. Paul Gas Light Company an interest of eight per cen~~tum per~~ annum on the amount of the sum of the original cost of said street lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same. * * *

Under the foregoing section the gas company, by direction of the city, constructed street lamps and up to January 1, 1897, they numbered 3362. The interest on the cost of these lamps, at the rate fixed by section 9, was regularly paid by the city up to January 1, 1897. About, or shortly after that date, in certain portions of the city, the use of electricity for lighting the streets was by direction of the municipality substituted for gas, and hence the street gas lamps in those portions of the city which were lighted by electricity were no longer used. It is fairly to be deduced from the record that either by its original charter or by amendments thereto the gas company was empowered to supply electricity as well as gas, and in virtue of this power it constructed an electrical plant and contracted with the city to supply the electric lights in those portions of the city where the use of gas had been dispensed with. The gas company asserted its right to recover from the city the interest on the cost of placing in position the lamps, the use of which had been discontinued under the circumstances just above stated. The city denied its obligation to pay interest on account of the cost of these lamps. As the result of this disagreement the city, in 1897, passed the following ordinance:

"Resolved, That the St. Paul Gas Light Company be and it is hereby required forthwith to remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with said company, and which said lamps have been discontinued by order of the board of public works.

"Resolved, further, That the board of public works is hereby required to transmit to the city comptroller a statement showing the number and location of said gas street lamp posts not now in service in said electric light district above referred to, and that from and after the passage of this resolution no interest be paid by the city of St. Paul to said St. Paul Gas Light Company on account of the cost of the purchase and equipment of said gas street lamp posts."

Thereupon the gas company commenced this suit to recover the interest on the cost of the construction of the lamps referred to in the ordinance. Without going into unnecessary detail it is adequate to say that the complaint alleged that the city was obliged by section 9 of the charter of the company to pay the interest on the cost of the lamps, although they were no longer in use for lighting purposes. The ordinance of the city which we have reproduced was expressly referred to in the complaint, and it was therein alleged that the ordinance in legal purview amounted to action by the state impairing the obligation of the contract, embodied in section 9 of the charter, and was hence void because repugnant to the Constitution of the United States. After answer and due proceedings the case was decided by the trial court in favor of the gas company. On appeal the judgment of the trial court was reversed by the Supreme Court of Minnesota, and a final judgment was ordered against the gas company. To this judgment of the Supreme Court of the state this writ of error is prosecuted.

Mr. Justice White, after stating the case, delivered the opinion of the court.

The Supreme Court of Minnesota held that the charter of the gas company did not impose on the city the obligation to pay the interest on the cost of constructing the lamps not used. Construing the whole charter, the court decided that, as it provided for contracts between the parties from time to time for the supply of lights, the sole obligation imposed was that the interest on the cost of the construction of the lamps should be paid by the city only during the time it was agreed that the lamps should be used and not during the life of the charter. * * *

Because the Supreme Court of Minnesota decided the controversy solely upon its appreciation of the meaning of the original contract, it does not necessarily follow that no federal question is presented for decision. Where subsequent state legislation is asserted to be repugnant to the Constitution of the United States because such legislation impairs the obligations of a contract, the power to determine whether there be such impairment imposes also on this court the duty, when necessary, to ascertain whether there was a contract and its import. And this, though it be in a given case, the state court has decided that there was no impairment either because the contract had never existed or because from an interpretation of its provisions it was found that the obligations which it is asserted were impaired, never arose. Houston & Texas Central Rd. v. Texas, 177 U. S. 66, 77, and cases cited. In cases of this nature, therefore, the questions to be considered are these: Was there a contract, and if yes, what obligations arose from it? and, Has there been state legislation impairing the contract obligations? Abstractly speaking, the duty would be first in order to determine whether the contract existed and its true meaning, before ascertaining whether any obligations of the contract had been impaired by subsequent legislation. As, however, the authority to review the judgment of the Supreme Court of Minnesota in this case, and in doing so to interpret the contract and enforce its obligations, arises solely because of the assertion that the obligations of the contract have been impaired by subsequent legislation, we will first consider whether, under any view which may be taken of the contract, there is shown on this record any act of state legislation which can be properly said to have impaired the obligations of the contract in the constitutional import of these words. That is to say, we propose first to consider, even although it be conceded arguendo that the Supreme Court of the State of Minnesota erroneously decided that the contract relied upon did not impose the duty on the city to pay interest on the cost of construction of the unused gas lamps, whether there has been any state legislation impairing the obligation of such contract. Whilst it is not pretended that there is any law of the State of Minnesota by which the obligation of the contract was impaired, it is asserted that such consequence results from the ordinance adopted by the municipal council of the city of St. Paul, the text of which ordinance has been reproduced in the statement of the case.

It is no longer open to question that "a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of the article of the Constitution of the United States." New Orleans Waterworks Co. v. Louisiana Sugar Refining Company, 125 U. S. 18, 31; Hamilton Gas Light & Coke Company v. Hamilton City, 146 U. S. 258; Walla Walla v. Walla Walla Water Company, 172 U. S. 1.

Referring to the ordinance in question from the provisions of which it is alone contended the impairment of the contract arose, it will be seen that only two subjects are therein referred to, the first, a command by the city to the gas company to "forthwith remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with the said company, which said lamps have been discontinued by order of the board of public works;" and, second, a declaration on the part of the municipal council of St. Paul of its intention not thereafter to pay the gas company interest on the cost of construction of the lamps so directed to be removed. If then there be any subsequent legislation impairing the obligation of the contract, it must arise from one or both of the provisions just referred to. Now, it is apparent that the command given by the city to the gas company to remove the unused gas lamp posts from the streets in no way even tended to impair the obligation, if any, resting on the city to pay interest on the cost of the construction of the lamp posts which were ordered to be removed, since in any event, if the contract imposed the obligation to make such payment, the duty of the city to do so was left absolutely unaffected by the order to remove. That is to say, if the duty to pay was created by the contract, such obligation remained wholly untouched by the order of removal. This being true, it results that the order to remove the unused lamp posts cannot be treated as an impairment of the obligations of the contract without saying that such obligations were destroyed, although they were absolutely unaffected by the act which it is asserted brought about the impairment. And it will become at once manifest from a consideration of the remaining provision of the ordinance that the same result must follow. The other provision in question created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. That is to say, it was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, whilst embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the city to enforce what it conceived to be its rights under the contract. When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of federal cognizance, determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error.

It is argued, however, that, as under the charter of the city of St. Paul the comptroller of the city was empowered to audit the claims of the gas company as a prerequisite to the appropriation by the city council of the necessary money to pay such claims, therefore the ordinance, to the extent that it deprived the comptroller of the power to audit, divested him of an attribute which he could otherwise have exercised on behalf of the claim if he favored its payment, and hence the ordinance impaired the contract obligations. But it is not pretended that the effect of the auditing by the comptroller would have been to authorize the payment of the claim, or indeed that it was anything but advisory; since even after he had audited, the payment could not have been procured without the passage of an appropriation by the council for that purpose. A large number of cases were cited in the argument at bar, under the assumption that they sustain the proposition that wherever a mere denial of contract liability is made by a municipality, such denial is an impairment of the obligations of the contract, since it is a refusal to comply with the contract and hence is a disregard of the obligations which the contract created. We do not stop to refer to all these cases thus relied upon, because we think it results from the statement of the proposition that it is without foundation. * * *

As it is apparent from the foregoing considerations that, even conceding the contract to be as contended for, no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract—within the purview of the Constitution—did or could result, it follows that the record involves solely an interpretation of the contract, and, therefore, presents no controversy within the jurisdiction of this court.

Dismissed for want of jurisdiction.[12]

LARSON v. SOUTH DAKOTA.

1929. Supreme Court of the United States. 278 U. S. 429.

[Appellant, Larson, sued the State of South Dakota in the state Supreme Court as permitted by § 2109, South Dakota Revised Code of 1919, for damages for the destruction of his ferry franchise on the Missouri River. In 1916 and 1921 two boards of county commissioners acting under a state statute granted to Larson leases or ferry franchises to operate a ferry across the Missouri River for toll. He accepted the franchises and equipped the ferry with boats and landings. The statute provided that when "any ferry lease has been granted, no other lease shall be granted within a distance of two miles" from the ferry landing. Under acts of the legislature the state, during the years 1923 and 1924, built a free bridge across the river less than two miles from Larson's ferry landing. Larson alleged that this free bridge totally destroyed his business, his ferry franchises, and made his investment worthless, damaging him to the amount of $44,000, for which he asked judgment. The court sustained a demurrer to this complaint and this appeal was taken.]

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[12] Cf. Northern Ohio Traction &c. Co. v. Ohio (1918) 245 U. S. 574, 62 L. ed. 481, L. R. A. 1918E, 865; Columbia Railway Gas & Elec. Co. v. South Carolina (1923) 261 U. S. 236, 67 L. ed. 629; Western Union Tel. Co. v. Georgia (1925) 269 U. S. 67, 70 L. ed. 166; Des Moines v. Des Moines City R. Co. (1909) 214 U. S. 179, 53 L. ed. 958.

"Something more than a mere refusal of a municipal corporation to perform its contract is necessary to make a law impairing the obligation of contracts." Holmes, J., in Dawson v. Columbia Ave. Sav. Fund &c. Trust Co., (1905) 197 U. S. 178, 182, 49 L. ed. 713.

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

The exclusive ferry leases were contracts between the state and the petitioner. The Binghamton Bridge, 3 Wall. 51. Was the building of the bridge a breach of them?

The Supreme Court of the state has had the meaning of "exclusive ferry franchise" before it twice before this case, in Nixon v. Reid, 8 S. D. 507, and in Chamberlain Ferry & Cable Bridge v. King, 41 S. D. 246; but these cases did not require consideration of the effect of the term as applied to anything but ferries. The court said on that subject in the present case:

"All that is contemplated by the statute and all that was granted by the plaintiff's leases was the right to operate a ferry together with a prohibition upon the granting boards from granting other ferry leases within the granted area during the period. * * * Nowhere in the statute can be found or implied a provision that the state was binding itself not to construct, nor authorize the construction of, a bridge across the river within the four mile area, or not to permit carriage by aviation across it. The fair and reasonable construction of the statute is that it refers solely to transportation by ferry."

Coming from the state Supreme Court, this language is very persuasive of the meaning of the statute and would indicate that in its view the building of a bridge was not a breach of the ferry contracts.

The petitioner relies on the contract clause of the federal Constitution, and is not prevented from invoking from this court an independent consideration of what the contract means, and whether by a proper construction, the building of a bridge impairs its obligation. Appleby v. City of New York, 271 U. S. 364, 380; Columbia Ry. Co. v. South Carolina, 261 U. S. 236, 245; Long Sault Development Co. v. Call, 242 U. S. 272, 277; Louisiana Ry. & Navigation Co. v. New Orleans, 235 U. S. 164, 170; Mobile and Ohio R. R. Co. v. Tennessee, 153 U. S. 486, 492; Huntington v. Attrill, 146 U. S. 657, 684; New Orleans Water Co. v. Louisiana Sugar Co., 125 U. S. 18, 38; Wright v. Nagle, 101 U. S. 791, 794; University v. People, 99 U. S. 309, 321; Bridge Proprietors v. Hoboken Co., 1 Wall. 116, 145; The Binghamton Bridge, 3 Wall. 51, 81; Jefferson Bank v. Skelly, 1 Black. 436, 443.

We must therefore treat the question as an open one and determine as an independent matter what the parties must be held to have had in mind in the use of the term "exclusive lease."

The chapter of the Revised Code of the state immediately preceding that which directs the letting and granting of exclusive ferry leases provides for the building of bridges over the rivers of South Dakota. This close relation of the chapters suggests that if bridges were intended to be forbidden by the contract, the parties would have been likely to mention a bridge as a breach. But there is no mention of a bridge in the statute or contract dealing with ferries.

On the other hand, it is argued that it was so well understood by everyone, including the parties, that the erection of a bridge in the forbidden area would destroy the value of the ferry leases, and so defeat the real object of the leases, that an implication necessarily arises that a bridge would be a breach of the leases.

Reference is made to Newburgh Turnpike Co. v. Miller, 5 Johns. Ch. 101, 111, a decision by Chancellor Kent. That was a suit to enjoin as a nuisance the construction and use of a bridge over the Wallkill River, upon which the plaintiff had a toll bridge of more than ten years' standing, and the injunction was granted.

The Chancellor said:

"It was observed in the case of Ogden v. Gibbons (4 Johns. Ch. Rep. 150, 160), and shown to be a principle of the common law, that if one had a ferry by prescription, and another erected a ferry so near it, as to draw away its custom, it was a nuisance, for which the injured party had his remedy by action. The same law and remedy were applied to the case of a fair or market, in which an individual had a freehold interest, if another fair or market was erected or used within its vicinity. The same doctrine applies to any exclusive privilege created by statute: all such privileges come within the equity and reason of the principle; no rival road, bridge, ferry, or other establishment of a similar kind, and for like purposes, can be tolerated so near to the other as materially to affect or take away its custom. It operates as a fraud upon the grant, and goes to defeat it. The consideration by which individuals are invited to expend money upon great and expensive and hazardous public works, as roads and bridges, and to become bound to keep them in constant and good repair, is the grant of a right to an exclusive toll. This right, thus purchased for a valuable consideration, can not be taken away by direct or indirect means, devised for the purpose, both of which are equally unlawful."

It will be observed that the facts there related to two bridges, and the case is not necessarily an express authority holding that an exclusive franchise for a ferry excludes a bridge. Yet it may be strongly argued from the language used that that is what the Chancellor had in mind.

We think, however, a broader question arises in the proper construction of a public grant like this. The leading case on the subject in Federal jurisprudence is that of Charles River Bridge v. Warren Bridge, 11 Pet. 420, 547. In that case the legislature of Massachusetts incorporated a company to build a bridge over the Charles River where a ferry stood, granting it tolls. Years after, the legislature incorporated another company for the erection of another bridge within 800 feet of the original one. The new bridge was to become free after a few years, and at the time of the litigation it had become actually free. The Charles River Bridge was deprived of the tolls and its value was destroyed. Its proprietors filed a bill against the proprietors of the Warren Bridge, for an injunction against the use of the bridge as an act impairing the obligations of a contract and repugnant to the Constitution of the United States. The Supreme Court of Massachusetts dismissed the bill and the case was brought by error to this court, which affirmed the judgment of the Massachusetts court. The principle of the case is that public grants are to be strictly construed, that nothing passes to the grantee by implication. The court cited United States v. Arredondo, 6 Pet. 691, 738; Jackson v. Lamphire, 3 Pet. 280, 289; Beaty v. Lessee of Knowler, 4 Pet. 152, 165; Providence Bank v. Billings and Pittman, 4 Pet. 514, 561. In the last case Chief Justice Marshall said, of an asserted limitation on the taxing power:

"* * * as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear."

The case then before the court was held to be subject to the same rule, although one of a corporate grant. The act of incorporation was silent in respect to the contested power. The argument made in favor of the proprietors of the Charles River Bridge was the same as that of the Providence Bank, namely, that the power claimed by the state, if it existed, must be so used as not to destroy the value of the franchise granted to the corporation. The argument was rejected.

Chief Justice Taney, delivering the opinion in the Charles River Bridge case, said [p. 547]:

"But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its powers of accomplishing the end for which it was created.

And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges that a state has surrendered for seventy years its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court above quoted, 'that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon does not appear.' "

The same principle is declared in Fanning v. Gregoire, 16 How. 524, 534; Wright v. Nagle, 101 U. S. 791, 796; Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287, 293, and Williams v. Mingo, 177 U. S. 601, 603. Speaking for the Court in the last case Mr. Justice Brewer said:

"A contract binding the state is only created by clear language and is not to be extended by implication beyond the terms of the statute. Fanning v. Gregoire, 16 How. 524, is in point and decisive."

The cases above cited are not exactly on all fours with the specific issue presented here, but they serve to show with great emphasis the necessity for one who relies upon a public grant as a basis for a private right, to bring it expressly within the grant or statute.

It is clear from them that in determining the effect of a public grant to an individual the principle *ut res magis valeat quam pereat* is not to be applied in his favor or an implication to be made enlarging his grant, as seems to have been the view of Chancellor Kent in Newburgh Turnpike Co. v. Miller, supra.

The contention that an exclusive ferry franchise should be construed to cover all methods of travel and transportation across the water is rejected in Dyer v. Tuskaloosa Bridge Co., 2 Porter 296 (Ala. 1835); Piatt v. Covington & Cincinnati Bridge Co., 8 Bush 31 (Ky. 1871); Snidow v. Board of Supervisors of Giles County, 123 Va. 578 (1918); Dibden v. Skirrow [1908] 1 Ch. 41. There are many strong dicta to this same effect. Morey v. Orford Bridge, Smith (N. H. 1804) 91, 95; Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35, 59 (1834); Bush v. Peru Bridge Co., 3 Ind. 21, 24 (1851); Parrot v. Lawrence, Fed. Cas. No. 10772 (C. C. Kan. 1872) 18 Fed. Cas. 1234; State ex rel. McPherson Bros. v. Superior Court, 142 Wash. 284, 291 (1927).

The great weight of authority holds that a contractual term forbidding a ferry or a toll bridge does not exclude a railroad bridge. Mohawk Bridge Co. v. Utica & Schenectady R. R., 6 Paige 554, 564

(N. Y. 1837); McLeod v. Savannah, Albany & Gulf R. R., 25 Ga. 445 (1858); Bridge Proprietors v. Hoboken Co., 1 Wall. 116, 149 (1863); Hopkins v. Great Northern Ry., 2 Q. B. D. 224 (1877), overruling Regina v. Cambrian Ry., L. R. 6 Q. B. 422 (1871). Contra: Enfield Toll Bridge Co. v. Hartford & New Haven R. R., 17 Conn. 40, 45 (1845).

There is some conflicting authority on the main question. Gates v. McDaniel, 2 Stewart 211 (Ala. 1829); Norris v. Farmers' & Teamsters' Co., 6 Cal. 590 (1856); Menzel Estate Co. v. City of Redding, 178 Cal. 475 (1918); Blanchard v. Abraham, 115 La. 989 (1906). But all of these cases are distinguishable in that the infringing bridge or ferry was established without legal authority, and there were other reasons such as obstruction to navigation, special statutes, or injury to tangible property which affected the decisions.

The strongest case for the appellant is Mason v. Harper's Ferry Bridge Co., 17 W. Va. 396 (1880), where a statute forbidding other ferries was held to give an exclusive right to transportation over the river and hence to prohibit rival bridges as well, but the court said that the legislature could take away at any time all the exclusive privileges of the proprietors theretofore existing.

In Hopkins v. Great Northern Railway, 2 Q. B. D. 224, 230 (1877), a railway company built a railway bridge and a foot bridge across a river one-half mile above an ancient ferry, which then went out of business. It was held that the ferry could not obtain compensation for either bridge, the railway being necessary for new traffic, and the foot bridge being used by those going to the railway station or by trespassers. There was a dictum by a court of distinguished English judges "that the owner of a ferry has not a grant of an exclusive right of carrying passengers and goods across the stream by any means whatever, but only a grant of an exclusive right to carry them across by means of a ferry."

We can hardly say, therefore, from the weight of authority, that an exclusive grant of a ferry franchise, without more, would prevent a legislature from granting the right to build a bridge near the ferry. Following the cases in this court in its limited and careful construction of public grants, it is manifest that we must reach in this case the same conclusion.

The judgment of the Supreme Court of South Dakota is

Affirmed.[13]

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[13] The rule of strict construction has frequently been applied to governmental grants of monopoly, special privileges, exemptions from taxation, exemption from rate regulation, power to lay tracks in public streets, to exercise power of eminent domain, and the like, both in determining whether any such grant has been made and if so the scope of it. See the note in Richard's Cases on Corporations (2d. ed. 1924) 241, and cases collected in Hall's Cases on Constitutional Law, p. 833, note.

"The principle is this: That all rights which are asserted against the state

GREENWOOD v. UNION FREIGHT COMPANY.

1882. Supreme Court of the United States. 105 U. S. 13.

[Appeal from the Circuit Court of the United States for the District of Massachusetts. The Marginal Freight Company was incorporated under a Massachusetts statute of 1867 to build and operate a railroad through certain of the streets of Boston. A statute of Massachusetts, passed in 1831, declared that all acts of incorporation enacted thereafter "shall be subject to amendment, alteration, or repeal, at the pleasure of the legislature." In 1872 the legislature incorporated the Union Freight Company for the same purpose, with authority to expropriate the track of the Marginal Freight Company upon making compensation therefor. This later statute also repealed the charter of the Marginal Freight Company. Greenwood, a citizen of New York and shareholder in the latter company, filed his bill to restrain the Union Freight Company and the city officials from carrying out this statute. From a dismissal of his bill he brought this appeal.]

Mr. Justice Miller delivered the opinion of the court. * * *

What is the effect of the repeal of the charter of a corporation like this?

One obvious effect of the repeal of a statute is that it no longer exists. Its life is at an end. Whatever force the law may give to transactions into which the corporation entered and which were authorized by the charter while in force, it can originate no new transactions dependent on the power conferred by the charter. If the corporation be a bank, with power to lend money and to issue circulating notes, it can make no new loan nor issue any new notes designed to circulate as money.

If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general

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must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts."—Davis, J., in The Binghamton Bridge (1865) 3 Wall. (U. S.) 51 75, 18 L. ed. 137.

laws of the state, is abrogated by the repeal of the law which granted these special rights.

Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the share-holders of such a corporation, to their interest in its property, are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights.

And while we are conscious that no definition, at once comprehensive and satisfactory, can be here laid down of what those rights and powers are that remain to the stock-holders and the creditors of such a corporation after the Act of repeal, we are of opinion that the foregoing observations are sufficient for the case before us.

A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power.

As early as 1806, in the case of Wales v. Stetson, 2 Mass. 143, the Supreme Court of that state made the declaration "that the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the Act of incorporation." In Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, decided in 1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim, under the clause of the federal Constitution against impairing the obligation of contracts, which, though received at the time with some dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in Fletcher v. Peck, 6 Cranch, 87, and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the state to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the state could not impair.

It became obvious at once that many Acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the states and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed. It was, no doubt, with a view to suggest a method by which the state legislatures could retain in a large measure this important power, without violating the provision of the federal Constitution, that Mr. Justice Story, in his concurring opinion in the Dartmouth College Case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observations we have already quoted from the case of Wales v. Stetson, 2 Mass. 143. It would seem that the states were not slow to avail themselves of this suggestion. * * *

This history of the reservation clause in Acts of incorporation supports our proposition, that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal.

This view is sustained by the decisions of this court and of other courts on the same question. Pennsylvania College Cases, supra; Tomlinson v. Jessup, 15 Wall. 454; Railroad Company v. Maine, 96 U. S. 499; Sinking Fund Cases, 99 Id. 700; Railroad Company v. Georgia, 98 Id. 359; McLaren v. Pennington, supra; Erie & N. E. Railroad v. Casey, supra; Miners' Bank v. United States, 1 Greene (Iowa), 553; 2 Kent, Com. 306, 307.

It results from this view of the subject that whatever right remained in the Marginal Company to its rolling-stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets, or any of the streets, of Boston. It no longer had the right to cumber these streets with a railroad track which it could not use, for these belonged by law to no person of right, and were vested in defendants only by virtue of the repealed charter.

It was, therefore, in the power of the Massachusetts Legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal Company. Whether this action was oppressive or unjust in view of the public good, or whether the legislature was governed by sufficient reason in thus repealing the charter of one company and in chartering another at the same time to perform as part of its functions the duties required of the first, is not, as we have seen, a judicial question in this case. * * *

Decree affirmed.[14]

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[14] Superior Water Light &c. Co. v. Superior (1923) 263 U. S. 125, 68 L. ed. 204: A corporation was chartered by the state in 1866, the state reserving a

BEER CO. v. MASSACHUSETTS.

1877. Supreme Court of the United States. 97 U. S. 25.

[The Boston Beer Company was chartered by the legislature of Massachusetts in 1828. An act of 1809 reserved a power to repeal any act or part thereof establishing any corporation. In 1869 the state passed a general law prohibiting the sale of intoxicating liquor. The state Supreme Court sustained a judgment against this company in a proceeding by the state to forfeit liquor held by the company for sale in violation of the prohibition law, and this writ of error was taken.]

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right to alter or repeal the charter. In 1887 a city granted the corporation a franchise for 30 years to supply the inhabitants with water, contracting to renew for another 30 years or to buy the plant by a specified mode of appraisal. In 1911 the legislature declared all such franchises "indeterminate permits." After 1917 the company sued the city for specific performance of its promise to renew the franchise or buy the plant. The state supreme court construed "indeterminate permit" in the act of 1911 to mean indeterminate as to time, not limited to 30 years or any other period; and held that thus altered the franchise did not expire in 1917 and hence no duty on the part of the city to renew or buy the plant could accrue. The Supreme Court of the United States reversed. It held that the state's reservation of a power to alter or repeal the charter did not include a power to change the contract made between the city and the company, without the latter's consent.

Similarly in People v. O'Brien (1888) 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. 684, where the case was: A corporation was created to endure 1,000 years under a state enabling act. It bought from the City of New York a franchise to build and operate a street railway in the streets of the city, the city having under the constitution of the state the exclusive power to give such a franchise. Under a power reserved the legislature repealed the charter, and undertook to transfer the railway to others. It was held that while the corporation was dissolved by the repeal, there was neither in the reservation nor in the contract any provision that upon dissolution of the corporation its property would pass to the state; that by the grant from the city the company had acquired rights in perpetuity to use the streets of the city, that this franchise was a property right which survived the repeal and was an asset that could be sold, the proceeds to go to the creditors and shareholders of the dissolved corporation.

"The reserve power stops short of the power to divest vested property rights, and is embodied in the state constitution for the purpose of enabling the state to retain control over corporations, and must be construed in connection with the other provisions of the constitution to the effect that private property shall not be taken for public use without compensation. It follows, therefore, 'that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.' Comm. v. Essex Co., 13 Gray (Mass.) 239." Northern Pac. R. Co. v. Railroad Commission (1909) 140 Wis. 145, 157-158, 121 N. W. 919.

"This court in Detroit United Railway v. Detroit, 229 U. S. 39, * * * held that where a street railway company, operating in the streets of the city under a franchise granted for a definite period, has enjoyed the full term of the grant, the municipality may, upon failure of renewal of the grant, require the company within a reasonable time to remove its tracks and other property from the streets, without impairing any contractual obligations protected by the federal Constitution or depriving the street railway company of its property without due process of law. We see no occasion to depart from the principles announced in that case." Detroit United R. Co. v. Detroit (1921) 255 U. S. 171, 174, 65 L. ed. 570.

Mr. Justice Bradley delivered the opinion of the court. * * *

But it is contended by the company that the repeal of the act of 1809 by the act of 1829 was a revocation or surrender of this reserved power.

We cannot so regard it. The charter of the company adopted the provisions of the act of 1809, as a portion of itself; and those provisions remained a part of the charter, notwithstanding the subsequent repeal of the act. * * *

If this view is correct, the legislature of Massachusetts had reserved complete power to pass any law it saw fit, which might affect the powers of the plaintiff in error.

But there is another question in the case, which, as it seems to us, is equally decisive.

The plaintiff in error was incorporated "for the purpose of manufacturing malt liquors in all their varieties," it is true; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interest of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state. * * *

The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power to confer any such rights. Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, Salus populi suprema lex; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. Boyd v. Alabama, 94 U. S. 645.[15] * * *

Judgment affirmed.

STONE v. MISSISSIPPI.

1879. Supreme Court of the United States. 101 U. S. 814.

[Writ of error to the Supreme Court of Mississippi which had affirmed a judgment of a lower state court ousting Stone and others from a lottery charter granted by the state legislature in 1867, the decision being based upon provisions in a new state constitution adopted in 1879 and statutes of 1870, forbidding the operation of lotteries.]

Mr. Chief Justice Waite delivered the opinion of the court. * * *

There can be no dispute but that under this form of words the Legislature of the State chartered a lottery company, having all the powers incident to such a corporation, for twenty-five years, and that in consideration thereof the company paid into the State treasury $5,000 for the use of a university, and agreed to pay, and until the commencement of this suit did pay, an annual tax of $1,000 and 'one-half of one per cent on the amount of receipts derived from the sale of certificates or tickets.' If the legislature that granted this charter had the power to bind the people of the State and all succeeding legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object, although there was an evident purpose to conceal the vice of the transaction by the phrases that were used. Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the State and the people of the State in that way. * * *

The question is therefore directly presented, whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require.

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[15] "We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals."—Field, J., in Boyd v. Alabama (1877) 94 U. S. 645, 650, 24 L. ed. 302 (dictum).

Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. Beer Company v. Massachusetts, 97 U. S. 25.

In Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, it was argued that the contract clause of the Constitution, if given the effect contended for in respect to corporate franchises, "would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for the purpose of internal government, and which, to subserve those purposes, ought to vary with varying circumstances" (p. 628); but Mr. Chief Justice Marshall, when he announced the opinion of the court, was careful to say (p. 629), "that the framers of the Constitution did not intend to restrain States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed." The present case, we think, comes within this limitation. We have held, not, however, without strong opposition at times, that this clause protected a corporation in its charter exemptions from taxation. While taxation is in general necessary for the support of government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.

But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances." They may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality.

The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptation of the term, mala in se, but, as we have just seen, may properly be made mala prohibita. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, 'by the casting of lots, or by lot, chance, or otherwise,' might be 'awarded' to them from the accumulations of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal.

On the whole, we find no error in the record.

Judgment affirmed.

BUTCHERS' UNION SLAUGHTER-HOUSE CO. v. CRESCENT CITY LIVE STOCK LANDING CO. (1883) 111 U. S. 746, 749-751, 28 L. ed. 585, sustaining a provision of the constitution of Louisiana of 1879 and ordinances of the city of New Orleans of 1881, which threw open the slaughter-house business in New Orleans to general competition, thereby abolishing the monopoly features of the charter of the Crescent City Company granted by the state in 1869. MR. JUSTICE MILLER for the court:

"No one can examine the provisions of the Act of 1869 with the knowledge that they were accepted by the Crescent City Company, and so far acted on that a very large amount of money was expended in a vast slaughter-house, and an equally extensive stock-yard and landing-place, and hesitate to pronounce that in form they have all the elements of a contract on sufficient consideration.

"It admits of as little doubt that the ordinance of the city of New Orleans, under the new constitution, impaired the supposed obligation imposed by those provisions on the state, by taking away the exclusive right of the company granted to it for twenty-five years, which was to the company the most valuable thing supposed to be secured to it by the statutory contract.

"We do not think it necessary to spend time in demonstrating either of these propositions. We do not believe they will be controverted.

"The appellant, however, insists that, so far as the Act of 1869 partakes of the nature of an irrepealable contract, the legislature exceeded its authority, and it had no power to tie the hands of the legislature in the future from legislating on that subject without being bound by the terms of the statute then enacted. This proposition presents the real point in the case.

"Let us see clearly what it is.

"It does not deny the power of that legislature to create a corporation, with power to do the business of landing live-stock and providing a place for slaughtering them in the city. It does not deny the power to locate the place where this shall be done exclusively. It does not deny even the power to give an exclusive right, for the time being, to particular persons or to a corporation to provide this stock-landing and to establish this slaughter-house.

"But it does deny the power of that legislature to continue this right so that no future legislature nor even the same body can repeal or modify it, or grant similar privileges to others. It concedes that such a law, so long as it remains on the statute-book as the latest expression of the legislative will, is a valid law, and must be obeyed, which is all that was decided by this court in the Slaughter-House Cases. But it asserts the right of the legislature to repeal such a statute, or to make a new one inconsistent with it, whenever, in the wisdom of such legislature, it is for the good of the public it should be done.

"Nor does this proposition contravene the established principle that the legislature of a state may make contracts on many subjects which will bind it, and will bind succeeding legislatures for the time the contract has to run, so that its provisions can neither be repealed nor its obligation impaired. The examples are numerous where this has been done and the contract upheld.

"The denial of this power, in the present instance, rests upon the ground that the power of the legislature intended to be suspended is one so indispensable to the public welfare that it cannot be bargained away by contract. It is that well-known but undefined power called the police power. We have not found a better definition of it for our present purpose than the extract from Kent's Commentaries in the earlier part of this opinion. 'The power to regulate unwholesome trades, slaughter-houses, operations offensive to the senses,' there mentioned, points unmistakably to the powers exercised by the act of 1869, and the ordinances of the city under the constitution of

1879. While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime.

"It cannot be permitted that, when the constitution of a state, the fundamental law of the land, has imposed upon its legislature the duty of guarding, by suitable laws, the health of its citizens, especially in crowded cities, and the protection of their person and property by suppressing and preventing crime, that the power which enables it to perform this duty can be sold, bargained away, under any circumstances, as if it were a mere privilege which the legislator could dispose of at his pleasure.

"This principle has been asserted and repeated in this court in the last few years in no ambiguous terms."

[Here the court referred to Beer Co. v. Massachusetts, ante, p. 1177; Stone v. Mississippi, ante, p. 1179; and Fertilizing Co. v. Hyde Park, 97 U. S. 659.]

NEW ORLEANS GAS-LIGHT CO. v. LOUISIANA LIGHT &c. MFG. CO.

1885. Supreme Court of the United States. 115 U. S. 650.

[In 1875 the plaintiff succeeded to the ownership of a sole and exclusive right for fifty years, granted by the legislature, to lay pipes in the streets of New Orleans and supply the inhabitants with gas. The state constitution of 1879 purported to annul the monopolistic feature of this grant. The defendant was incorporated in 1881 under a state statute, and a franchise to supply the inhabitants with gas was sold to it by the city of New Orleans. The present appeal arose from a suit to enjoin defendant from exercising this franchise.]

MR. JUSTICE HARLAN delivered the opinion of the court. * * * It is true, as suggested in argument, that the manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character. Under proper management, the business contributes very materially to the public convenience, while, in the absence of efficient supervision, it may disturb the comfort and endanger the health and property of the community. It also holds important relations to the public through the facilities furnished, by the lighting of streets with gas, for the detection and prevention of crime. * * *

It is earnestly insisted that, as the supplying of New Orleans and its inhabitants with gas has relation to the public comfort, and, in some sense, to the public health and the public safety, and, for that reason, is an object to which the police power extends, it was not competent for one legislature to limit or restrict the power of a subsequent legislature in respect to those subjects. It is, consequently, claimed that the State may at pleasure recall the grant of exclusive privileges to the plaintiff; and that no agreement by her, upon whatever consideration, in reference to a matter connected in any degree with the public comfort, the public health, or the public safety, will constitute a contract the obligation of which is protected against impairment by the national Constitution. And this position is supposed by counsel to be justified by recent adjudications of this court in which the nature and scope of the police power have been considered. * * * [Here reference is made to some of the early, but then recent, cases on the police power.] Definitions of the police power must, however, be taken subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land. * * *

That the police power, according to its largest definition, is restricted in its exercise by the national Constitution, is further shown by those cases in which grants of exclusive privileges respecting public highways and bridges over navigable streams have been sustained as contracts the obligations of which are fully protected against impairment by state enactments. * * * [Bridge Prop'rs v. Hoboken Co., 1 Wall. 116, and The Binghamton Bridge, 3 Wall. 51, are here discussed.][16]

Numerous other cases could be cited as establishing the doctrine that the state may by contract restrict the exercise of some of its most important powers. We particularly refer to those in which it is held that an exemption from taxation, for a valuable consideration at the time advanced, or for services to be thereafter performed, constitutes a contract within the meaning of the Constitution. * * *

If the state can, by contract, restrict the exercise of her power to construct and maintain highways, bridges, and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation, by granting exemption from taxation to particular individuals and corporations, it is difficult to perceive upon what ground we can deny her authority,—when not forbidden by her own organic law,—in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the state might undertake to perform either herself or by subordinate municipal agencies.

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[16] Both of the cited cases sustained as against subsequent legislative impairment state grants of exclusive franchises to maintain toll bridges within specified distances on rivers, one a franchise for 99 years, the other a franchise in perpetuity.

The former adjudications of this court, upon which counsel mainly rely, do not declare any different doctrine, or justify the conclusion for which the defendant contends. * * *

The principle upon which the decisions in Beer Co. v. Massachusetts, Fertilizing Co. v. Hyde Park, Stone v. Mississippi, and Butchers' Union Co. v. Crescent City Live-Stock Landing Co., rest, is that one legislature cannot so limit the discretion of its sucessors that they may not enact such laws as are necessary to protect the public health, or the public morals. That principle, it may be observed, was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of those cases that statutory authority given by the state to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others.

The present case involves no such considerations. We have seen the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the state may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization, for the promotion of the public convenience and the public safety. * * *

With reference to the contract in this case, it may be said that it is not, in any legal sense, to the prejudice of the public health or the public safety. It is none the less a contract because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public; for the grant of exclusive privileges to the plaintiff does not restrict the power of the state, or of the municipal government of New Orleans acting under authority for that purpose, to establish and enforce regulations which are not inconsistent with the essential rights granted by plaintiff's charter, which may be necessary for the protection of the public against injury, whether arising from the want of due care in the conduct of its business, or from an improper use of the streets in laying gas pipes, or from the failure of the grantee to furnish gas of the required quality and amount. The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with the state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations. * * *

If, in the judgment of the state, the public interests will be best subserved by an abandonment of the policy of granting exclusive privileges to corporations, other than railroad companies, in consideration of services to be performed by them for the public, the way is open for the accomplishment of that result, with respect to corporations whose contracts with the state are unaffected by that change in her organic law. The rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation to the company, under the state's power of eminent domain. * * * In that way the plighted faith of the public will be kept with those who have made large investments upon the assurance by the state that the contract with them will be performed. * * *

The complainant was entitled to a decree perpetually restraining the defendants. * * *[17]

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[17] So a monopoly granted to a private corporation to lay water pipes in the public streets and to supply the inhabitants of the city of New Orleans with water was held to be protected against a later grant of an infringing right, on the reasoning of the above opinion. New Orleans Water Works Co. v. Rivers (1885) 115 U. S. 674, 29 L. ed. 525.

Grand Trunk Western R. Co. v. South Bend (1913) 227 U. S. 544, 57 L. ed. 633, 44 L. R. A. (N. S.) 405: In 1868 the city granted a right to a steam railroad company to lay a double track on a broad public street. In 1881 the company laid a single track for the whole of the distance, and double track for half of it. In 1901 the company was proceeding to lay the remainder of the double track. The city attempted to prevent this by repealing so much of the grant as authorized the building of this additional track. Held, that the franchise had been accepted as an entirety and could not be repealed as to this part, no power to do so having been reserved. The court, by Lamar, J., said: "While the franchise to lay and use a double track was a contract which could not be impaired, yet, as the police power remained efficient and operative, * * * the city could * * * legislate as to crossings, grades, character of rails, rate of speed, giving of signals, and the details of operating track and train, regulating the use of the franchise, and preserving the concurrent rights of the public and the company. And, as in the viaduct cases, it might require these tracks to be lowered or elevated (Chicago, B. & Q. R. R. v. Nebraska, 170 U. S. 57), or—the franchise, and not the particular location, being the essence of the contract—the city, under the power to regulate, might compel the company to remove the tracks from the center to the side, or from the side to the center,

TEXAS & NEW ORLEANS R. CO. v. MILLER.

1911. Supreme Court of the United States. 221 U. S. 408.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

In that view of it which must be accepted here, this case may be stated as follows: It was an action to recover damages for the death of a locomotive engineer, resulting from the derailment of an engine which he was driving while in the service of two railroad companies which were jointly operating a line of railroad through the States of Louisiana and Texas. The derailment and ensuing

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of the street. New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453 * * *.

"These, however, are examples of the persistence of the power to regulate, and do not sustain the validity of the repealing ordinance of 1901, since it is not regulative of the use, but destructive of the franchise. In every case like this, involving an inquiry as to whether a law is valid, as an exertion of the police power, or void, as impairing the obligation of a contract, the determination must depend on the nature of the contract and the right of government to make it. The difference between the two classes of cases is that which results from the want of authority to barter away the police power, whose continued existence is essential to the well-being of society, and the undoubted right of government to contract as to some matters, and the want of power, when such contract is made, to destroy or impair its obligation. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650."

Cf. Illinois Central R. Co. v. Illinois (1892) 146 U. S. 387, 36 L. ed. 1018, holding repealable a grant made by the legislature to the railroad company of all the state's rights to the submerged lands in the harbor at Chicago to a distance of one mile from the shore, though no right to repeal had been expressly reserved. The court said:

"The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable water of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. * * *

"We cannot, it is true, cite any authority, where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the state, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated, except in those instances mentioned, of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining."

death occurred in Louisiana, June 1, 1905, and proximately were caused by the negligence of the two companies. One of the companies was incorporated by a Louisiana statute of March 30, 1878, which contained a provision exempting the company from liability for the death of any person in its service, even if caused by its negligence. Laws of Louisiana, 1878, No. 21, § 17, p. 267. Another Louisiana statute, enacted July 10, 1884, and still in force, conferred upon designated relatives a right to recover the damages sustained by them through the death of a person negligently caused by another, * * * . The relatives so designated commenced in the District Court of Harris County, Texas, an action to recover from the two railroad companies the damages sustained by the engineer's death. * * * At the trial the statutes of 1878 and 1884 were both duly proved, and upon all the evidence the finding and judgment were for the plaintiffs. The defendants appealed to the Court of Civil Appeals of the State, where the judgment was affirmed (128 S. W. Rep. 1165), and then sued out this writ of error. In the trial court, and again in the Court of Civil Appeals, it was held (1) that the exempting provision in the statute of 1878 was repealed by the statute of 1884, * * * . In the assignments of error here these rulings are challenged upon the theory, which also was advanced in the state courts, that the exempting provision in the statute of 1878 was a contract and could not be repealed consistently with the contract clause of the Federal Constitution, * * * .

The doctrine that a corporate charter is a contract which the Constitution of the United States protects against impairment by subsequent state legislation is ever limited in the area of its operation by the equally well settled principle that a legislature can neither bargain away the police power nor in anywise withdraw from its successors the power to take appropriate measures to guard the safety, health and morals of all who may be within their jurisdiction. Beer Co. v. Massachusetts, 97 U. S. 25; Fertilizing Co. v. Hyde Park, Id. 659; Stone v. Mississippi, 101 U. S. 814; Douglas v. Kentucky, 168 U. S. 488. In the first of these cases it was said:

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

The fact that the provision in question was embodied in the statute incorporating the Louisiana company does not suffice to show that it became a part of the charter contract, for obviously nothing became a part of that contract that was not within the contracting power of the legislature. Such of the provisions of the statute as were within that power became both a law and a contract and were within the protection of the contract clause of the Constitution, but such of them as were not within that power became a law only and were as much subject to amendment or repeal as if they had been embodied in a separate enactment. As was said by this court in Stone v. Mississippi, supra, "It is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain."

The subject to which the provision in question relates is the civil liability of a railroad company for the death of its employees resulting from its negligence. That is a matter of public concern, and not of mere private right. It is closely connected with the safety of the employees and undoubtedly belongs to that class of subjects over which the legislature possesses a regulatory but not a contracting power. Manifestly, therefore, the charter contract did not embrace that provision and the contract clause of the Constitution did not prevent its repeal. * * *

Affirmed.

ST. CLOUD PUBLIC SERVICE CO. v. ST. CLOUD.

1924. Supreme Court of the United States. 265 U. S. 352.

MR. JUSTICE SANFORD delivered the opinion of the court.

This suit was brought by the Public Service Company to enjoin the city from interfering with a proposed increase in the rates charged for fuel gas.

The allegations of the bill, shortly stated, are: The company is a public service corporation organized under the laws of Minnesota, and the city, a municipal corporation of that state. In 1905 the city, by ordinance, granted the company's predecessor, its successors and assigns, the right to construct and maintain for thirty years works for the manufacture, distribution and sale of gas to the city and its inhabitants, and authorized it to sell fuel gas at a rate not exceeding $1.35 per thousand cubic feet. The grantee's rights were assigned to the company in 1915, and since then it has been engaged in manufacturing and selling fuel gas under the ordinance. Since 1917 the company has sold fuel gas at the maximum rate of $1.35 prescribed by the ordinance. This rate has not yielded, and cannot yield any return on the value of the property devoted to the gas business, has resulted in a constant loss and steadily increasing operating deficit, is inadequate and confiscatory, and deprives the company of its property without due process of law in violation of the Fourteenth Amendment to the Constitution. The City Commission has refused to entertain a petition to prescribe a rate yielding a reasonable return on the invested capital. To secure a fair and reasonable return, a rate of $3.39 per thousand cubic feet is necessary. The company intends to increase its rate to that price. The city, however, has threatened to interfere with the collection of the proposed increased rate, and, unless restrained, will attempt to force the company to continue to sell gas at the prescribed maximum rate, resulting in controversies and multiplicity of suits, and inflicting irreparable loss and injury upon the company.

The bill prays that the court adjudge that the maximum rate prescribed by the ordinance is confiscatory and violates the rights of the company under the Fourteenth Amendment; and that the city be enjoined from interfering with the company in raising the rate to $3.39, or attempting in any manner to force it to continue to sell gas at the ordinance rate.

A motion by the company for a preliminary injunction was denied. Thereafter, on motion of the city, the court dismissed the bill for want of equity, on the ground that there was a "valid and subsisting contract between the city and the plaintiff company governing the matter of a maximum rate for fuel gas." The company, by reason of the constitutional question involved, has appealed directly to this court. Jud. Code, § 238; Columbus Ry. Co. v. Columbus, 249 U. S. 399.

It has been long settled that a state may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time, and that the effect of such a contract is to suspend, during its life, the governmental power of fixing and regulating the rates. Home Telephone Co. v. Los Angeles, 211 U. S. 265, 273, and cases there cited. And where a public service corporation and the municipality have power to contract as to rates, and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are confiscatory is immaterial. Southern Iowa Elec. Co. v. Chariton, 255 U. S. 539, 542, and cases there cited; Paducah v. Paducah Ry. Co., 261 U. S. 267, 273; Georgia Ry. Co. v. Decatur, 262 U. S. 432, 438. The existence of a binding contract as to the maximum rate for fuel gas is therefore the controlling issue upon which this controversy depends. Its solution turns upon the questions whether the city had power to contract on this subject by the ordinance of 1905; and, if so, whether the ordinance constituted such a contract.

1. Was the city authorized to enter into a contract as to the rate to be charged for fuel gas? Such authority must clearly and unmistakably appear. Home Telephone Co. v. Los Angeles, supra, p. 273; Paducah v. Paducah Ry. Co., supra, p. 272. Whether it existed depends upon the laws of Minnesota in force at the time. The consolidated charter of the city (Special Laws of 1889, c. 6, p. 131) provided as follows: The city "shall be capable of contracting and being contracted with; and shall have all the powers possessed by municipal corporations at common law." C. 1, § 1. "The common council in addition to all powers herein * * * specifically mentioned, shall have full power and authority to make * * * all such ordinances * * * for the general welfare of the city and the inhabitants thereof, as they shall deem expedient." C. 4, § 4. "The common council shall have full power by ordinance: * * * To provide for and control the erection and operation of gas works, electric lights, or other works or material for lighting the streets and alleys, public grounds, and buildings of said city, and supplying light and power to said city and its inhabitants; and to grant the right to erect, maintain and operate such works, with all rights incident or pertaining thereto, to one or more private companies or corporations * * *; to provide for and control the erection and operation of works for heating the public buildings of said city by steam, gas, or other means, and supplying light, heat, and power to the inhabitants of said city; to grant the right to erect such works and all incident rights to one or more private companies or corporations, and to control and regulate the erection and operation of such works * * *; provided, * * * that the common council shall have authority to regulate and prescribe the fees and rates and charges of any and all companies hereinbefore mentioned." C. 4, § 5, cl. 10.

In construing and giving effect to these provisions of the charter we look to the decisions of the Supreme Court of the State. [Here are summarized Reed v. City of Anoka, 85 Minn. 294 and City of St. Cloud v. Water Co., 88 Minn. 329.]

In the light of these decisions of the Supreme Court of the State of Minnesota we think it is clear that the city had authority, in 1905, under its charter and the laws of the state, to enter, by ordinance, into a contract, in its proprietary capacity and for the benefit of its inhabitants as well as itself, providing for the construction and operation of gas works for a period of thirty years and fixing the rates to be charged for gas sold to it and its inhabitants. This power existed, under the doctrine of the Reed Case, under the provisions of the charter giving the council the power to provide for the control and erection of gas works for the purpose of supplying the city and its inhabitants with heat and light. And we do not think that this contractual power was limited by the proviso that the council should have the right to "regulate and prescribe" the rates and charges of the companies to which it might grant the right of constructing such works. It is true that, standing alone, this proviso, in the absence of any state decision to the contrary, would, under the construction given similar language in Home Telephone Co. v. Los Angeles, supra, p. 274, be regarded as conferring authority merely to exercise the governmental power of regulating rates, and not authority to enter into a contract. In that case, however, it was pointed out that there was no other provision of the charter authorizing the city to contract as to rates. And in the present case, as the other provisions of the charter gave the city authority so to contract, we must regard the proviso as merely an alternative provision; that is to say, we think that the city might either contract as to the rates, as an incident to its power of granting the right to construct and operate the public utility, or, if it did not exercise this power to contract, might thereafter "regulate and prescribe" the rates in the exercise of the governmental authority conferred by the proviso. One power, however, is not destructive of the other. And where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract, its power to regulate the rates during the period of the contract is thereby suspended, and the contract is binding. Paducah v. Paducah Ry. Co., supra, pp. 272, 273. * * *

2. Did the ordinance constitute a contract fixing the maximum rate for gas? The intention to so contract must clearly and unmistakably appear. Paducah v. Paducah Ry. Co., supra, p. 272. [Here are stated the "essential provisions" of the ordinance.]

We think that the language of the ordinance, viewed in its entirety, clearly shows that it was the intention of the parties to enter into a contract for the construction of gas works and the manufacture and supply of gas to the city and its inhabitants during the thirty-year period, at the maximum rate prescribed. * * * The provision that the grantee is "authorized" to sell fuel gas at a rate not exceeding $1.35, clearly implies that it shall not sell such gas at a higher rate. This is recognized by the bill itself. In this respect the language has the same effect as that involved in Vicksburg v. Waterworks Co., 206 U. S. 496, 508, 516. There the ordinance granted the right to make such charges for the use of water as the grantees might determine, provided that they should not exceed fifty cents for each thousand gallons. This was held to constitute a binding contract fixing the maxmium rates for water supplied to private consumers for the period of thirty years as set forth in the ordinance. * * *

3. The general provision of the Laws of 1919, c. 469, p. 603, authorizing cities of the class of the appellee "through its city council

or like governing body, by ordinance, to prescribe from time to time the rates which any public service corporation supplying gas or electric current for lighting or power purposes within said city may charge for such service", has no application to the present case. Even if, in any aspect, it could otherwise be applicable, it is excluded from operating here by the specific proviso that it shall not be "construed to impair the obligation of any contract or franchise provision now existing between any such city and any such public service corporation." The city, clearly, could not avail itself of this statute to reduce the gas rates below the maximum prescribed in the contract of 1905; and the company, conversely, cannot under it obtain higher rates. The contract is binding on both parties alike.

The decree of the District Court is

Affirmed.[18]

MR. JUSTICE BUTLER took no part in the hearing or decision of this case.

PENNSYLVANIA HOSPITAL v. PHILADELPHIA.

1917. Supreme Court of the United States. 245 U. S. 20.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Whether contract obligations were impaired in violation of rights of the plaintiff in error protected by the Constitution of the United States as the result of the decision below, is the sole question we are called upon to decide on this record. It thus arises:

The plaintiff in error, a charitable institution, was organized under the laws of Pennsylvania and in 1841 it established on a tract of land in the City of Philadelphia a hospital for the care and cure of the insane. Solicitous lest the opening of streets, lanes and alleys through its grounds might injuriously affect the performance of its work, in 1854 a committee of the managers of the hospital memorialized the legislature on that subject and this resulted in the passage of a law specially forbidding the opening of any street or alley through the grounds in question without the consent of the hospital authorities. The act was conditioned upon the hospital making certain payments and furnishing ground for a designated public street or streets and these terms were accepted by the hospital and complied with. In 1913 the city, within the authority conferred upon it by the state, took the necessary preliminary steps to acquire by eminent domain land for the opening of a street through the hospital grounds and to prevent the accomplishment of this result the present suit was begun by the hospital to protect its right of property and its alleged contract under the Act of 1854. As the result of proceedings in the state court the purpose of the city was so shaped as to cause it to seek to take under the right of eminent domain not only the land desired for the street, but the rights under the contract of 1854, and there was a judgment against the hospital and in favor of the city in the trial court which was affirmed by the Supreme Court by the judgment which is under review on this writ of error. 254 Pa. St. 392.

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[18] In San Antonio v. San Antonio Public Service Co. (1921) 255 U. S. 547, 65 L. ed. 777, a state constitutional provision, "that no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof," was held, to prevent a municipality, acting under the authority of the legislature, from entering into a binding contract as to public service rates. See also Southern Iowa Elec. Co. v. Chariton (1921) 255 U. S. 539, 65 L. ed. 764, where it was held that the utility company was entitled to relief from confiscatory rates which it had apparently contracted to abide by, because the city had not authority to make such a contract.

Even though a city has legislative authority to make a rate contract with a utility company and does so, the legislature has power, without the city's consent, to release or discharge the company from the obligation of the contract, with the consent of the company. In the absence of municipal automony conferred by the state constitution, the city is regarded as subject to the will of the legislature. Consequently the legislature may authorize a rate regulating commission to increase rates fixed by city rate contracts. See Pawhuska v. Pawhuska Oil & Gas Co. (1919) 250 U. S. 394, 63 L. ed. 1054; Southern Utilities Co. v. Palatka (1925) 268 U. S. 232, 69 L. ed. 930; Charles K. Burdick, Cases on the Law of Public Service (1924) pp. 289-297 and notes; also by the same author, Regulating Franchise Rates, (1920) 29 Yale L. Jour. 589; cases collected in (1924) 29 A. L. R. 356 and notes there cited.

The conclusions of the court were sustained in a per curiam opinion pointing out that there was no question involved of impairing the contract contained in the Act of 1854 since the express purpose of the city was to exert the power of eminent domain not only as to the land proposed to be taken, but as to the contract itself. The right to do both was upheld on the ground that the power of eminent domain was so inherently governmental in character and so essential for the public welfare that it was not susceptible of being abridged by agreement and therefore the action of the city in exerting that power was not repugnant either to the state constitution or to the contract clause of the Constitution of the United States.

It is apparent that the fundamental question, therefore, is, did the Constitution of the United States prevent the exertion of the right of eminent domain to provide for the street in question because of the binding effect of the contract previously made excluding the right to open the street through the land without the consent of the hospital. We say this is the question since if the possibility were to be conceded that power existed to restrain by contract the further exercise by government of its right to exert eminent domain, it would be unthinkable that the existence of such right of contract could be rendered unavailing by directing proceedings in eminent domain against the contract, for this would be a mere evasion of the assumed power. On the other hand, if there can be no right to restrain by contract the power of eminent domain, it must also of necessity follow that any contract by which it was sought to accomplish that result would be inefficacious for want of power. And these considerations bring us to weigh and decide the real and ultimate question, that is, the right to take the property by eminent domain, which embraces within itself, as the part is contained in the whole, any supposed right of contract limiting or restraining that authority. We are of opinion that the conclusions of the court below in so far as they dealt with the contract clause of the Constitution of the United States were clearly not repugnant to such clause. There can be now, in view of the many decisions of this court on the subject, no room for challenging the general proposition that the states cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties. Beer Company v. Massachusetts, 97 U. S. 25; Stone v. Mississippi, 101 U. S. 814; Butchers' Union Co. v. Crescent City Co., 111 U. S. 746; Douglas v. Kentucky, 168 U. S. 488; Manigault v. Springs, 199 U. S. 473; Texas & New Orleans R. R. Co. v. Miller, 221 U. S. 408. And it is unnecessary to analyze the decided cases for the purpose of fixing the criteria by which it is to be determined in a given case whether a power exerted is so governmental in character as not to be subject to be restrained by the contract clause, since it is equally true that the previous decisions of this court leave no doubt that the right of government to exercise its power of eminent domain upon just compensation for a public purpose comes within this general doctrine. Charles River Bridge v. Warren Bridge, 11 Pet. 420; West River Bridge Co. v. Dix, 6 How. 507; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685; Offield v. New York, New Haven & Hartford R. R. Co., 203 U. S. 372; Cincinnati v. Louisville & Nashville R. R. Co., 223 U. S. 390. * * *

Affirmed.[19]

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[19] "The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropriated as an existing enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated. All of this has been so long settled as to need only the citation of some of the many cases. Charles River Bridge v. Warren Bridge, 11 Pet. 420; The West River Bridge Co. v. Dix, 6 How. 507; N. O. Gas Co. v. La. Light Co., 115 U. S. 650; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685; Offield v. Railroad Co., 203 U. S. 372." Cincinnati v. Louisville & N. R. Co. (1912) 223 U. S. 390, 400, 56 L. ed. 481.

MANIGAULT v. SPRINGS ET AL.

1905. Supreme Court of the United States. 199 U. S. 473.

[Plaintiff and defendants were adjoining riparian owners on the Santee River, at the mouth of Kinloch Creek. The creek was used as a highway by the riparian owners. In 1898 the defendants erected a dam across the creek. That same year the defendants removed the dam in pursuance of a contract between the plaintiff and the defendants whereby the latter agreed not to obstruct the channel of the creek. In 1903 the state legislature passed an act which recited the necessity of draining the low lands on the Santee River, whereby their taxable value would be greatly enhanced, and gave defendants by name authority to erect and maintain a dam across Kinloch Creek. Plaintiff sued in a circuit court of the United States to restrain the defendants from erecting the dam or otherwise obstructing the creek. From a dismissal of his bill, he brought this appeal.]

MR. JUSTICE BROWN delivered the opinion of the court. * * *

The main argument was addressed to the question whether the contract of August, 1898, providing for the removal of the obstruction on December 31 and the free ingress and egress through the creek thereafter, was impaired by the act of the general assembly of 1903, permitting the defendants by name to construct and maintain the dam in question.

It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic; in other words, that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good.

While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary,—a discretion which courts ordinarily will not interfere with. The leading case upon this point is that of Charles River Bridge v. Warren Bridge, 11 Pet. 420, in which a franchise to maintain a ferry between Cambridge and Boston, under which a bridge was subsequently erected, was held to be subject to the power of the legislature to establish a parallel bridge between the same points. In Stone v. Mississippi, 101 U. S. 814, a charter to a lottery company for twenty-five years was held to be subject to the power of the state to abolish lotteries altogether. Similar cases announcing the same principle are Boyd v. Alabama, 94 U. S. 645; Beer Company v. Massachusetts, 97 U. S. 25; Butchers' Union Co. v. Crescent City Co., 111 U. S. 746; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 672; Mugler v. Kansas, 123 U. S. 623, 665; Chicago &c. R. R. Co. v. Chicago, 166 U. S. 226.[20]

It only remains to consider, in connection with this branch of the case, whether the act of the General Assembly of 1903 was a proper exercise of the police power of the state. Of this we have no doubt. Although it was not an exercise of that power in its ordinarily accepted sense of protecting the health, lives and morals of the community, it is defensible in its broader meaning of providing for the general welfare of the people, by the reclamation of swampy, overflowed and infertile lands, and the erection of dams, levees and dikes for that purpose. We have often held that private interests are subservient to that right, except where property is taken for which compensation must be paid, and must give way to any general scheme for the reclamation or improvement of said lands. * * *

Judgment affirmed.

UNION DRY GOODS CO. v. GEORGIA PUBLIC SERVICE CORP.

1919. Supreme Court of the United States. 248 U. S. 372.

Mr. Justice Clarke delivered the opinion of the court.

The Georgia Public Service Corporation and The Union Dry

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[20] In Hall's Cases on Constitutional Law occurs the following discriminating note upon these citations:

"It will be noticed that the court here does not distinguish two very different classes of cases: One, where contracts that may affect the public interest are made between individuals or corporations; and the other, where the state itself, or an authorized subdivision of it, has contracted about such a matter. Compare the results in Buffalo East Side R. R. v. Buffalo St. R. R., 111 N. Y. 132, 19 N. E. 63, 2 L. R. A. 284 (1888) (contract between companies as to rates), with those in Detroit v. Det., etc., Ry., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. ed. 592 (1902) (similar contract between city and company). See, also, Bedford v. Eastern Bldg. Assn, 181 U. S. 227, 21 Sup Ct. 597, 45 L. ed. 834 (1901); Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611, 615, 23 Sup. Ct. 206, 47 L. ed. 328 (1903). The doctrine of the principal case is perhaps the true ground upon which to rest the retroactive abolition of imprisonment for debt and the exemption from execution of small amounts of personal property. See Von Hoffman v. Quincy, ante, p. 805 [In the present casebook, at p. 1140, ante.]; Edwards v. Kearzey, 96 U. S. 595, 609, 24 L. ed. 793 (1877) by Clifford, J."

Goods Company, both corporations organized under Georgia law and doing business in Macon, on July 18, 1912, contracted together in writing for the term of five years, the former to supply electric light and power to the latter, which agreed to pay stipulated rates for the service.

The contract was performed for almost two years until in April, 1914, when the Dry Goods Company refused to pay a bill for service rendered during March, in which a rate higher than that of the contract was charged. The Service Corporation claimed that this rate was authorized and required by an order of the Railroad Commission of Georgia, entered after investigation and hearing.

Soon thereafter the Dry Goods Company commenced this suit to compel specific performance of its contract, which had three years yet to run; to enjoin the Service Corporation from charging the higher rate, and from executing a threat to cut it off from a supply of electricity, because of failure to pay the increased rate.

The trial court and the Supreme Court of Georgia both held against the claims of the Dry Goods Company and the case is here for review on writ of error. * * *

Thus it will be seen that the case of the plaintiff in error is narrowed to the claim that reasonable rates, fixed by a state in an appropriate exercise of its police power, are invalid for the reason that if given effect they will supersede the rates designated in the private contract between the parties to the suit, entered into prior to the making of the order by the Railroad Commission.

Except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion.

That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court. Thus in Manigault v. Springs, 199 U. S. 473, 480, it was declared that:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from properly exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected."

This on authority of many cases which are cited.

In Hudson County Water Co. v. McCarter, 209 U. S. 349, 357, it is said that:

"One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter."

In Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 482, this is quoted with approval from Knox v. Lee, 12 Wall. 457, 550, 551, viz:

"Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to defeat the legitimate government authority."

In the same report, in Chicago, Burlington & Quincy R. R. Co. v. McGuire, 219 U. S. 549, at p. 567, it is said:

"There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

In Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548, 558, the court said:

"It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

And in Rail & River Coal Co. v. Ohio Industrial Commission, 236 U. S. 338, 349, the state of the law upon the subject is thus aptly described:

"This court has so often affirmed the right of the state in the exercise of its police power to place reasonable restraints like that here involved, upon the freedom of contract that we need only refer to some of the cases in passing."

These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state, and the judgment of the Supreme Court of Georgia must be

Affirmed.[21]

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[21] The above case is annotated in (1920) 9 A. L. R. 1420, 1423. See Ortega Co. v. Triay (1922) 260 U. S. 103, 67 L. ed. 153.

"The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed the exertion of legislative power solely to that end is precluded by the contract impairment clause of the Constitution. The power does not exist per se. It is the intervention of the public interest which justifies and at the same time conditions its exercise." Sutherland, J., in Arkansas Nat. Gas Co. v. Arkansas R. Comm. (1923) 261 U. S. 379, 383, 67 L. ed. 705.

Security Sav. Bank v. California (1923) 263 U. S. 282, 285-286, 68 L. ed 301, 31 A. L. R. 391:

"It was settled in Provident Institution for Savings v. Malone, 221 U. S. 660,

Section 3.—Other Retrospective Legislation.

RANDALL v. KREIGER.

1874. Supreme Court of the United States.
23 Wall. 137.

Appeal from the Circuit Court for the District of Minnesota.

Mrs. Sarah Randall, whose husband, John Randall, had been seized in fee during their marriage of a piece of land in Minnesota, brought suit, her husband being now dead, to have dower in the land.

The case was thus:

In May, 1849, the said John Randall, being seized as above said in fee of the land, he and his wife, then, as always before and afterwards, resident in the State of New York, executed in the form proper to pass a feme covert's interest in lands in that state, a power of attorney to a person in Minnesota, by which the latter was authorized to sell and convey the land in question, as also other tracts. The power was duly recorded in Minnesota. At the time when this power was given it seemed that there was no mode prescribed by statute in Minnesota by which a non-resident feme covert could execute a power under seal to pass her interest in real estate.

In January, 1855, there being still apparently no statute in Minnesota of the sort just mentioned, the attorney, professing to act in

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that, where the procedure is appropriate, neither the due process clause, nor any right of the bank under the contract clause, is violated by a law requiring it to pay over to the state as depository savings deposits which have long remained unclaimed. Compare Cunnius v. Reading School District, 198 U. S. 458; Blinn v. Nelson, 222 U. S. 1. The contract of deposit does not give the banks a tontine right to retain the money in the event that it is not called for by the depositor. It gives the bank merely the right to use the depositor's money until called for by him or some other person duly authorized. If the deposit is turned over to the state in obedience to a valid law, the obligation of the bank to the depositor is discharged. Louisville & Nashville R. R. Co. v. Deer, 200 U. S. 176. It is no concern of the bank's whether the state receives the money merely as depositary or takes it as an escheat."

During "a social emergency caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort and even to the peace of a large part of the people of the state," a state statute is valid which changes the legal effect of existing leases by substituting for the specific amount of rent contracted for "a fair and reasonable rent" to be fixed by a court. Levy Leasing Co. v. Siegel (1922) 258 U. S. 242, 66 L. ed. 595.

Other cases sustaining state legislation which impaired the obligation of existing contracts between private persons, on the ground that they were enacted in exercise of the police power: Marcus Brown Holding Co. v. Feldman (1921) 256 U. S. 170, 198, 65 L. ed. 877; Thornton v. Duffy (1920) 254 U. S. 361, 65 L. ed. 304; Sutter Butte Canal Co. v. Railroad Comm. (1929) 279 U. S. 125, 73 L. ed. 637.

behalf of Randall and his wife, sold and conveyed with general warranty the land, in consideration of $3000, to one Kreiger. The deed to Kreiger was in conformity to the local law of Minnesota, and the sum for which he purchased the land—one apparently fair —was paid to Randall, the husband.

On the 24th of February, 1857, the legislature of Minnesota, then still a Territory of the United States, passed an act in these words:

"A husband and wife may convey by their lawful agent or attorney any estate or interest in any lands, situate in this territory; and *all* deeds of conveyance of any such lands, whether *heretofore* or hereafter made, under a joint power of attorney from the husband and wife, shall be as binding and have the same effect as if made and executed by the original parties."

In May, 1859, Randall and his wife by an instrument duly executed revoked the power of attorney made in 1849. Randall himself soon afterwards died, leaving to his wife his entire estate; the same consisting wholly of personalty, and being estimated as worth between $100,000 and $200,000. She had already received of it more than $50,000.

The value of the property now was $7000, independently of improvements put upon it after the conveyance.

The claim of the widow was resisted on several grounds; among them that any defect in her acknowledgment had been remedied by the curative act of 1857. [The Circuit Court gave judgment for the defendant and the plaintiff appealed.]

MR. JUSTICE SWAYNE delivered the opinion of the court. * * *

It is not objected that the act of 1857, as regards its application to the present case, is in conflict with the constitution of the state. We have carefully examined that instrument and have found nothing bearing upon the subject.

Nor was the act forbidden by the Constitution of the United States.

There is nothing in that instrument which prohibits the legislature of a state or territory from exercising judicial functions, nor from passing an act which divests rights vested by law, provided its effect be not to impair the obligation of a contract. Contracts are not impaired but confirmed by curative statutes. Satterlee v. Matthewson, 2 Peters, 380; Watson v. Mercer, 8 Peters, 110. * * *

Dower given by law * * * is believed to be the only kind which ever obtained in this country. During the life of the husband the right is a mere expectancy or possibility. In that condition of things, the law-making power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs the law of descent and distribution may be moulded according to the will of the legislature.

Laws upon those subjects in such cases take effect at once, in all respects as if they had preceded the birth of such persons then living. Upon the death of the husband and the ancestor the rights of the widow and the heirs become fixed and vested. Thereafter their titles respectively rest upon the same foundation, and are protected by the same sanctions as other rights of property.

The power of a legislature under the circumstances of this case to pass laws giving validity to past deeds which were before ineffectual is well settled.

In Watson v. Mercer, 8 Peters, 100, the title to the premises in controversy was originally in Margaret Mercer, the wife of James Mercer. For the purpose of transferring the title to her husband, they conveyed to a third person, who immediately conveyed to James Mercer. The deed of Mercer and wife bore date of the 30th of May, 1785. It was fatally defective as to the wife in not having been acknowledged by her in conformity with the provision of the statute of Pennsylvania of 1770, touching the conveyance of real estate by femes covert. She died without issue. James Mercer died leaving children by a former marriage. After the death of both parties, her heirs sued his heirs in ejectment for the premises and recovered. The supreme court of the state affirmed the judgment. In 1826 the legislature passed an act which cured the defective acknowledgment of Mary Mercer, and gave the same validity to the deed as if it had been well executed originally on her part. The heirs of James Mercer thereupon sued her heirs and recovered back the same premises. This judgment was also affirmed by the supreme court of the state, and the judgment of affirmance was affirmed by this court. This case is conclusive of the one before us.

To the objection that such laws violate vested rights of property it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character. Consent to remedy the wrong is to be presumed. The only right taken away is the right dishonestly to repudiate an honest contract or conveyance to the injury of the other party. Even where no remedy could be had in the courts the vested right is usually unattended with the slightest equity.

There is nothing in the record persuasive to any relaxation in favor of the appellant of the legal principles which, as we have shown, apply with fatal effect to her case. The curative act of 1857 has a strong natural equity at its root. It did for her what she attempted to do, intended to do, and doubtless believed she had done, and for doing which her husband was fully paid.

The purchase-money for the lot became a part of his estate, and the entire estate was given to her at his death. Not satisfied with this she seeks to fasten her dower upon the property in question.

The act accomplished what a court of equity, if called upon, would have decreed promptly as to the husband, and would have failed to decree as to the wife only from the want of power. The unbending rule of law as to femes covert in such cases would have prevented it. The legislature thus did what right and justice demanded, and the act strongly commends itself to the conscience and approbation of the judicial mind.

Decree affirmed.[1]

League v. Texas (1902) 184 U. S. 156, 46 L. ed. 478, sustaining a state statute which had the effect of imposing upon delinquent tax payers a duty to pay interest on delinquent taxes even as to delinquencies which had occurred before the taking effect of the statute and which under the law existing at the time they occurred did not bear interest, the court by Brewer, J., said:

"The statute may be retroactive, but a statute of a state is not brought into conflict with the federal Constitution by the mere fact that it is retroactive in its operation. In Baltimore & Susquehanna Railroad Co. v. Nesbit, 10 How. 395, 401, it was said:

" 'That there exists a general power in the state governments to enact retrospective or retroactive laws, is a point too well settled to admit of question at this day. The only limit upon this power in the states by the federal Constitution, and therefore the only source of cognizance or control with respect to that power existing in this court, is the provision that these retrospective laws shall not be such as are technically ex post facto, or such as impair the obligation of contracts. Thus, in the case of Watson et al. v. Mercer, 8 Pet. 110, the court say: "It is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the states from passing retrospective laws generally, but only ex post facto laws. Now, it has been solemnly settled by this court that the phrase ex post facto is not applicable to civil laws, but to penal and criminal laws." For this position is cited the case of Calder v. Bull, already mentioned; of Fletcher v. Peck, 6 Cranch, 138; Ogden v. Saunders, 12 Wheat. 266, and Satterlee v. Matthewson, 2 Pet. 380.'

"This decision, it is true, was before the Fourteenth Amendment, and the restrictions placed by that amendment upon state action apply to retrospective as well as prospective legislation. But it contains no prohibition of retrospective legislation as such, and therefore now, as before, the mere fact that a statute is retroactive in its operation does not make it repugnant to the federal Constitution.

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[1] Note that it frequently has been held that legislation destroying the wife's expectation of dower (dower inchoate) even as to land of which the husband is already seized, is not prohibited by the due process of law clause. Cases are collected in (1909) 12 Ann. Cas. 192; and see Ferry v. Spokane, P. & S. R. Co., ante, p. 483.

"As the state may, in the first instance, enact that taxes shall bear interest from the time they become due, so, without conflicting with any provision of the federal Constitution, it may in like manner provide that taxes which have become delinquent shall bear interest from the time the delinquency commenced. This is adding no novel or extraordinary penalty, for interest is the ordinary incident to the non-payment of obligations."[2]

PLUMMER v. NORTHERN PAC. R. CO.

1907. Circuit Court, W. D., Washington, N. D. 152 Fed. 206.

At Law. Action to recover damages for a personal injury alleged to have been caused by negligence of the defendant in the operation of its railroad, the plaintiff being at the time of the injury in the service of the defendant as a brakeman. Heard on defendant's petition for a new trial, after a verdict in favor of the plaintiff for $5,000. Petition granted.

Hanford, District Judge. The plaintiff suffered a painful injury while working for the Northern Pacific Railway Company, as a brakeman on one of its trains, at Seattle, in the month of March, 1906. This action was commenced in August, 1906. * * * The jury awarded him $5,000, which sum is less than probably would have been awarded if it had not been proved that his personal negligence was a contributing cause of the mishap; and a verdict for the defendant on the ground that plaintiff's contributory negligence had been clearly proved by all the evidence introduced, including his own testimony, would have been directed, if the court had not been influenced to refuse to so direct the jury, by consideration of the act of Congress of June 11, 1906, commonly called "The Employer's Liability Act" (Act June 11, 1906, c. 3073, 34 Stat. 232), which makes important changes in the law applicable to common carriers engaged in interstate and foreign commerce. The case was submitted to the jury under instructions which assumed that said act is valid, and applicable to the case. * * *

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[2] Distinguish a retroactive statute which merely attempts to enforce payment of a tax previously levied from one which levies a new tax retroactively. Will every statute of the latter sort be deemed arbitrary and unreasonable and violative of the standard of due process of law? See Nichols v. Coolidge (1927) 274 U. S. 531, 71 L. ed. 1184; Untermyer v. Anderson (1928) 276 U. S. 440, 72 L. ed. 645, and the cases cited in the latter. It has been said: "The court will not attempt to decide that there may not, in extreme cases, be a legitimate statutory enactment imposing a retroactive taxation for previous years upon a class of property not then subject to taxation at all. But it would at least be a rare case." First Nat. Bk. v. Covington (1900) 103 Fed. 523.

"Sec. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury." 34 Stat. 232, c. 3073.

The phrase "all actions hereafter brought" is broad enough to include actions for injuries suffered prior to the enactment; but although within the letter of the law, such cases must be deemed to be not within its purview, if the retroactive effect would defeat the law by making it unconstitutional. I hold that a retroactive statute enacted by Congress is not unconstitutional, unless its effect would be a deprivation of life, liberty, or property, contrary to the fifth amendment, and that the taking away of defenses to civil actions based upon rules of law which are purely arbitrary, e. g., the statute of limitations, would not be such a deprivation. Campbell v. Holt, 115 U. S. 620-634, 6 Sup. Ct. 209, 29 L. ed. 483. The plea of contributory negligence as a defense to an action to recover damages for an alleged tortious injury, is an affirmative traverse of the plaintiff's cause of action, similar to a plea of want of consideration as a defense to an action upon an alleged contract, for if it can be established by evidence it disproves the plaintiff's case. Such a defense does not rest upon a mere arbitrary rule exempting a party from legal process to enforce an obligation, but its foundation is in reason and natural justice.

In the case of Little v. Hackett, 116 U. S. 371, 6 Sup. Ct. 393, 29 L. ed. 652, Mr. Justice Field, in delivering the opinion of the court, said:

"That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. * * * If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy, against one also in the wrong."

This rule has been heretofore generally recognized as a part of the common law, in England and the United States, and the same rule is to be found in the Roman law. Wharton on the Law of Negligence (2d Ed.) § 300; 7 Amer. & Eng. Encyc. Law (2d Ed.) 371, 372.

Therefore this statute creates a new right and a new obligation. I do not question the justice of the rule of comparative negligence, as it may be applied in actions for injuries suffered after its legalization, but it cannot be applied to past occurrences without working a deprivation of property in a manner which the Constitution forbids; for if so applied, the statute, and not the injury, would fix the plaintiff's rights and the defendant's obligation, which are the important elements of the cause of action.

For this reason alone, the petition for a new trial will be granted.[3]

DANFORTH v. GROTON WATER CO.

1901. Supreme Judicial Court of Massachusetts. 178 Mass. 472.

Holmes, C. J. These are petitions to the Superior Court for a jury to assess damages for the taking of water rights. The respondent filed motions to dismiss on the ground that the petitioners had not applied first to the county commissioners. The Superior Court dismissed the petitions, and on report its action was sustained by this court. 176 Mass. 118. The decision was rendered on May 17, 1900. On May 3 had been passed c. 299 of the statutes of that year, but it escaped every one's attention until after the rescript had gone. A rehearing subsequently was granted by agreement of all concerned, on the single question of the effect of that act upon this case.

The water was actually withdrawn in November, 1897, and was taken not later than that date. By the respondent's charter, the right of the petitioners to apply for the assessment of damages was limited to one year from the taking. Therefore as the law stood just before the enactment of St. 1900, c. 299, the petitioners had lost their chance of recovery from the respondent, because it then was too late to file new applications, and, as the previous decision in this case has shown, the petitions on file could not be entertained.

The statute provides that no such petition as the present "now or hereafter pending in the superior court * * * shall be dismissed for want of jurisdiction in said court solely on the ground that no previous application for the assessment of such damages had been made to a board of county commissioners." These words seem to us plainly to apply to the present petitions. It is true that the petitions had been ordered to be dismissed, but the orders were made subject to a report to this court, as we have said, and the cases were still pending in the superior court. There can be no doubt of the intent of the statute and the only question is whether it is constitutional with regard to those who, like the respondent, at the time of its passage had a good defense. There certainly is a strong argument that as against parties in the respondent's position the act cannot be sustained.

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[3] Luria v. United States (1913) 231 U. S. 9, 58 L. ed. 101: An act of Congress of 1906 authorized cancellation of naturalization fraudulently obtained, and declared that a presumption that a person had not had the essential intent at the time of naturalization to reside permanently in the United States should arise from his taking permanent residence in a foreign country within five years after his naturalization. Luria was naturalized in 1894. It was held that his acquiring permanent residence abroad in 1894 raised the presumption, although under the law as it stood in 1894 residence abroad of a naturalized person had no effect upon naturalization. The court justified the presumption as due process of law on the grounds (1) that it was rebuttable, and (2) was based upon a reasonable inference from the conduct which the statute declared should give rise to it. See also Johannessen v. United States (1912) 225 U. S. 227, 56 L. ed. 1066.

In Campbell v. Holt, 115 U. S. 620, in which it was held by a majority of the court that a repeal of the statute of limitations as to debts already barred violated no rights of the debtor under the Fourteenth Amendment, Mr. Justice Miller speaks as if the constitutional right relied on were a right to defeat a just debt. But the constitutional right asserted was the same that would be set up if the legislature should order one citizen to pay a sum of money to another with whom he had been in no previous relations of any kind. Such a repeal requires the property of one person to be given to another when there was no previous enforceable legal obligation to give it. Whether the freedom of the defendant from liability is due to a technicality or to his having had no dealings with the other party, he is equally free, and it would seem logical to say that if the Constitution protects him in one case it protects him in all. With regard to cases like Campbell v. Holt, under the state constitution the later intimations of this court have been that such a repeal would have no effect. Bigelow v. Bemis, 2 Allen, 496, 497; Prentice v. Dehon, 10 Allen, 353, 355; Ball v. Wyeth, 99 Mass. 338, 339. See also Kinsman v. Cambridge, 121 Mass. 558; Rockport v. Walden, 54 N. H. 167; McCracken Co. v. Mercantile Trust Co., 84 Ky. 344; Cooley, Const. Lim. (6th ed.) 448.

Nevertheless in this case, as in others, the prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on fundamental grounds. Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions. It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power. Camfield v. U. S., 167 U. S. 518, 523, 524. But, however that may be, multitudes of cases have recognized the power of the legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small.

In some such cases there has been at an earlier time an enforceable obligation, in others there never has been one, but in both classes the courts have laid hold of a distinction between the remedy and the substantive right, or have said that "a party has no vested right in a defense based upon an informality not affecting his substantial equities" (Cooley, Const. Lim. [6th ed.] 454), or that "there is no such thing as a vested right to do wrong," Foster v. Bank, 16 Mass. 245, 273, or have called it curing an irregularity, Thompson v. Lee Co., 3 Wall. 327, 331; Lane v. Nelson, 79 Pa. St. 407; Randall v. Kreiger, 23 Wall. 137, or have dwelt upon the equities, meaning the moral worth of the claim that was preserved, or by one device or another have prevented a written constitution from interfering with the power to make small repairs which a legislature naturally would possess.

In a case which would seem almost stronger than that of a debt barred by the statute of limitations it was held that services of an unlicensed physician which could not be recovered for when rendered were made a good cause of action by a repeal of the statute which created the bar. Hewitt v. Wilcox, 1 Metc. 154. So in case of a usurious contract after a repeal of the usury law. Ewell v. Daggs, 108 U. S. 143.

The constitutional difficulties in the way of the present statute are as small as they well can be. Its effect in saving the petitioners from being barred by the statute of limitations in the respondent's charter is only secondary and accidental. All that it does directly which is open to question is to enact that parties having a case in court shall not be turned out for neglect of what under the circumstances was a naked and useless form. The case is stronger for the petitioners than Campbell v. Holt or Hewitt v. Wilcox. The respondent had incurred a legal obligation to them which, although not contractual, was voluntary and legal, and which was entitled to the highest protection of the law, as it sprang from the exercise of eminent domain. The petitioners were enforcing the obligation in good faith. There is no especially striking equity in favor of defeating them because of a mistake of procedure, and as the legislature now has said that they shall not be defeated, we have not much hesitation in yielding to the current of decisions and in accepting its mandate as authoritative in this case.

Motions overruled.

CHAPTER X.

THE REGULATION OF COMMERCE.

Section 1.—What is Commerce—Interstate and Foreign?

Take

GIBBONS v. OGDEN.

1824. Supreme Court of the United States. 9 Wheat. 1.

[Ogden filed a bill in the Court of Chancery of New York, setting forth that Livingston and Fulton had been granted by the legislature of New York a monopoly of navigating by fire or steam all the waters within the jurisdiction of that state; that he, Ogden, had acquired by assignment from them the privilege of operating vessels by fire or steam between Elizabethtown, New Jersey, and New York City; that defendant, Gibbons, was operating two steamboats between Elizabethtown and New York City, in violation of the monopoly, and prayed that defendant be enjoined. The defendant answered that his vessels were enrolled and licensed for the coasting trade under an act of Congress of February 18, 1793. The Chancellor granted a permanent injunction; his decree was affirmed by the Court for the Trial of Impeachments and Errors of New York, and this writ of error was taken.]

Mr. Chief Justice Marshall delivered the opinion of the court.

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains are repugnant to the Constitution and laws of the United States. * * * The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more,—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the Constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself. It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted,—that which the words of the grant could not comprehend. If, then, there are in the Constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united in that construction which comprehends navigation in the word "commerce." Gentlemen have said, in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade. That it may be, and often is, used as an instrument of war, cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case an embargo is no more a war measure than a merchantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen. * * *

The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The Constitution informs us, to commerce "with foreign nations, and among the several states, and with the Indian tribes." It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several states." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary-line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state.

This principle is, if possible, still more clear when applied to commerce "among the several states." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the states must, of necessity, be commerce with the states. In the regulation of trade with the Indian tribes, the action of the law, especially when the Constitution was made, was chiefly within a state. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states. The sense of the nation on this subject is unequivocally manifested by the provisions made in the laws for transporting goods by land between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. * * * The power of Congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness that, although the power of Congress to regulate commerce with foreign nations, and among the several states, be coextensive with the subject itself, and have no other limits than are prescribed in the Constitution, yet the states may severally exercise the same power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty before the formation of the Constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the Tenth Amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description. The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it. Both parties have appealed to the Constitution, to legislative acts, and judicial decisions; and have drawn arguments from all these sources to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the states are transferred to the government of the Union, yet the state governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not in its nature incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defence and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation. The sole question is, can a state regulate commerce with foreign nations and among the states while Congress is regulating it? * * *

But the inspection laws are said to be regulations of commerce, and are certainly recognized in the Constitution as being passed in the exercise of a power remaining with the states. That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to a general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

No direct general power over these objects is granted to Congress, and consequently they remain subject to state legislation. If the legislative power of the Union can reach them it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious that the government of the Union, in the exercise of its express powers,—that, for example, of regulating commerce with foreign nations and among the states,—may use means that may also be employed by a state in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state. If Congress license vessels to sail from one port to another in the same state, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police. So if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the state, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one general government whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise the powers of the other. * * *

It has been contended by the counsel for the appellant that, as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the court is not satisfied that it has been refuted. * * *

It has been said that the Constitution does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it. In the exercise of this power, Congress has passed "An act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise. It will at once occur that when a legislature attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone if the right itself be annihilated. * * *

The fourth section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade;" and prescribes its form. * * * The word "license" means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license. * * *

But if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers, and this is no part of that commerce which Congress may regulate. If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive, argument to prove that the construction is correct; and if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. * * *

Steam boats may be enrolled and licensed, in common with vessels using sails, * * * and the act of a state inhibiting the use of either to any vessel having the license under the act of Congress comes, we think, in direct collision with that act.

Decree reversed.

[Johnson, J., concurred on the ground that the commerce clause vested in Congress the sole power to regulate foreign and interstate commerce and of its own force, without any action taken by Congress, wholly excluded the states from regulating such commerce. In his view the act of Congress licensing vessels for the coastwise trade had no bearing.]

International Textbook Co. v. Pigg (1910) 217 U. S. 91, 54 L. ed. 678. Harlan, J., for the court: "The International Textbook Company is a Pennsylvania corporation, and the proprietor of what is known as the International Correspondence Schools at Scranton in that Commonwealth. * * * The executive officers of the company, as well as the teachers and instructors employed by it, reside and exercise their respective functions at Scranton. Its business is conducted by preparing and publishing instruction papers, textbooks and illustrative apparatus for courses of study to be pursued by means of correspondence, and the forwarding, from time to time, of such publications and apparatus to students. In the conduct of its business the company employs local or traveling agents, called Solicitor-Collectors, whose duties are to procure and forward to the company at Scranton, from persons in a specified territory, on blanks furnished by it, applications for scholarships in its Correspondence Schools, and also to collect and forward to the company deferred payments on scholarships. * * *

"During the period covered by the present transaction the company had a Solicitor-Collector for the territory that included Topeka, Kansas, and he solicited students to take correspondence courses in the plaintiff's schools. His office in Kansas was procured and maintained at his own expense, for the purpose of furthering the procuring of applications for scholarships and the collection of fees therefor. The company had no office of its own in that state. * * *

"At the time this suit was brought, numerous persons in Topeka were taking the plaintiff's course of instruction by correspondence through the mails. * * *

"It is true that the business in which the International Text-Book Company is engaged is of a somewhat exceptional character, but, in our judgment, it was, in its essential characteristics, commerce among the states within the meaning of the Constitution of the United States. It involved, as already suggested, regular and practically continuous intercourse between the Text-Book Company, located in Pennsylvania, and its scholars and agents in Kansas and other states. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. More than that; this mode—looking at the contracts between the Text-Book Company and its scholars—involved the transportation from the state where the school is located to the state in which the scholar resides, of books, apparatus, and papers, useful or necessary in the particular course of study the scholar is pursuing, and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction. Intercourse of that kind, between parties in different states,—particularly when it is in execution of a valid contract between them,—is as much intercourse in the constitutional sense, as intercourse by means of the telegraph,—'a new species of commerce,'[1] to use the words of this court in Pensacola Teleg. Co. v. Western U. Teleg. Co., 96 U. S. 1, 9. In the great case of Gibbons v. Ogden, 9 Wheat. 1, 189, this court, speaking by Chief Justice Marshall, said: 'Commerce, undoubtedly, is traffic; but it is something more; it is *intercourse.*' Referring to the constitutional power of Congress to regulate commerce among the states and with foreign countries, this court said in the Pensacola Case, just cited, that 'it is not only the right, but the duty, of Congress, to see to it that *intercourse* among the states and the *transmission of intelligence* are not obstructed or unnecessarily encumbered by state legislation.' This principle has never been modified by any subsequent decision of this court.

"The same thought was expressed in Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 356, where the court said: 'Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only *ideas, wishes, orders, and intelligence.'* It was said in the Circuit Court of Appeals for the Eighth Circuit, speaking by Judge Sanborn, in Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, 17, that 'all interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens[2] of different states, which contemplates and causes such importation, whether it be of goods, persons, *or information,* is a transaction of interstate commerce.' If intercourse between persons in different states by means of telegraphic messages conveying intelligence or information is commerce among the states, which no state may directly burden or unnecessarily encumber, we cannot doubt that intercourse or communication between persons in different states, by means of correspondence through the mails, is commerce among the states within the meaning of the Constitution, especially where, as here, such intercourse and communication really relate to matters of regular, continuous business, and to the making of contracts and the transportation of books, papers, etc., appertaining to such business. In our further consideration of this case, we shall therefore assume that the business of the Textbook Company, by means of correspondence through the mails and otherwise between Kansas and Pennsylvania, was interstate in its nature."

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[1] "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth." Waite, C. J., in Pensacola Tel. Co. v. Western Union Tel. Co. (1877) 96 U. S. 1, 9, 24 L. ed. 708. Accord: The Pipe Line Cases (1914) 234 U. S. 548, 58 L. ed. 1459 (interstate transportation by pipe line); Neiswonger v. Goodyear Tire & Rubber Co. (1929) 35 Fed. (2d) 761 (air transportation).

"It does not seem to be open to question that radio transmission and reception among the states are interstate commerce. To be sure it is a new species of commerce. Nothing visible and tangible is transported. There is not even a wire, over which "ideas, wishes, orders, and intelligence" are carried. A device in one state produces energy which reaches every part, however small, of the space affected by its power. Other devices in that space respond to the energy thus transmitted. The joint action of the transmitter owned by one person and the receiver owned by another is essential to the result. But that result is the transmission of intelligence, ideas, and entertainment. It is intercourse, and that intercourse is commerce." United States v. American Bond & Mtg. Co. (1929) 31 Fed. (2d) 448, 454. See also City of New York v. Federal Radio Commission (1929) 36 Fed. (2d) 115 (holding a city-owned sending station subject to federal regulation).

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[2] Compare Kirmeyer v. State of Kansas (1915) 236 U. S. 568, 59 L. ed. 721: A man domiciled in Leavenworth, Kansas, had a beer warehouse in Stillings, Missouri, just across the river from Leavenworth. He accepted orders only at his warehouse, by telephone, and made deliveries therefrom by wagons and teams to buyers in Leavenworth. Held (1) that the business thus conducted was interstate commerce and that prior to the enactment of the act of Congress of March 1, 1913 (Webb-Kenyon Law) Kansas could not forbid such deliveries; (2) that the man's domicile in Kansas was immaterial.

When an offer is sent from Alabama to New York, to buy property then in New York, and the offer is accepted, and the contract does not call for or contemplate delivery outside of New York, the transaction is not one of interstate commerce. Ware & Leland v. Mobile County (1908) 209 U. S. 405, 413, 52 L. ed. 855, 14 Ann. Cas. 1031.

"The facts that the property sold is outside the state and the seller and buyer foreigners are not enough to make a sale commerce with foreign nations or among the several states." Holmes, J., in Hatch v. Reardon (1907) 204 U. S. 152, 162, 51 L. ed. 415, 9 Ann. Cas. 736.

A Wisconsin corporation agreed to convey land in Wisconsin to a Maine corporation, and delivered the deeds in Illinois. McReynolds, J., for the court said: "No interstate commerce was directly involved in the transactions." Munday v. Wisconsin Trust Co. (1920) 252 U. S. 499, 64 L. ed. 684.

COMMERCE WITH INDIAN TRIBES.—"If commerce, or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a state. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single state, than commerce with the Indian tribes."—Miller, J., in United States v. Holliday (1866), 3 Wall. 407, 418, 18 L. ed. 182 (holding valid an act of Congress construed to declare it a federal offense to make a sale anywhere in the United States of intoxicating liquor to any Indian who was still under supervision of federal officers).

For this peculiar wardship over Indian tribes and Indians individually, continuing in some circumstances over citizen Indians, see D. O. McGovney, American Citizenship (1911), 11 Col. L. Rev. 326, 337.

[Fuller, C. J., and McKenna, J., dissented.]

The Daniel Ball, (1871) 10 Wall. 557, 564-566, 19 L. ed. 999, sustaining a recovery by the United States of a penalty from the Daniel Ball imposed by an act of Congress of July 7, 1838 upon vessels using the navigable waters of the United States without a federal license. The Daniel Ball plied only on the Grand River between Grand Rapids and Grand Haven, both in the State of Michigan, and was incapable, because of her construction, of crossing Lake Michigan to any other state; and her cargo was as described in the opinion. The court, by Field, J., said:

"But it is contended that the steamer 'Daniel Ball' was only engaged in the internal commerce of the state of Michigan, and was not, therefore, required to be inspected or licensed, even if it be conceded that Grand River is a navigable water of the United States.

"There is undoubtedly an internal commerce which is subject to the control of the states. The power delegated to Congress is limited to commerce 'among the several states,' with foreign nations, and with the Indian tribes. This limitation necessarily excludes from federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a state, and does not extend to or affect other states. Gibbons v. Ogden, 9 Wheat. 194, 195. In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other states than Michigan, and in receiving and transporting up the river goods brought within the state from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the state, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other states, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress.

"It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a state; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a state on which grain or fruit is transported to a distant market. We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation.[3] And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a state, and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter."

McCLUSKEY, ADMR. OF NORDGARD v. MARYSVILLE & this NORTHERN R. CO.

1917. Supreme Court of the United States. 243 U. S. 36.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This suit was brought under the Employers' Liability Act to recover damages resulting from injuries suffered by Nordgard while in the employ of the defendant railway company. The trial court directed a verdict for the defendants on the ground that there was no evidence tending to show that the defendants and Nordgard were engaged at the time of the accident in interstate or foreign commerce, and the case is here on writ of error to secure a reversal of the action of the court below affirming the judgment entered by the trial court dismissing the suit. 218 Fed. Rep. 737.

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[3] "The regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway. They are simply the means and instrumentalities of commerce, and the power of Congress to regulate commerce carries with it power over all the means and instrumentalities by which commerce is carried on. * * * We are so much accustomed to see artificial highways, such as common roads, and railroads, constructed under the authority of the states, and the improvement of natural highways carried on by the general government, that at the first it might seem that there was some inherent difference in the power of the national government over them. But the grant of power is the same." Brewer, J., in Monongahela Navigation Co. v. United States (1893) 148 U. S. 342, 37 L. ed. 463.

These are the facts: The defendant Stimson Mill Company was engaged in the logging and lumber business and carried its logs on its own logging railroad, the Marysville & Northern Railway, from timber land owned by it in Washington to a point near Marysville in that state where they were dumped into the waters of Puget Sound. Part of the logs were thereafter sold to mills located on the sound and the balance were rafted and taken by tugs to the Stimson Company's mills at Ballard, Washington, where they were manufactured into timber, which was thereafter sold, about twenty per cent. in local markets and the remainder in other states and countries. The logs which were sold after they had been carried to tidewater by the railroad were towed away by the purchasers to their mills or places for storage and part of them were subsequently re-sold for piling or poles to purchasers both within and without the state. Nordgard was a brakeman on the logging railroad and suffered the injuries for which he sued while engaged in unloading logs from the cars at tidewater.

The conclusion of the court below that under these facts the defendants were not engaged in interstate or foreign commerce when the injuries were suffered was based upon the decisions in Coe v. Errol, 116 U. S. 517, and The Daniel Ball, 10 Wall. 557, from the former of which the following quotations were made:

"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state." 116 U. S. 517, 525.

"But this movement [that is, interstate commerce movement] does not begin until the articles have been shipped or started for transportation from one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. * * * Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state." 116 U. S. 517, 528.

After pointing out that these rulings had not been modified, but on the contrary had been re-affirmed by the subsequent cases relied upon by the plaintiff in error (Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111; Louisiana Railroad Commission v. Texas & Pacific Ry. Co., 229 U. S. 336; Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498; Ohio Railroad Commission v. Worthington, 225 U. S. 101) the court said:

"In the case at bar there was no initial shipment of the goods. The transportation of the poles from the forest in which they were cut to tidewater, where they were sold, was not a shipment. There was no contract of carriage; there was no bill of lading; there was no consignor or consignee. The goods were not committed to a carrier. The defendant Mill Company simply carried over its own road, on its own cars, its own goods to a market where it sold and delivered them. It had no concern with the subsequent disposition of them. It was under no obligation to deliver them to another carrier, and no other carrier was under obligation to receive them or carry them further. The selling of the poles after the first sale by the Mill Company, or whether they were going outside of the state, depended upon chance or the exigencies of trade. The movement of the poles did not become interstate commerce until by the act of the purchasers thereof the poles were started on their way to their destination in another state or country. The beginning of the transit which constitutes interstate commerce 'is defined in Coe v. Errol, to be the point of time that an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage.' General Oil Co. v. Crain, 209 U. S. 211, 229."

The conclusion of the court below that the defendants were not engaged in interstate or foreign commerce when the accident occurred is, we think, clearly demonstrated by the reasoning by which it sustained its conclusion and the authorities upon which it relied as above stated, and its judgment should be affirmed. * * *

Affirmed.

New York ex rel. Pennsylvania R. Co. v. Knight (1904) 192 U. S. 21, 26-28, 48 L. ed. 325, sustaining a state franchise tax imposed upon the railroad company's operation of cabs in New York City exclusively for carriage of its interstate passengers arriving in and leaving the city, the court, by Mr. Justice Brewer in part said:

"It is true that a passenger over the Pennsylvania Railroad to the city of New York does not, in one sense, fully complete his journey when he reaches the ferry landing on the New York side, but only when he is delivered at his temporary or permanent stopping place in the city. Looking at it from this standpoint, the company's cab service is simply one element in a continuous interstate transportation, and as such would be excluded from state, and be subject to national, control. The state may not tax for the privilege of doing an interstate commerce business. Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160. On the other hand, the cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. The party receiving it owes no legal duty of crossing the state line.

"Undoubtedly, a single act of carriage or transportation wholly within a state may be part of a continuous interstate carriage or transportation. Goods shipped from Albany to Philadelphia may be carried by the New York Central Railroad only within the limits of New York, and yet that service is in interstate carriage. By reason thereof the nation regulates that carriage, including the part performed by the New York company. But it does not follow therefrom that the New York company is wholly relieved from state regulation and state taxation, for a part of its work is carriage and transportation begun and ended within the state. So the Pennsylvania company, which is engaged largely in interstate transportation, is amenable to state regulation and state taxation as to any of its service which is wholly performed within the state, and not as a part of interstate transportation. Wherever a separation in fact exists between transportation service wholly within the state and that between the states, a like separation may be recognized between the control of the state and that of the nation. * * *

"Many things have more or less close relation to interstate commerce which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed? We are of opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation."[4]

Thornton v. United States (1926) 271 U. S. 414, 424-425; 70 L. ed. 1013, sustaining a conviction of Thornton and others for the crime of conspiracy, as defined in §§ 37, 62 of the Criminal Code of the United States,—conspiracy to assault an employee of the federal Bureau of Animal Industry while he was performing duties incumbent upon him under statutes of the United States for the quarantine of cattle having contagious diseases, one of the statutes being an act of 1884, the court said by TAFT, C. J., in part: "It is finally urged against this conviction that the statute of 1884, supra, is unconstitutional, in that Congress had no power to make it a duty of a federal employee to dip cattle and suppress disease among cattle within a state; that such power is vested in the legislature of the state under the reservations of the Tenth Amendment to the federal Constitution; and that such legislation by Congress cannot be sustained as a regulation of interstate commerce, because it is not confined to interstate commerce, and the cattle treated were not in interstate commerce.

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[4] Wagons of an express company are engaged in interstate or foreign commerce in the streets of a city while collecting packages destined to points outside the state or delivering packages received from outside. Barrett v. City of New York (1910), 183 Fed. 793, (1914) 232 U. S. 14, 58 L. ed. 483.

See Borelli v. International Ry. Co. (1925) 240 N. Y. 54, 147 N. E. 356, for possibility that a common city street car not crossing a state line may be engaged in foreign commerce.

Is an ordinary residence telephone an instrument of interstate commerce at all times or only when connected with an instrument in another state?

"It is very evident, from the act of 1884 and the subsequent legislation and the regulations issued under them, that everything authorized to be done was expressly intended to prevent the spread of disease from one state to another by contagion, which, of course, means by the passage of diseased cattle from one state to another. This is interstate commerce. The quarantine provided for was to stop and regulate such interstate commerce until it could be safely carried on. Not until suitable inspection by the federal authorities and treatment prescribed for dipping of the cattle could the cattle be certainly rid of the ticks and splenetic fever, and prevented from being a dangerous source of contagion in the state into which they were going. The duties of the employees of the Bureau of Animal Industry here interfered with were all part of the measure of quarantine reasonably adapted to prevent the spread of contagion in and by interstate commerce.

"The requirement of dipping was a reasonable condition of allowing cattle from a suspected district to pass into another state, and the provision of dipping vats and other means of complying with this requirement in a border county by the United States, and the supervision of such dipping by federal employees, and indeed the dipping itself by them, were conveniences promoting interstate commerce where quarantine was necessary. There is no evidence that federal employees took part in enforcing dipping of all cattle of the county. That was done by state officers under the state law.

"But it is said that these cattle do not appear to have been intended to be transported by rail or boat from one state to another, and this only is interstate commerce in cattle under the Constitution. They were on the line between the two states. To drive them across the line would be interstate commerce, and the act of 1905 expressly prohibits driving them on foot when carrying contagion. It is argued, however, that when the cattle only range across the line between the states, and are not transported or driven, their passage is not interstate commerce. We do not think that such passage by ranging can be differentiated from interstate commerce. It is intercourse between states, made possible by the failure of owners to restrict their ranging, and is due, therefore, to the will of their owners.

"More than this, it is established by United States v. Ferger, 250 U. S. 199, that the authority of Congress over interstate commerce extends to dealing with and preventing burdens to that commerce and the spread of disease from one state to another by such cattle ranging would clearly be such a burden, if it were not to be regarded as commerce itself and is therefore properly within the congressional inhibition. Stafford v. Wallace, 258 U. S. 495."[5]

Take.

UNITED STATES v. SIMPSON.

1920. Supreme Court of the United States. 252 U. S. 465.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is an indictment under § 5 of the Act of March 3, 1917, known as the Reed Amendment, 39 Stat. 1069, c. 162, which declares that—

"Whoever shall * * * cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state * * * the laws of which * * * prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished," etc.

And the question for decision is whether the statute was applicable where the liquor—five quarts of whisky—was transported by its owner in his own automobile and was for his personal use and not for an excepted purpose. The District Court answered the question in the negative and on that ground sustained a demurrer to the third count, which is all that is here in question and discharged the accused. 257 Fed. 860.

We think the question should have been answered the other way. The evil against which the statute was directed was the introduction of intoxicating liquor into a prohibition state from another state for purposes other than those specially excepted—a matter which Congress could and the states could not control. Danciger v. Cooley, 248 U. S. 319, 323. The introduction could be effected only through transportation, and whether this took one form or another it was transportation in interstate commerce. Kelley v. Rhoads, 188 U. S. 1; United States v. Chavez, 228 U. S. 525, 532-533; United States v. Mesa, 228 U. S. 533; Pipe Line Cases, 234 U. S. 548, 560; United States v. Hill, 248 U. S. 420. The statute makes no distinction between different modes of transportation and we think it was intended to include them all, that being the natural import of its words. Had Congress intended to confine it to transportation by railroads and other common carriers it well may be assumed that other words appropriate to the expression of that intention would have been used. And it also may be assumed that Congress foresaw that if the statute were thus confined it could be so readily and extensively evaded by the use of automobiles, auto-trucks and other private vehicles that it would not be of much practical benefit. See Kirmeyer v. Kansas, 236 U. S. 568. At all events we perceive no reason for rejecting the natural import of its words and holding that it was confined to transportation for hire or by public carriers.

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[5] Carter v. United States (1930) 38 Fed. (2d) 227, 228: "It seems to us that the decision of the Supreme Court in the Thornton Case, supra, is sufficient answer. It is true the opinion in that case states that cattle ranged between Georgia and Florida in that region, but that was far from saying that the cattle of every owner must range across the boundary line between the two states in order to give the government jurisdiction to dip them and free them from fever. Cattle which ranged across the line were liable to be infected by cattle which did not. It hardly can be doubted since the decision of the Supreme Court on the subject that in the protection of interstate commerce in cattle the government has power to require domestic cattle to be treated in an effort to eradicate Texas fever."

The published decisions show that a number of the federal courts have regarded the statute as embracing transportation by automobile, and have applied it in cases where the transportation was personal and private, as here. Ex parte Westbrook, 250 Fed. 636; Malcolm v. United States, 256 Fed. 363; Jones v. United States, 259 Fed. 104; Berryman v. United States, 259 Fed. 208.

That the liquor was intended for the personal use of the person transporting it is not material, so long as it was not for any of the purposes specially excepted. This was settled in United States v. Hill, supra.

We conclude that the District Court erred in construing the statute and sustaining the demurrer.

Judgment reversed.

Mr. Justice Clarke, dissenting. The indictment in this case charges that the defendant, being in the City of Cheyenne, Wyoming, "bought, paid for and owned" five quarts of whisky and thereafter, in his own automobile, driven by himself, transported it into the City of Denver, Colorado, intending to there devote it to his own personal use. Colorado prohibited the manufacture and sale therein of intoxicating liquor for beverage purposes. The court decides that this liquor was unlawfully "transported in interstate commerce," from Wyoming into Colorado within the meaning of the Act of Congress of March 3, 1917 (39 Stat. 1069).

With this conclusion I cannot agree.

By early (Gibbons v. Ogden, 9 Wheat. 1, 193) and by recent decisions (Second Employers' Liability Cases, 223 U. S. 1, 46) of this court and by the latest authoritative dictionaries, interstate commerce, in the constitutional sense, is defined to mean commercial, business, intercourse—including the transportation of passengers and property—carried on between the inhabitants of two or more of the United States,—especially (we are dealing here with property) the exchange, buying or selling of commodities, of merchandise, on a large scale between the inhabitants of different states. The liquor involved in this case, after it was purchased and while it was being held for the personal use of the defendant, was, certainly, withdrawn from trade or commerce as thus defined—it was no longer in the channels of commerce, of trade or of business of any kind—and when it was carried by its owner, for his personal use, across a state line, in my judgment it was not moved or transported in interstate commerce, within the scope of the Act of Congress relied upon or of any legislation which Congress had the constitutional power to enact with respect to it at the time the Reed Amendment was approved. The grant of power to Congress is over Commerce,—not over isolated movements of small amounts of private property, by private persons for their personal use.

I think the Hill Case, 248 U. S. 420, was wrongly decided and that the judgment of the District Court in this case should be affirmed.[6]

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[6] United States v. Hill (1919) 248 U. S. 420, 423-424, 63 L. ed. 337: "The transportation of one's own goods from state to state is interstate commerce, and, as such, subject to the regulatory power of Congress. Pipe Line Cases, 234 U. S. 548, 560. The transportation of liquor upon the person of one being carried in interstate commerce is within the well-established meaning of the words 'interstate commerce.' United States v. Chaves, 228 U. S. 525, 532." The charge against Hill was that he rode in a street car from Kentucky into West Virginia with a quart of intoxicating liquor on his person, which he had bought in Kentucky, for personal use. The court held that Hill's conduct came within the statute and that the statute so construed was valid.

It had previously been decided that transportation of a thing across a state boundary for sale is interstate commerce though the thing is carried by its owner in his own wagon. Kirmeyer v. Kansas (1915) 236 U. S. 568, 59 L. ed. 721.

Where the carriage is by independent carrier, for hire, the carriage is interstate commerce even though the purpose at the destination is not commercial. Caminetti v. United States (1917) 242 U. S. 470, 61 L. ed. 442, L. R. A. 1915F, 502; L. R. A. 1917B, 1168. And in such case it is immaterial whether the hired carrier is a public or a private carrier. See Wilson v. United States (1914) 232 U. S. 563, 58 L. ed. 728. "Where the carriage [is] being done by an independent carrier, it is commerce merely by reason of the business of carriage." Holmes, J., in Francis v. United States (1903) 188 U. S. 375, 377, 47 L. ed. 508.

The act of Congress called the White Slave Traffic Act, sustained as an exercise of the commerce power, seems to cover the case of a person carrying a woman in his own automobile from one state to another for "uncommercialized vice." United States v. Burch (1915) 226 Fed. 974.

Holding that a locomotive engineer was engaged in interstate commerce the court said: "That the engine was not in commercial use but merely on the way to a repair shop is immaterial. It was being taken from one state to another and this was the true test of whether it was moving in interstate commerce. See North Carolina R. R. v. Zachary, 232 U. S. 248, 259." Chicago, R. I. & P. R. Co. v. Wright (1916) 239 U. S. 548, 60 L. ed. 431.

"If it be commerce to send goods from * * * Ohio to * * * Kentucky it is equally such to travel in person from Cincinnati to Covington. * * * The thousands of people who daily pass and repass over this [interstate boundary] bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool." Brown, J., in Covington Bridge Co. v. Kentucky (1894) 154 U. S. 204, 218, 38 L. ed. 962. The case in-

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WESTERN UNION TELEGRAPH CO. v. SPEIGHT.

1920. Supreme Court of the United States. 254 U. S. 17.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought in a state court by the respondent against the petitioner, the Telegraph Company, to recover for mental suffering caused by a mistake in delivering a telegraphic message. The message handed to the defendant was "Father died this morning. Funeral tomorrow, 10:10 a. m.," and was dated January 24. As delivered to the plaintiff on January 24 it was dated January 23 and thus caused her to fail to attend the funeral which otherwise she would have done. The message was from Greenville, North Carolina, to Rosemary in the same state, and was transmitted from Greenville through Richmond, Virginia, and Norfolk, to Roanoke Rapids, the delivery point for Rosemary. This seems to have been the route ordinarily used by the company for years, and the company defends on the ground that the message was sent in interstate commerce, and that therefore a suit could not be maintained for mental suffering alone. Southern Express Co. v. Byers, 240 U. S. 612. The jury found that the message was sent out of North Carolina into Virginia for the purpose of fraudulently evading liability under the law of North Carolina and gave the plaintiff a verdict. The presiding judge then set the verdict aside "as a matter of law" and ordered a non-suit. But on appeal the supreme court of the state set aside the non-suit and directed that a judgment be entered on the verdict.

We are of opinion that the judge presiding at the trial was right and that the supreme court was wrong. Even if there had been any duty on the part of the telegraph company to confine the transmission to North Carolina, it did not do so. The transmission of a message through two states is interstate commerce as a matter of fact. Hanley v. Kansas City Southern Ry. Co., 187 U. S. 617. The fact must be tested by the actual transaction. Kirmeyer v. Kansas, 236 U. S. 568, 572.

As the line was arranged and had been arranged for many years, ever since Roanoke Rapids had been an independent office, Rich-

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volved the validity of a state statute regulating the tolls to be charged by the bridge company in the operation of its stationary vehicle of interstate transportation. Is a person walking across a state line for a social visit doing an act of interstate commerce?

The Abby Dodge (1912) 223 U. S. 166, 56 L. ed. 390: "Undoubtedly (Lord v. Steamship Company, 102 U. S. 541), whether the Abby Dodge was a vessel of the United States or of a foreign nation, even although it be conceded that she was solely engaged in taking or gathering sponges in the waters which by the law of nations would be regarded as the common property of all [the high seas] and was transporting the sponges so gathered to the United States, the vessel was engaged in foreign commerce, and was therefore amenable to the regulating power of Congress over that subject. * * * Congress by an exertion of its power to regulate foreign commerce has the authority to forbid merchandise carried in such commerce from entering the United States."

mond was the relay point from Greenville to the latter place. The message went through Weldon, North Carolina, and was telegraphed back from Richmond, as Weldon business also was. It would have been possible, physically, to send direct from Weldon but would have required a rearrangement of the wires and more operators. The course adopted was more convenient and less expensive for the company and there was nothing to show motives except the facts. As things were, the message was sent in the quickest way. The court below did not rely primarily upon the finding of the jury as to the purpose of the arrangement but held that when as here the termini were in the same state the business was intrastate unless it was necessary to cross the territory of another state in order to reach the final point. This, as we have said, is not the law. It did however lay down that the burden was on the company to show that what was done "was not done to evade the jurisdiction of the state." If the motive were material, as to which we express no opinion, this again is a mistake. The burden was on the plaintiff to make out her case. Moreover the motive would not have made the business intrastate. If the mode of transmission adopted had been unreasonable as against the plaintiff, a different question would arise, but in that case the liability, if it existed, would not be a liability for an intrastate transaction that never took place but for the unwarranted conduct and the resulting loss.

Judgment reversed.[7]

MR. JUSTICE PITNEY concurs in the result.

DAHNKE-WALKER MILLING CO. v. BONDURANT.

1921. Supreme Court of the United States. 257 U. S. 282.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action to recover damages for the breach of a contract for the sale and delivery of a crop of wheat estimated at 14,000 bushels. The plaintiff was a Tennessee corporation engaged in operating a flour and feed mill at Union City, in that state. The defendant was a resident of Hickman, Kentucky, and extensively engaged in farming in that vicinity. They were the parties to the contract. It was made at Hickman and the wheat was to be delivered and paid for there. But the delivery was to be on board the cars of a common carrier, and the plaintiff intended to ship the wheat to its mill in Tennessee. A small part of the crop was delivered as agreed, but delivery of the rest was refused, although the plaintiff was prepared and expecting to receive and pay for it. A payment advanced on the crop more than covered what was delivered. At the time for delivery wheat had come to be worth several cents per bushel more than the price fixed by the contract. The action was brought in a state court in Kentucky.

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[7] Accord: Missouri Pac. R. Co. v. Stroud (1925) 267 U. S. 404, 68 L. ed. 683, holding that a state statute regulating the furnishing of cars to shippers could not apply to a shipment from Oxly to St. Louis, both in Missouri, over a route that was partly in Illinois.

The principal defense interposed—the only one which we have occasion to notice—was to the effect that the plaintiff had not complied, as was the fact, with a statute of Kentucky (Ky. Stats. 1915, § 571) prescribing the conditions on which corporations of other states might do business in that state, and that the contract was therefore not enforceable. To this the plaintiff replied that the only business done by it in Kentucky consisted in purchasing wheat and other grain in that state for immediate shipment to its Tennessee mill and then shipping the same there; that the contract in question was made in the course of this business and with the purpose of forwarding the wheat to the mill as soon as it was delivered on board the cars; that this transaction was in interstate commerce and as to it the statute of Kentucky whose application was invoked by the defendant was invalid because in conflict with the commerce clause of the Constitution of the United States.

The cause was tried twice. On the first trial the plaintiff obtained a verdict and judgment, the court ruling that the statute could not constitutionally be applied to the transaction in question. But the Court of Appeals of the state, while conceding the invalidity of the statute as respects transactions in interstate commerce, held the transaction in question was not in such commerce, declared the statute valid and properly enforceable as to that transaction and reversed the judgment with a direction for a new trial. That court proceeded on the theory that, as the contract was made in Kentucky, related to property then in that state and was to be wholly performed therein, the transaction was strictly intrastate and not within the reach or protection of the commerce clause of the Constitution of the United States. * * *

Where goods in one state are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. Brown v. Maryland, 12 Wheat. 419, 446-447; American Steel & Wire Co. v. Speed, 192 U. S. 500, 519. On the same principle, where goods are purchased in one state for transportation to another the commerce includes the purchase quite as much as it does the transportation.

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There is no controversy about the facts bearing on the character of the transaction in question. It had been the practice of the plaintiff to go into Kentucky to purchase grain to be transported to and used in its mill in Tennessee. On different occasions it had purchased from the defendant—at one time 13,000 bushels of corn. This contract was made in continuance of that practice, the plaintiff intending to forward the grain to its mill as soon as the delivery was made. In keeping with that purpose the delivery was to be on board the cars of a public carrier. Applying to these facts the principles before stated, we think the transaction was in interstate commerce. The state court, stressing the fact that the contract was made in Kentucky and was to be performed there, put aside the further facts that the delivery was to be on board the cars and that the plaintiff, in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been considered. They showed that what otherwise seemed an intrastate transaction was a part of interstate commerce. See Swift & Co. v. United States, 196 U. S. 375, 398; United States v. Reading Co., 226 U. S. 324, 367; Pennsylvania R. R. Co. v. Clark Brothers Coal Mining Co., 238 U. S. 456-468; Eureka Pipe Line Co. v. Hallanan, 251 U. S. 265. The state court also attached some importance to the fact that after the grain was delivered on the cars the plaintiff might have changed its mind and have sold the grain at the place of delivery or have shipped it to another point in Kentucky. No doubt this was possible, but it also was improbable. With equal basis it could be said that a shipment of merchandise billed to a point beyond the state of its origin might be halted by the shipper in the exercise of the right of stoppage in transitu before it got out of that state. The essential character of the transaction as otherwise fixed is not changed by a mere possibility of that sort. See United Fuel Gas Co. v. Hallanan, supra.

For these reasons we are of opinion that the transaction was a part of interstate commerce, in which the plaintiff lawfully could engage without any permission from the State of Kentucky, and that the statute in question, which concededly imposed burdensome conditions, was as to that transaction invalid because repugnant to the commerce clause.

Judgment reversed.[8]

Mr. Justice Brandeis, with whom concurred Mr. Justice Clarke, dissenting [on a question of jurisdiction which is omitted above].

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[8] Moore v. New York Cotton Exchange (1926) 270 U. S. 593, 604, 70 L. ed. 750, 45 A. L. R. 1370, Sutherland, J.: "The New York [Cotton] Exchange is engaged in a local business. Transactions between its members are purely local in their inception and in their execution. They consist of agreements made on the spot for the purchase and sale of cotton for future delivery, with a provision that such cotton must be represented by a warehouse receipt issued by a licensed warehouse in the Port of New York and be deliverable from such warehouse. Such agreements do not provide for, nor does it appear that they contemplate, the shipment of cotton from one state to another. If interstate shipments are actually made, it is not because of any contractual obligation to that effect, but it is a chance happening which cannot have the effect of converting these purely local agreements or the transactions to which they relate into subjects

NEW YORK LIFE INSURANCE COMPANY v. DEER LODGE COUNTY.

1913. Supreme Court of the United States. 231 U. S. 495.

[The plaintiff sued in a Montana court to recover a tax paid under a state statute which levied the tax on every insurance company doing business in the state. The plaintiff contended that the tax imposed a burden on interstate commerce beyond the power of a state under the Commerce Clause. The state supreme court affirmed a judgment dismissing the suit, and this writ of error was taken.]

Mr. Justice McKenna delivered the opinion of the court. * * *

The plaintiff is a New York corporation, with its home office in New York City, and has transacted and does transact the business of life insurance on a large scale in all of the states of the United States, and with persons residing in every country of the civilized world. It commenced to transact its business with residents of Montana in 1869, and its business has progressively increased until its total insurance in force in that state amounts to $10,023,445, calling for premiums amounting to $343,664.93. This total insurance is made up of policies averaging $2,000 each and these are subject to sale, assignment and transfer and are used for collateral security and other commercial purposes and are valuable for such purpose and for other general purposes of trade and commerce.

The company transacts its business through agents, who solicit insurance, collect the first premium and deliver the policy, which is prepared and transmitted from the Home Office to him for such purpose. * * * In Butte, in the State of Montana, the company maintains a cashier, appointed from the Home Office, whose authority, however, is limited to making and supervising such records as the business of the office requires, receiving from the soliciting agents and medical examiners applications for new insurance solely for transmission to the Home Office, receiving the reports of the Home Office of its action on such applications, and receiving policies, and the premiums which are paid on the new policies and not transmitted directly to the Home Office, mailing premium notices made out at the Home Office, and sent to him for that purpose; receiving renewal premiums when specially authorized; depositing the amount thereof in bank at Butte to the credit of the company and to be drawn upon by it and not by him; keeping account of the insurance obtained by the soliciting agents and settling with such agents the commission. The company has never had any office or place of business except said office at Butte and one other at Helena, with like duties and authority.

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of interstate commerce. Ware & Leland v. Mobile County, 209 U. S. 405, 412-413 The most that can be said is that the agreements are likely to give rise to interstate shipments. This is not enough."

Forms for the use of the several transactions are prepared at the Home Office and transmitted by mail to the company's employés. No agent is authorized to accept risks of any kind or make or modify contracts, nor have they ever done so. The officers of the company reside and have always resided in and near the City of New York and had and have their offices and places of business at the Home Office. All risks are accepted and contracts made, modified and discharged at the Home Office. * * *

The same contention is made here as in the state courts, that is, that the tax is a burden on interstate commerce, and an elaborate argument is presented to distinguish this case from those in which this court has decided that insurance is not commerce. These cases are: Paul v. Virginia, 8 Wall. 168 (1868); Ducat v. Chicago, 10 Wall. 410; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566; Philadelphia Fire Ass'n v. New York, 119 U. S. 110; Hooper v. California, 155 U. S. 648; Noble v. Mitchell, 164 U. S. 367; New York Life Ins. Co. v. Cravens, 178 U. S. 389; and Nutting v. Massachusetts, 183 U. S. 553.

If we consider these cases numerically, the deliberation of their reasoning, and the time they cover, they constitute a formidable body of authority and strongly invoke the sanction of the rule of stare decisis. This we especially emphasize, for all of the cases concerned, as the case at bar does, the validity of state legislation, and under varying circumstances the same principle was applied in all of them. For over forty-five years they have been the legal justification for such legislation. To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the states and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision. In deference, however, to the earnestness of counsel, we will consider more particularly (1) what the cases decide, and (2) whether they are wrong in principle.

Paul v. Virginia is the progenitor case. A law of Virginia precluded any insurance company not incorporated under the laws of the state doing business in the state without previously obtaining a license for that purpose, which could only be obtained by a deposit with the state treasury of bonds of a specified character to an amount varying from thirty to fifty thousand dollars. A subsequent law required the agent of a foreign insurance company to take out a license.

Paul was appointed the agent of several fire insurance companies incorporated in the State of New York. He applied for a license, offering to comply with all the provisions of the law excepting the deposit of bonds. The license was refused and he, notwithstanding, undertook to act as agent for the companies, offered to issue policies in their behalf and in one instance did issue a policy in their name to a citizen of Virginia. For this violation of the statute he was indicted and convicted in one of the state courts and the judgment was affirmed by the Supreme Court of Appeals of the state. Error was prosecuted from this court based on, as one of its grounds, the alleged violation of the commerce clause of the Constitution of the United States.

Replying to the argument to sustain the contention, the court said, by Mr. Justice Field, that its defect lay in the character of the business done. "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

The doctrine announced, that insurance was not commerce but a personal contract, was emphasized by illustrations. Nathan v. Louisiana, 8 How. 73, was cited, where a tax on money and exchange brokers who dealt in the purchase and sale of foreign bills of exchange was sustained as not conflicting with the constitutional power of Congress to regulate commerce. The individual thus using his money, it was said (quoting the cited case), "is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship-builder, without whose labor foreign commerce could not be carried on." The doctrine was further illustrated by bills of exchange foreign and domestic, which it was said were subject to the regulating and taxing laws of the states.

In Hooper v. California, [counsel urged] the invalidity of the statute of the state making it a misdemeanor for any person in that state to procure insurance for a resident in the state from an insurance company not incorporated under its laws. The argument was that in as much as the contract involved was one for marine insurance,[9] it was a matter of interstate commerce, and as such beyond the reach of state authority and included among the exceptions to the rule. It was replied by the court: "This proposition involves an erroneous conception of what constitutes interstate commerce. That the business of insurance does not generically appertain to such commerce has been settled since the case of Paul v. Virginia." To the attempt to distinguish between policies of marine insurance and policies of fire insurance, and thus take the former out of the rule of Paul v. Virginia, it was answered, "It ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other." And it was pointed out that if the power to regulate interstate commerce applied to all of the incidents of such commerce and "to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature." And then, sweeping away the distinction between the different subject-matters of insurance contracts, and the different events indemnified against, and declaring the principle applicable to all and determinative of the regulating power of the states over all, it was said, "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.' "

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[9] "Let it be assumed, as this court has said, that the insurance business, generically considered, is not commerce; that the contract of insurance is a personal contract,—an indemnity against the happening of a contingent event. The enquiry

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still remains whether policies of insurance against marine risks during the voyage to foreign ports are not so vitally connected with exporting that the tax on such policies is essentially a tax upon the exportation itself.

"The answer must be found in the actual course of trade; for exportation is a trade movement and the exigencies of trade determine what is essential to the process of exporting. The avails of exports are usually obtained by drawing bills against the goods; these drafts must be accompanied by the bills of lading and policies or certificates of insurance. It is true that the bills of lading represent the goods, but the business of exporting requires not only the contract of carriage but appropriate provision for indemnity against marine risks during the voyage. The policy of insurance is universally recognized as one of the ordinary 'shipping documents.' Thus, when payment is to be made in exchange for such documents, they are held to include not only a proper bill of lading but also 'a policy of insurance for the proper amount.' Tamvaco v. Lucas, 1 B. & S. 185, 197, 206. It is not sufficient to tender the bill of lading without the policy. Benjamin on Sales, § 590, note; Hickox v. Adams, 34 L. T. N. S. 404. The requirements of exportation are reflected in the familiar 'C. I. F.' contract (that is, at a price to cover cost, insurance, and freight), which has 'its recognized legal incidents, one of which is that the shipper fulfils his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and policy of insurance with a credit note for the freight, as explained by Lord Blackburn in Ireland v. Livingston' (L. R. 5 H. L. 395, 406). Ströms Bruks Aktie Bolag v. Hutchison (1905) A. C., 515, 528. See also Mee v. McNider, 109 N. Y. 500. It cannot be doubted that insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation; the business of the world is conducted upon this basis." Thames & Mersey Marine Ins. Co. v. United States (1915) 237 U. S. 19, 25-26, 59 L. ed. 821, L. R. A. 1515D, 1167.

This declaration was repeated and applied in Noble v. Mitchell, 164 U. S. 367, and in New York Life Insurance Co. v. Cravens, 178 U. S. 389. * * * [In the latter case] it was also urged that modern life insurance had taken on essentially a national and international character, and that when Paul v. Virginia was decided the business was "to a great extent, local, that is, conducted through the domestic contracts by stock companies. The great and commanding organizations of the present day had hardly begun the amazing development which has made them the greatest associations of administrative trusts in the business world."

These contentions were earnestly made; the reply to them deliberately meditated and its extent fully appreciated. The ruling in Paul v. Virginia and other cases was applied. * * *

This detail shows what the cases decided. Were they rightly decided? The reasoning of the cases anticipate and answer the question, and it would rack ingenuity to attempt to vary its expression or more aptly illustrate it. A policy of insurance, the cases declare, is a personal contract, a mere indemnity, for a consideration, against the happening of some contingent event, which may bring detriment to life or property, and its character is the same no matter what the event insured against, whether fire or hurricane, acts of man or acts of God, storms on land or storms on sea, death or lesser accident. The same event may involve both life and property, precipitating the obligation of the policies. Nor does the character of the contracts change by their numbers or the residence of the parties. The latter is made much of in this case. It was made much of in the Cravens Case. The effort has been to give a special locality to the contracts and determine their applicatory law, and, indeed, to a centralization of control, to employ local agents but to limit their power and judgment. To accomplish the purpose there is necessarily a great and frequent use of the mails, and this is elaborately dwelt on by the insurance company in its pleading and argument, it being contended that this and the transmission of premiums and the amounts of the policies constitute a 'current of commerce among the states.' This use of the mails is necessary, it may be, to the centralization of the control and supervision of the details of the business; it is not essential to its character. * * *

We have already pointed out that if insurance is commerce and becomes interstate commerce whenever it is between citizens of different states, then all control over it is taken from the states and the legislative regulations which this court has heretofore sustained must be declared invalid.

The number of transactions do not give the business any other character than magnitude. If it did, the department store which deals with every article which covers or adorns the human body, or, it may be, nourishes it, would have one character while its neighbor, humble in the variety and extent of its stock, would have another.

Nor, again, does the use of the mails determine anything. Certainly not that which takes place before and after the transaction between the plaintiff and its agents in secret or in regulation of their relations. But put agents to one side and suppose the insurance company and the applicant negotiating or consummating a contract. That they may live in different states and hence use the mails for their communications does not give character to what they do; cannot make a personal contract the transportation of commodities from one state to another, to paraphrase Paul v. Virginia. Such might be incidents of a sale of real estate (certainly nothing can be more immobile). Its transfer may be negotiated through the mails and completed by the transmission of the consideration and the instrument of transfer also through the mails.

It is contended that the policies are subject to sale and transfer, may be used for collateral security and other commercial purposes. This may be, but this use of them is after their creation, a use by the insured, not by the insurer. The quality that is thus ascribed to them may be ascribed to any instrument evidencing a valuable right. The argument was anticipated in Paul v. Virginia, citing Nathan v. Louisiana, where, as we have seen, a tax on money and exchange brokers who dealt in the purchase and sale of foreign bills of exchange was sustained as not conflicting with the constitutional power of Congress to regulate commerce among the states or with foreign nations.

It is contended that Paul v. Virginia and the cases which follow it must be limited, as it is contended "the facts therein did limit them, to intrastate, not interstate, contracts," and that if they be not so limited the Lottery Case, 188 U. S. 321, and the International Textbook Co. v. Pigg, 217 U. S. 91, cannot stand.

The basis of this contention necessarily is the insistence that the contracts in Paul v. Virginia and the succeeding cases were intrastate contracts while the contracts in the case at bar are interstate contracts. But this is a false characterization of the contracts. The decision of the cases is that contracts of insurance are not commerce at all, neither state nor interstate. This is the obstacle to the contention of the insurance company. The company realizes it to be an obstacle and has attempted to remove it by detailing the manner of conducting its business as demonstrating that its policies are interstate contracts. We have replied to the attempt and shown that its manner of business has no such effect. It follows necessarily, therefore, that neither the Lottery Case nor the Pigg Case impugns the authority or the application of the cited cases. They, the Lottery Case and the Pigg Case, were concerned with transactions which involved the transportation of property and were not mere personal contracts.

There are cognate cases to the cited cases, of contracts incident to commerce but not of themselves commerce. In Williams v. Fears, 179 U. S. 270, there was levied by the State of Georgia a tax upon each emigrant agent or employer or employé of such agent, doing business in the state. The law imposing the tax was attacked as a violation of the Commerce Clause of the Constitution of the United States. Commerce was defined, quoting Mr. Justice Field, in Mobile County v. Kimball, 102 U. S. 691, 702, to "consist in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." The court considered the definition comprehensive enough for the purpose of the case and, testing its application, said, by Mr. Chief Justice Fuller: "These agents were engaged in hiring laborers in Georgia to be employed beyond the limits of the state. Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the emigrant agent was engaged in transportation." The conclusion was supported by cases, among others, Paul v. Virginia and Hooper v. California. On the authority of the same cases and Life Insurance Co. v. Cravens, in Ware & Leland v. Mobile County, 209 U. S. 405, it was held that contracts by brokers for the sale of cotton for future delivery, where the transactions were closed by contracts completed and executed in one state although the orders were received from another state, were legally subject to a tax. Such contracts, it was said, were not "the subjects of interstate commerce, any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company." * * *

Further discussion, we think, is unnecessary, and we have gone beyond the citing of the authoritative cases only in deference to the able and earnest argument of counsel.

Judgment affirmed.[10]

MR. JUSTICE HUGHES and MR. JUSTICE VAN DEVANTER dissent.

CRESCENT COTTON OIL CO. v. MISSISSIPPI.

1921. Supreme Court of the United States. 257 U. S. 129.

MR. JUSTICE CLARKE delivered the opinion of the court.

An act of the Legislature of Mississippi, approved March 28, 1914 (designated in the record the "Anti-Gin Act"), prohibits corporations, whether organized under the laws of that state or authorized under the laws thereof to do any local business therein, among other things, from owning or operating any cotton gin, when such corporation is interested in the manufacture of cotton seed oil or cotton seed meal. A penalty is provided for violation of the act, but corporations are permitted to operate their gins for a reasonable time until they may be sold. A proviso permits cotton seed oil companies to operate gins of a prescribed capacity, but only in the city or town where their oil plants are located. Mississippi Laws 1914, c. 162; § 4752, et seq. Hemingway's Code, 1917.

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[10] Compare Blumenstock Bros. Adv. Agency v. Curtis Pub. Co. (1920) 252 U. S. 436, 64 L. ed. 649 (making of contracts for advertising between an advertising agency and a nationally circulated magazine); Hemphill v. Orloff (1928) 277 U. S. 537, 72 L. ed. 978 (a business trust created under the laws of one state buying and selling negotiable paper in another); United States Fidelity & Guaranty Co. v. Kentucky (1913) 231 U. S. 394, 58 L. ed. 283 (business of supplying to nonresident merchants and others information as to the financial credit of local merchants); Williams v. Fears (1900) 179 U. S. 270, 45 L. ed. 186 (employment agency hiring laborers within a state for employment outside).

The plaintiff in error, a corporation organized under Tennessee Laws, prior to 1914 owned and operated a cotton seed oil mill at Memphis in that state, and two cotton gins in Mississippi. Disregarding the Anti-Gin Act, it continued to operate its two gins in Mississippi until October, 1915, when, for the purpose of enforcing the law, the state, on the relation of its Attorney General, instituted a suit in equity against the company in a county court of chancery, which, after various vicissitudes, resulted in a decree that the act was constitutional, and that the plaintiff in error was guilty of violating it. A penalty was imposed upon the company, its right to do intrastate or local business in Mississippi was declared forfeited, it was perpetually enjoined from operating cotton gins in the state, and it was ordered that, within ninety days, the company should dispose of the two cotton gins which it owned and operated in Mississippi. * * *

This is a proceeding in error to review the decree of the Supreme Court of Mississippi affirming that decree of the county court as to the Anti-Gin Act. * * *

It clearly appears that in practice it is an advantage to the purchaser of cotton seed to operate gins, not only for the profit that may be made from them directly, but because the grower of cotton often prefers to sell his seed to the company ginning it rather than carry it to another purchaser. It is also in evidence that individuals, as well as corporations, owned and operated gins and that other oil companies than the plaintiff in error obtained their supplies of seed from growers, from gin owners and from brokers.

The plaintiff in error has heretofore relied, and here relies, for its defense, upon the unconstitutionality of the Anti-Gin Act, which it asserts upon two grounds, viz: first, that, as applied to the plaintiff in error, it imposes a direct and substantial, and therefore an unconstitutional, burden upon an instrumentality of interstate commerce; * * *.

The basis of the first contention is the claim that it had become impracticable for the oil company to carry on its oil manufacturing business successfully when purchasing its cotton seed supply from other ginners or from brokers, that for this reason the company acquired its two cotton gins in Mississippi, and nine in other states, to obtain the advantage of purchasing seed direct from the growers of cotton, and that all of the cotton seed which it had purchased in connection with its gins was shipped in interstate commerce to its oil mill at Memphis, the gins being in effect, "feeders" to its oil mill.

These facts, not disputed in the record, it is argued, constitute the gins an essential means and instrumentality of interstate commerce and that therefore the act imposes a direct and unconstitutional burden on commerce between the states in violation of § 8 of Article I of the Constitution of the United States. * * *

The question we are now considering * * * is whether a cotton gin operated by an oil company in Mississippi is rendered an instrumentality of interstate commerce by the fact that the owner of it ships out of the state, for its use in another state, all of the cotton seed which may be purchased in connection with its ginning operations. * * *

The separation of the seed from the fiber of the cotton which is accomplished by the use of the cotton gin, is a short but important step in the manufacture of both the seed and the fiber into useful articles of commerce, but that manufacture is not commerce was held in Kidd v. Pearson, 128 U. S. 1, 20, 21; United States v. E. C. Knight Co., 156 U. S. 1, 12, 13; Capitol City Dairy Co. v. Ohio, 183 U. S. 238, 245; McCluskey v. Marysville & Northern Ry. Co., 243 U. S. 36, 38; Hammer v. Dagenhart, 247 U. S. 251, 252; and in Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 249 U. S. 134, 151, 152. And the fact, of itself, that an article when in the process of manufacture is intended for export to another state does not render it an article of interstate commerce. Coe v. Errol, 116 U. S. 517, and New York Central R. R. Co. v. Mohney, 252 U. S. 152, 155. When the ginning is completed the operator of the gin is free to purchase the seed or not, and if it is purchased to store it in Mississippi indefinitely, or to sell or use it in that state or to ship it out of the state for use in another, and, under the cases cited, it is only in this last case and after the seed has been committed to a carrier for interstate transport that it passes from the regulatory power of the state into interstate commerce and under the national power.

The application of these conclusions of law to the manufacturing operations of the cotton gins, which we have seen precede but are not a part of interstate commerce, renders it quite impossible to consider them an instrumentality of such commerce, which is burdened by the Anti-Gin Act, and the first contention of the plaintiff in error must be denied. * * *

Affirmed.[11]

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[11] "Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In Hammer v. Dagenhart, 247 U. S. 251, 272, we said: 'The making of goods and mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. Delaware, Lackawanna & Western

BROWNING v. CITY OF WAYCROSS.

1914. Supreme Court of the United States. 233 U. S. 16.

[Error to the Court of Appeals of Georgia, which had sustained a conviction of Browning in the municipal court on the charge stated in the opinion.]

Mr. Chief Justice White delivered the opinion of the court.

The plaintiff in error was charged in a municipal court with violating an ordinance which imposed an annual occupation tax of $25 upon "lightning rod agents or dealers engaged in putting up or erecting lightning rods within the corporate limits" of the City of Waycross. Although admitting that he had carried on the business he pleaded not guilty and defended upon the ground that he had done so as the agent of a St. Louis corporation on whose behalf he had solicited orders for the sale of lightning rods; had received the rods when shipped on such orders from St. Louis and had erected them for the corporation, the price paid for the rods to the corporation including the duty to erect them without further charge. This it was asserted constituted the carrying on of interstate commerce which the city could not tax without violating the Constitution of the United States. * * *

The general principles by which it has been so frequently determined that a state may not burden by taxation or otherwise the taking of orders in one state for goods to be shipped from another or the shipment of such goods in the channels of interstate commerce up to and including the consummation by delivery of the goods at the point of shipment have been so often stated as to cause

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R. R. Co. v. Yurkonis, 238 U. S. 439.'" Taft, C. J., in United Mine Workers v. Coronado Coal Co. (1922) 259 U. S. 344, 407, 66 L. ed. 975, 27 A. L. R. 762.

It has been said that if the contrary were held, "the result would be that Congress would be invested with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly an interstate or foreign market?" Kidd v. Pearson (1888) 128 U. S. 1, 21, 32 L. ed. 346. So as to mining, Heisler v. Thomas Colliery Co. (1922) 260 U. S. 245, 67 L. ed. 237; Oliver Iron Min. Co. v. Lord (1923) 262 U. S. 172, 67 L. ed. 929.

McCready v. Virginia (1876) 94 U. S. 391, 24 L. ed. 248 (holding that a state statute which excluded citizens of other states from planting oysters in the public waters of the state violated neither Art. IV, Sec. 2, Cl. 1 nor the Commerce Clause): "There is no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade." So also (semble) the gathering of sponges from the marginal seas of a state is exclusively within the state's control. The Abby Dodge (1912) 223 U. S. 166, 56 L. ed. 390.

While it has been held that fishing for free swimming fishes in the marginal sea of a state (ordinarily defined as within a marine league of the shore) is within the power of the state to regulate (Manchester v. Massachusetts (1891) 139 U. S. 240, 35 L. ed. 159) it is not clear that Congress does not have superior power thereover.

them to be elementary and as to now require nothing but a mere outline of the principle. The sole question, therefore, here is whether carrying on the business of erecting lightning rods in the state under the conditions established, was interstate commerce beyond the power of the state to regulate or directly burden. * * *.

Caldwell v. North Carolina, 187 U. S. 622, concerned the validity of an ordinance of the village of Greensboro, imposing a tax upon the business of selling or delivering picture frames, photographs, etc. The question was whether Caldwell, the agent of an Illinois corporation, was liable for this tax because in Greensboro he had taken from a railroad freight office certain packages of frames and pictures which were awaiting delivery and which had been shipped to Greensboro by the selling corporation to its own order for the purpose of filling orders previously obtained by its agents in North Carolina. After the packages of frames and pictures were received by Caldwell, in a room in a hotel, the pictures and frames were fitted together and were delivered to those who had ordered them. The assertion that there was liability for the tax was based on the contention that the act of Caldwell in receiving the pictures and frames and bringing them together was not under the protection of the commerce clause, but was the transaction of local business after the termination of interstate commerce, especially because the pictures and frames had been shipped from Chicago in separate packages and, because the pictures and frames were incomplete on their arrival, and were made complete in the state by the union accomplished after the end of their movement in interstate commerce. Both of these propositions were decided to be unsound and it was adjudged that as both the pictures and frames had been ordered from another state and their shipment was the fulfillment of an interstate commerce transaction, the mere fact that they were shipped in separate packages and brought together at the termination of the transit, did not amount to the transaction of business within North Carolina which the state could tax without placing a direct burden upon interstate commerce. * * *

We are of the opinion that the court below was right in holding that the business of erecting lightning rods under the circumstances disclosed, was within the regulating power of the state and not the subject of interstate commerce for the following reasons: (a) Because the affixing of lightning rods to houses, was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of state authority. (b) Because, besides, such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce or the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated. It is true, that it was shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause. It is manifest that if the right here asserted were recognized or the power to accomplish by contract what is here claimed, were to be upheld, all lines of demarkation between national and state authority would become obliterated, since it would necessarily follow that every kind or form of material shipped from one state to the other and intended to be used after delivery in the construction of buildings or in the making of improvements in any form would or could be made interstate commerce.

Of course we are not called upon here to consider how far interstate commerce might be held to continue to apply to an article shipped from one state to another, after delivery and up to and including the time when the article was put together or made operative in the place of destination in a case where because of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction. In saying this we are not unmindful of the fact that some suggestion is here made that the putting up of the lightning rods after delivery by the agent of the seller was so vital and so essential as to render it impossible to contract without an agreement to that effect, a suggestion however which we deem it unnecessary to do more than mention in order to refute it.

Affirmed.[12]

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[12] In York Manufacturing Co. v. Colley (1918) 247 U. S. 21, 62 L. ed. 963, 11 A. L. R. 611, it was held that the company, a Pennsylvania corporation, did only interstate commerce business in Texas in performing the following contract there: "The contract covered an ice plant guaranteed to produce three tons of ice a day, consisting of gas compression pumps, a compressor, ammonia condensers, freezing tank and cans, evaporating coils, a brine agitator and other machinery and accessories including apparatus for utilizing exhaust steam for making distilled water for filling the ice cans. These parts of machinery, it was provided, were to be shipped from Pennsylvania to the point of delivery in Texas and were there to be erected and connected. This work, it was stipulated, was to be done under the supervision of an engineer to be sent by the York Manufacturing Company for whose services a fixed per diem charge of $6.00 was to be paid by the purchasers and who should have the assistance of mechanics furnished by the purchasers, the supervision to include not only the erection but the submitting of the machinery to a practical test in operation before the obligation to finally receive it would arise. It was moreover undisputed that these provisions were carried out, that about three weeks were consumed in erecting the machinery and about a week in practically testing it, when after a demonstration of its successful operation it was accepted by the purchasers."

The court said that the only possible question was, "Was the particular provision of the contract for the service of an engineer to assemble and erect the machinery * * * and to practically test its efficiency before complete delivery relevant and appropriate to the interstate sale of the machinery?" The court answered "yes," and remarked upon the complexity of the machinery composing

Section 2.—Dual Control of Interstate and Foreign Commerce.

COOLEY v. BOARD OF WARDENS OF PORT OF PHILADELPHIA.

1851. Supreme Court of the United States. 12 How. 299.

[Suit was begun in a Pennsylvania court to recover from Cooley, the consignee of two vessels, half pilotage fees, the two vessels having sailed from Philadelphia without a local pilot, in violation of a state statute which required vessels coming into or leaving the port to accept local pilots for pilotage through the Delaware River, and upon neglect to do so the master, owner or consignee was made liable to pay to the warden, as a penalty, half the pilotage fees, creating a fund for the relief of pilots and their dependents. The state supreme court sustained a judgment against Cooley, who took this writ of error.]

MR. JUSTICE CURTIS delivered the opinion of the court. * * *

That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several states, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution.

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used. Accordingly, the first Congress assembled under the Constitution passed laws, requiring the masters of ships and vessels of the United States to be citizens of the United States, and established many rules for the government and regulation of officers and seamen. 1 Stats. at Large, 55, 131. These have been from time to time added to and changed, and we are not aware that their validity has been questioned. * * *

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the plant "and the necessity of its aggregation and unison with mechanical skill and precision in order that the result of the contract of sale—the ice plant purchased—might come into existence."

Compare General Railway Signal Co. v. Virginia (1918) 246 U. S. 500, 62 L. ed. 854, and Kansas City Structural Steel Co. v. Arkansas (1925) 269 U. S. 148, 70 L. ed. 204.

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The Act of Congress of the 7th of August, 1789, § 4, is as follows:

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states, respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."

If the law of Pennsylvania, now in question, had been in existence at the date of this act of Congress, we might hold it to have been adopted by Congress, and thus made a law of the United States, and so valid. Because this act does, in effect, give the force of an act of Congress, to the then existing state laws on this subject, so long as they should continue unrepealed by the state which enacted them. But the law on which these actions are founded, was not enacted till 1803. What effect then can be attributed to so much of the act of 1789 as declares that pilots shall continue to be regulated in conformity "with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress"?

If the states were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the states that power. And yet this act of 1789 gives its sanction only to laws enacted by the states. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a state acting in its legislative capacity, can be deemed a law enacted by a state; and if the state has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views, we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress did per se deprive the states of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter. If they are excluded, it must be because the nature of the power thus granted to Congress requires that a similar authority should not exist in the states. If it were conceded on the one side that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the states, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the states from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution ("Federalist," No. 32), and with the judicial construction given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations. Sturges v. Crowninshield, 4 Wheat. 193; Houston v. Moore, 5 Wheat. 1; Willson v. Blackbird Creek Co., 2 Pet. 251.

The diversities of opinion, therefore, which have existed on this subject have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage, is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such that until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this act of 1789, as declares that pilots shall continue to be regulated "by such laws as the states may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the states a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the states, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. How, then, can we say that, by the mere grant of power to regulate commerce, the states are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of Congress must be exclusive? This would be to affirm that the nature of the power is, in this case, something different from the nature of the subject to which, in such case, the power extends, and that the nature of the power necessarily demands, in all cases, exclusive legislation by Congress, while the nature of one of the subjects of that power, not only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the states, in conformity with the circumstances of the ports within their limits. In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive by affirming of the power what is not true of its subject now in question.

It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the states in the absence of all congressional legislation; nor to the general question, how far any regulation of a subject by Congress, may be deemed to operate as an exclusion of all legislation by the states upon the same subject. We decide the precise questions before us, upon what we deem sound principles, applicable to this particular subject in the state in which the legislation of Congress has left it. We go no further. * * *

Judgment affirmed.

[McLean and Wayne, JJ., dissented, and Daniel, J., concurred for other reasons.]

HALL v. DE CUIR.

1877. Supreme Court of the United States. 95 U. S. 485.

Error to the Supreme Court of Louisiana.

Benson, the defendant below, was the master and owner of the "Governor Allen," a steamboat enrolled and licensed under the laws of the United States for the coasting trade, and plying as a regular packet for the transportation of freight and passengers between New Orleans, in the State of Louisiana, and Vicksburg, in the State of Mississippi, touching at the intermediate landings both within and without Louisiana, as occasion required. The defendant in error, plaintiff below, a person of color, took passage upon the boat, on her trip up the river from New Orleans, for Hermitage, a landing place within Louisiana, and being refused accommodations, on account of her color, in the cabin specially set apart for white persons, brought this action in the eighth district court for the Parish of New Orleans, under [the state statute stated in the opinion] to recover damages for her mental and physical suffering on that account. Benson, by way of defense, insisted, among other things, that the statute was inoperative and void as to him, in respect to the matter complained of, because, as to his business, it was an attempt to "regulate commerce among the states," and, therefore, in conflict with Art. 1, Sect. 8, Par. 3, of the Constitution of the United States. The District Court of the parish held that the statute made it imperative upon Benson to admit Mrs. De Cuir to the privileges of the cabin for white persons, and that it was not a regulation of commerce among the states, and, therefore, not void. After trial, judgment was given against Benson for $1,000; from which he appealed to the supreme court of the state, where the rulings of the district court were sustained. * * * Benson having died, Hall, his administratrix, was substituted in this court.

Mr. Chief Justice Waite delivered the opinion of the court.

For the purposes of this case, we must treat the Act of Louisiana of February 23, 1869, as requiring those engaged in interstate commerce to give all persons traveling in that state, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that act in the courts below, and it is conclusive upon us as the construction of a state law by the state courts. It is with this provision of the statute alone that we have to deal. We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the states. * * *

But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.

It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these water is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammeled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin, during his passage down the river, or be subject to an action for damages, "exemplary as well as actual," by any one who felt himself aggrieved because he had been excluded on account of his color.

This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the states, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade. As was said by Mr. Justice Field, speaking for the court in Welton v. State of Missouri, 91 U. S. 282: "Inaction [by Congress] * * * is equivalent to a declaration that interstate commerce shall remain free and untrammeled." Applying that principle to the circumstances of this case, congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. * * *

Reversed.[1]

[MR. JUSTICE CLIFFORD concurred with a separate opinion.]

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[1] South Covington etc. St. Ry. Co. v. Kentucky (1920) 252 U. S. 399, 64 L. ed. 631: A domestic corporation operated an interurban electric railway between towns in Kentucky and Cincinnati, Ohio. Eighty per cent. of its passengers were interstate. Not over six per cent. of its passengers were colored. On many trips there were no colored passengers. The company ran its cars as single cars. A state statute required every company "operating any of the railroads of this state" to segregate white and colored passengers into separate cars or separate compartments, the latter to be "divided by a good and substantial wooden partition with a door therein." The Supreme Court of the United States affirmed the conviction by a Kentucky court of a company for violation of this statute. The specific offense charged was the operation in Kentucky of a car without the compartments prescribed. The defense set up was that the car in question was bound from a point in Kentucky to Cincinnati, Ohio. This was held unavail-

SOUTH COVINGTON & CINCINNATI STREET RY. CO. v. COVINGTON.

1915. Supreme Court of the United States. 235 U. S. 537.

[The street railway company sued to enjoin enforcement by the City of Covington of the ordinance which is stated in the opinion. The state supreme court affirmed the trial court's dismissal of the petition, over the contention that the ordinance violated the commerce clause and the due process clause of the Fourteenth Amendment, and this writ of error was taken.]

Mr. Justice Day delivered the opinion of the court. * * *

The testimony shows that the plaintiff is a Kentucky corporation, and its principal occupation is the carrying of passengers in connection with an Ohio corporation which operates on the other side of the Ohio River, upon continuous and connecting tracks, and across a bridge from Covington to Cincinnati, which this court has held to be an instrument of interstate commerce. Covington &c. Bridge Co. v. Kentucky, 154 U. S. 204. This traffic is conducted by means of continuous trips and for a single fare, between points on the lines of the railway in Covington and Fourth Street or Fountain Square in the City of Cincinnati, or from any point between Fourth Street or Fountain Square in the City of Cincinnati to points in the City of Covington. Practically every car is thus engaged in going to or coming from Cincinnati, and from seventy-five to eighty per cent. of the passengers carried in the City of Covington are

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ing. The Court said: "An interurban railroad company deriving its powers from the state, and subject to obligations under the laws of the state, should not be permitted exercise of powers given by the state, and escape its obligations to the state under the circumstances presented by this record, by running its coaches beyond the state lines." Pitney, Van Devanter and Day, JJ., dissented, Day, J., saying:

"Secondly, it is suggested, and this seems to be the weight of the argument, that cars could be constructed with a separate compartment for the few colored persons who ride in the car after it reaches or before it leaves Kentucky. It is admitted that this regulation would not apply to interstate passengers, and colored passengers going from Kentucky to Cincinnati, or going from Cincinnati to Kentucky on a through trip, would not be subject to the regulation. The few colored passengers traveling exclusively in the State of Kentucky in this car would thus be discriminated against by reason of the different privilege accorded to other colored passengers on the same car, a condition not likely to promote the peace or public welfare." The majority opinion did not cite Plessy v. Ferguson, ante, p. 891, nor any other race separation case.

That a state may require railroads to equip their trains for separation racially of passengers traveling between two points in the same state, and to make such separation, even as to trains running into or out of the state, see Chesapeake & Ohio R. Co. v. Kentucky (1900) 179 U. S. 388, 45 L. ed. 244, and cases there cited. It has been held that a railroad company acting under its common-law power to prescribe the terms upon which it will render service, provided they are not unreasonable, may racially separate its passengers, even those traveling interstate. Chiles v. Chesapeake & Ohio R. Co. (1910) 218 U. S. 71, 54 L. ed. 936, 20 Ann. Cas. 980; but the Supreme Court has not held (1930) that a state may require separation as to interstate traveling passengers.

being transported from Covington to Cincinnati, or from Cincinnati to Covington or farther in Kentucky. The cars operate without change of motormen or conductors, and under the direction of the same officers.

This court has repeatedly held that whether given commerce is of an interstate character or not is to be determined by what is actually done, and if the transportation is really and in fact between states, the mere arrangements of billing or plurality of carriers do not enter into the concluson. Here is an uninterrupted transportation of passengers between states, on the same cars, and under practically the same management, and for a single fare. We have no doubt that this course of business constitutes interstate commerce. Texas & New Orleans R. R. v. Sabine Tram Co., 227 U. S. 111; St. Louis, S. F. & T. R. R. v. Seale, 229 U. S. 156; Railroad Commission of Ohio v. Worthington, 225 U. S. 101; Omaha & Council Bluffs Street Ry. v. Interstate Commerce Commission, 230 U. S. 324, 336. * * *

Reaching the conclusion that the traffic here regulated is of an interstate character, and therefore within the control of the federal Congress, the further question is presented: Does the case come within that class wherein the state may regulate the matter legislated upon until Congress has acted by virtue of the supreme authority given it by virtue of the commerce clause of the Constitution? * * *.

In the light of the principles settled and declared, the various provisions of this ordinance must be examined. That embodied in §§ 1 and 6 makes it unlawful for the company to permit more than one-third greater in number of the passengers to ride or be transported within its cars over and above a number for which seats are provided therein, except this provision shall not apply or be enforced on the Fourth of July, Decoration Day, or Labor Day, and by § 6 it is made the duty of the company operating the cars within the city of Covington to run and operate the same in sufficient numbers at all times to reasonably accommodate the public, within the limits of the ordinance as to the number of passengers permitted to be carried, and the council is authoried to direct the number of cars to be increased sufficiently to accommodate the public if there is a failure in this respect. To comply with these regulations, the testimony shows, would require about one-half more than the present number of cars operated by the company, and more cars than can be operated in Cincinnati within the present franchise rights and privileges held by the company, or controlled by it, in that city. Whether, in view of this situation, this regulation would be so unreasonable as to be void, we need not now inquire. These facts, together with the other details of operation of the cars of this company, are to be taken into view in determining the nature of the regulation here attempted, and whether it so directly burdens interstate commerce as to be beyond the power of the state. We think the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there, where the traffic is much impeded and other lines of street railway and many hindrances have to be taken into consideration in regulating the traffic. If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in Hall v. De Cuir, 95 U. S. 485, 489, "commerce cannot flourish in the midst of such embarrassments."

We need not stop to consider whether Congress has undertaken to regulate such interstate transportation as this, for it is clearly within its power to do so, and absence of federal regulation does not give the power to the state to make rules which so necessarily control the conduct of interstate commerce as do those just considered.

There are other parts of the ordinance which we are of opinion are within the authority of the state, and proper subject-matter for its regulation; at least, until the federal authority is exerted. These are the provisions with reference to passengers riding on the rear platform unless the same be provided with a suitable rail or barrier, etc., and as to persons riding upon the front platform unless a rail or barrier be provided, separating the motorman from the balance of the front platform, as well as those provisions with reference to the requirement to keep the cars clean and ventilated and fumigated. We think these regulations come within that class in which this court has sustained the right of the local authorities to safeguard the traveling public, and to promote their comfort and convenience, only incidentally affecting the interstate business, and not subjecting the same to unreasonable demands. New York, N. H. & H. R. Co. v. New York, 165 U. S. 628; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 291, 292. As to the regulation affecting the temperature of the cars, and providing that they shall never be permitted to be below 50° Fahrenheit, the undisputed testimony shows that it is impossible in the operation of the cars to keep them uniformly up to this temperature, owing to the opening and closing of doors, and other interferences that make it impracticable. We therefore think, upon this showing, this feature of the ordinance is unreasonable and cannot be sustained.

Our conclusion is that the Court of Appeals of Kentucky erred in refusing the injunction as against the provisions of the ordinance regulating the number of passengers to be carried in a car and the number of cars to be provided, and the requirement as to heating in view of the testimony as heretofore stated. In these respects its decision should be reversed. We think the other provisions of the ordinance separable and concerning them the plaintiff in error was not entitled to an injunction in the state court.

Reversed in part.

Smith v. St. Louis & S. W. R. Co. (1901) 181 U. S. 248, 45 L. ed. 847, sustaining a Texas quarantine against bringing into Texas any cattle, mules or horses from Louisiana, proclaimed by the governor of Texas to be effective from June 5 to November 15, 1897. This proclamation and the recommendation of the Texas Live Stock Sanitary Commission upon which it was based were made in accordance with a Texas statute. The commission's recommendation recited that charbon or anthrax had broken out or was liable to do so, in Louisiana within the dates stated. Mr. Justice McKenna, for the court: "To what extent the police power of the state may be exerted on traffic and intercourse with the state, without conflicting with the commerce clause of the Constitution of the United States, has not been precisely defined. * * *

"In Railroad Company v. Husen, 95 U. S. 465, a statute of Missouri which provided that 'no Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this state between the 1st day of March and the 1st day of November in each year, by any person or persons whatsoever,' was held to be in conflict with the clause of the Constitution which gives to Congress the power to regulate interstate commerce.

"The case was an action for damages against the railroad company for bringing cattle into the state in violation of the act. A distinction was made between a proper and an improper exertion of the police power of the state. The former was confined to the prohibition of actually infected or diseased cattle and to regulations not transcending such prohibition. The statute was held not to be so confined, and hence was declared invalid. * * *

"The exclusion in the case at bar is not as complete as in the cited cases. That, however, makes no difference if it is within their principle; and their principle does not depend upon the number of states which are embraced in the exclusion. It depends upon whether the police power of the state has been exerted beyond its province,—exerted to regulate interstate commerce,—exerted to exclude, without discrimination, the good and the bad, the healthy and the diseased, and to an extent *beyond what is necessary for any proper* *quarantine.* The words in italics express an important qualification. The prevention of disease is the essence of a quarantine law. Such law is directed, not only to the actually diseased, but to what has become exposed to disease. In Morgan's Steamship Co. v. Louisiana Board of Health, 118 U. S. 455, the quarantine system of Louisiana was sustained. It established a quarantine below New Orleans, provided health officers and inspection officers, and fees for them, to be paid by the ships detained and inspected. The system was held to be a proper exercise of the police power of the state for the protection of health, though some of its rules amounted to regulations of commerce with foreign nations and among the states. In Kimmish v. Ball, 129 U. S. 217, certain sections of the laws of Iowa were passed on. One of them imposed a penalty upon any person who should bring into the state any Texas cattle, unless they had been wintered at least one winter north of the southern boundary of the state of Missouri or Kansas; or should have in his possession any Texas cattle between the 1st day of November and the 1st day of April following. Another section made any person having in his possession such cattle liable for any damages which might accrue from allowing them to run at large, 'and thereby spreading the disease among other cattle, known as the Texas fever,' and there was, besides, criminal punishment. The court did not pass upon the first section. In commenting upon the second, some pertinent remarks were made on the facts which justified the statute, and the case of Railroad Company v. Husen, supra, was explained. It was said that the case 'interpreted the law of Missouri as saying to all transportation companies: "You shall not bring into the state any Texas cattle, or any Mexican cattle, or Indian cattle, between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the state or not; and if you do bring them in, even for the purpose of carrying them through the state without unloading them, you shall be subject to extraordinary liabilities." p. 473. Such a statute, the court held, was not a quarantine law, nor an inspection law, but a law which interfered with interstate commerce, and therefore invalid. At the same time the court admitted unhesitatingly that a state may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it. p. 472. No attempt was made to show that all Texas, Mexican, or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given, a different question would have been presented for the consideration of the court. Certainly all animals thus infected may be excluded from the state by its laws until they are cured of the disease, or at least until some mode of transporting them without danger of spreading it is devised.'

"In Missouri, Kansas & Texas Railway v. Haber, 169 U. S. 613, the Husen Case was again commented upon, and what the law of Missouri was and was not was again declared. A statute of Kansas, however, which made any person who shall drive or ship into the state 'any cattle liable or capable of communicating Texas, splenetic or Spanish fever to any domestic cattle of this state shall be liable for damages,' was held not to be a regulation of commerce. It was also held that the statute was not repugnant to the act of Congress of May 29, 1884, 23 Stat. 31, c. 60, known as the Animal Industry Act.

"What, however, is a proper quarantine law—what a proper inspection law in regard to cattle—has not been declared. Under the guise of either a regulation of commerce[2] will not be permitted. Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained. Henderson v. Mayor of New York, 92 U. S. 259, and Chy Lung v. Freeman, 92 U. S. 275. But we are not now put to any inquiry of that kind. The good faith and sincerity of the Texas officers cannot be doubted, and the statutes under which they acted cannot be justifiably complained of. The regulations prescribed are complained of, but are they not reasonably adaptive to the purpose of the statutes,—not in excess of it? Quarantine regulations cannot be the same for cattle as for persons, and must vary with the nature of the disease to be defended against. As the supreme court of Tennessee said: 'The necessities of such cases often require prompt action. If too long delayed the end to be attained by the exercise of the power to declare a quarantine may be defeated and irreparable injury done.'

"It is urged that it does not appear that the action of the live-stock sanitary commission was taken on sufficient information. It does not appear that it was not, and the presumption which the law attaches to the acts of public officers must obtain and prevail. * * * So far as the record shows, every animal, of the kind prohibited, in the state of Louisiana may have been actually affected with charbon or anthrax; and it is conceded that this is a disease different from Texas or splenetic fever, and that it is contagious and infectious and of the most virulent character."

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[2] In Morgan's Louisiana &c. R. & S. S. Co. v. Louisiana Board of Health (1886) 118 U. S. 455, 30 L. ed. 237, the state statutes sustained required every vessel entering the Mississippi River to stop at a state quarantine station in the river about 75 miles below New Orleans for inspection as to presence of contagious diseases, for fumigation of the vessel if found necessary and detention of passengers when necessary, and the payment of stated inspection fees. The language of the court was: "Undoubtedly it is in some sense a regulation of commerce. It arrests a vessel on a voyage which may have been a long one. It may affect commerce among the states when the vessel is coming from some other state of the Union than Louisiana, and it may affect commerce with foreign nations when the vessel arrested comes from a foreign port. This interruption of the voyage may be for days or for weeks. It extends to the vessel, the cargo, the officers and seamen, and the passengers. In so far as it provides a rule by which this power is exercised, it cannot be denied that it regulates commerce."

"Such laws undoubtedly operate upon interstate and foreign commerce. They could not be effective otherwise. * * * The power of the state to take steps to prevent the introduction or spread of disease, although interstate and foreign commerce are involved (subject to the paramount authority of Congress if it decides to assume control), is beyond question." Minnesota Rate Cases (Simpson v. Shepard) (1913) 230 U. S. 352, 406, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18.

Judgment affirmed.[3]

[HARLAN and BROWN, JJ., gave dissenting opinions, with the former of which WHITE, J., concurred.]

SOUTHERN RAILWAY CO. v. KING.

1910. Supreme Court of the United States. 217 U. S. 524.

[Two actions in a Circuit Court of the United States for injuries to persons crossing the railroad track. The railroad company's liability was alleged to arise from failure to observe the Georgia blow-post law stated in the opinion. Judgments for the plaintiffs were affirmed by the Circuit Court of Appeals and now on certiorari:]

MR. JUSTICE DAY delivered the opinion of the court. * * *

This statute is found in § 2222 of the Civil Code of Georgia, and reads as follows:

"There must be fixed on the line of said road, and at the distance of 400 yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof so as to stop in time should any person or thing be crossing said track on said road." * * *

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[3] For present federal statutes restricting importation and interstate shipment of diseased animals, and providing for federal quarantine to prevent the spread of animal diseases, see U. S. C. A., Title 21, §§ 101-132. It seems that federal legislation so far (1930) on this subject has not excluded the states from legislation thereon not conflicting with the federal law and not unreasonably restricting interstate commerce. Asbell v. Kansas (1908) 209 U. S. 251, 52 L. ed. 778, 14 Ann. Cas. 1101; Reid v. Colorado (1902) 187 U. S. 137, 47 L. ed. 108; Atlantic Coast Line R. Co. v. Bahnsen (1924) 300 Fed. 233; Ex parte Goddard (1920) 44 Nev. 128, 190 Pac. 916.

The contrary has been held as to the present federal legislation for prevention of the spread of plant diseases. See U. S. C. A. Title 7, §§ 151-167. Oregon-Washington R. & Nav. Co. v. Washington (1926) 270 U. S. 87, 99, 70 L. ed. 482, (states excluded from restricting interstate commerce for this purpose). Some state cooperation with the federal Secretary of Agriculture in administering the act is provided for in § 166.

The rights of the states to pass laws not having the effect to regulate or directly interfere with the operations of interstate commerce, passed in the exercise of the police power of the state in the interest of the public health and safety, have been maintained by the decisions of this court. We may instance some of the cases of this nature in which statutes have been held not to be a regulation of interstate commerce, although they may affect the transaction of such commerce among the states. In Smith v. Alabama, 124 U. S. 465, it was held to be within the police power of the state to require locomotive engineers to be examined and licensed. In N. Y., N. H. & H. Railroad Co. v. New York, 165 U. S. 628, a law regulating the heating of passenger cars and requiring guard posts on bridges was sustained. In Lake Shore R. R. Co. v. Ohio, 173 U. S. 286, it was held to be a valid enactment to require railway companies operating within the State of Ohio to cause three of its regular passenger trains to stop each way daily at every village containing over three thousand inhabitants. In Erb v. Morasch, 177 U. S. 584, it was held that a municipal ordinance of Kansas City, Kansas, although applicable to interstate trains, which restricted the speed of all trains within the city limits to six miles an hour, was a valid exertion of the police power of the state. In the case of Crutcher v. Kentucky, 141 U. S. 47, this court said:

"It is also within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of Congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

On the other hand, it has been held to be an illegal attempt to regulate interstate commerce to require interstate passenger trains to stop at county seats when adequate train service had already been provided for local traffic. C. C. C. & St. L. R. R. Co. v. Illinois, 177 U. S. 514. * * *

Applying the general rule to be deduced from these cases to such regulations as are under consideration here, it is evident that the constitutionality of such statutes will depend upon their effect upon interstate commerce. It is consistent with the former decisions of this court and with a proper interpretation of constitutional rights, at least in the absence of Congressional action upon the same subject-matter, for the state to regulate, the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the train which shall be required under such circumstances. Crossings may be so situated in reference to cuts or curves as to render them highly dangerous to those using the public highways. They may be in or near towns or cities, so that to approach them at a high rate of speed would be attended with great danger to life or limb. On the other hand, highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such crossings would be practically destructive of the successful operation of such passenger trains. Statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the state to enact. * * *

The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution, and a direct burden upon, and impedes interstate traffic * * *. But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional. They do not show the number or location of the crossings at which the railway company would be required to check the speed of its trains so as to interfere with their successful operation. * * * In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense, and that the demurrer thereto was properly sustained.

* * *

Affirmed.

[HOLMES and WHITE, JJ., dissented.]

SEABOARD AIR LINE RAILWAY v. BLACKWELL.

1917. Supreme Court of the United States. 244 U. S. 310.

[The action was like those in the preceding case and involved the same statute. It was brought in a Georgia court. In answer the defendant alleged that the train was running in interstate commerce from Atlanta, Georgia, to other points in Georgia and South Carolina, that from Atlanta to the state line was 123 miles, that in that distance there were 124 crossings at which the statute required slowing down, that 3 minutes would be consumed in each slowing, or about 6 hours for all these slowings, increasing the train time from 4½ hours to 10½ hours between Atlanta and the state line. Upon demurrer to this answer, judgment went for the plaintiff. On appeal the state supreme court held the statute valid as applied to these facts. On writ of error.]

Mr. Justice McKenna delivered the opinion of the court. * * *

It will be observed, therefore, from this statement that the law of the state was an element in the decisions of the state tribunals and its constitutionality was sustained against the attacks of the railway company. The question is, therefore, presented for our consideration. In its consideration we need not descant upon the extent of the police power of the state and the limitations upon it when it encounters the powers conferred upon the national government. There is pertinent exposition of these in Southern Railway Co. v. King, 217 U. S. 524, in which the law now under review was passed upon. The case is clear as to the relation of the powers and that the power of the state cannot be exercised to directly burden interstate commerce. It was recognized that there might be crossings the approach to which the state could regulate. But, on the other hand, it was said there might be others so numerous and so near together that to require the slackening of speed would be practically destructive of the successful operation of interstate passenger trains, and, therefore, "statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the state to enact." * * *

The facts so specified and which it was decided would give illegal operation to the statute are alleged in the present case, and, assuming them to be true—and we must so assume—compel the conclusion that the statute is a direct burden upon interstate commerce, and, being such, is unlawful. The demurrer to the answer averring them was therefore improperly sustained. * * *

Reversed and case remanded for further proceedings not inconsistent with this opinion.

The Chief Justice [White], Mr. Justice Pitney and Mr. Justice Brandeis dissent on the ground that the regulation in question was within the class which the state is entitled to enact in the absence of congressional action, and until such action. There having been no action by Congress, there is therefore no ground for holding the state action void as a regulation of interstate commerce.

DI SANTO v. PENNSYLVANIA.

1927. Supreme Court of the United States. 273 U. S. 34.

[Di Santo was convicted in a Pennsylvania court for selling steamship tickets or orders for transportation without a license required by state statute. The statute forbade any person or corporation other than a railroad or steamship company to sell steamship tickets without first obtaining a license from the state Commissioner of Banking, who was authorized to issue a license only upon the applicant's proving good moral character, fitness to conduct the business, and filing a $1000 bond to indemnify against his dishonesty, fraud or misrepresentation to purchasers. Steamship companies supplied sellers with books of tickets, advertising matter and schedules of sailings. The seller collected for the tickets, received a commission and accounted to the steamship companies. The state supreme court construed the statute as not applying to agents of steamship companies, but to persons operating as Di Santo did, in the manner of independent contractors. From its judgment sustaining the conviction this writ of error was taken.]

MR. JUSTICE BUTLER delivered the opinion of the court. * * *

The soliciting of passengers and the sale of steamship tickets and orders for passage between the United States and Europe constitute a well-recognized part of foreign commerce. See Davis v. Farmers' Co-operative Co., 262 U. S. 312, 315. A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed. Shafer v. Farmers' Grain Co., 268 U. S. 189, 199, and cases cited. Such legislation cannot be sustained as an exertion of the police power of the state to prevent possible fraud. Real Silk Mills v. Portland, 268 U. S. 325, 336. The Congress has complete and paramount authority to regulate foreign commerce and, by appropriate measures, to protect the public against the frauds of those who sell these tickets and orders. The sales here in question are related to foreign commerce as directly as are sales made in ticket offices maintained by the carriers and operated by their servants and employees. The license fee and other things imposed by the act on plaintiff in error, who initiates for his principals a transaction in foreign commerce, constitute a direct burden on that commerce. This case is controlled by Texas Transport Co. v. New Orleans, 264 U. S. 150, and McCall v. California, 136 U. S. 104.

Judgment reversed.

MR. JUSTICE BRANDEIS, with whom MR. JUSTICE HOLMES concurs, dissenting.

The statute is an exertion of the police power of the state. Its evident purpose is to prevent a particular species of fraud and imposition found to have been practiced in Pennsylvania upon persons of small means, unfamiliar with our language and institutions. Much of the immigration into the United States is effected by arrangements made here for remittance of the means of travel. The individual immigrant is often an advance guard. After gaining a foothold here, he has his wife and children, aged parents, brothers, sisters or other relatives follow. To this end he remits steamship tickets or orders for transportation. The purchase of the tickets involves trust in the dealer. This is so not only because of the nature of the transaction, but also because a purchaser when unable to pay the whole price at one time makes successive deposits on account, the ticket or order not being delivered until full payment is made. The facilities for remitting both cash and steamship tickets are commonly furnished by private bankers of the same nationality as the immigrant. It was natural that the supervision of persons engaged in the business of supplying steamship tickets should be committed by the statute to the commissioner of banking. * * *

The statute is not an obstruction to foreign commerce. It does not discriminate against foreign commerce. It places no direct burden upon such commerce. It does not affect the commerce except indirectly. Congress could, of course, deal with the subject, because it is connected with foreign commerce. But it has not done so. Nor has it legislated on any allied subject. Thus, there can be no contention that Congress has occupied the field. And obviously, also, this is not a case in which the silence of Congress can be interpreted as a prohibition of state action—as a declaration that in the sale of ocean steamship tickets fraud may be practiced without let or hindrance. If Pennsylvania must submit to seeing its citizens defrauded, it is not because Congress has so willed, but because the Constitution so commands. I cannot believe that it does. * * *

To require that the dealer in tickets be licensed in order to guard against fraud in the local sale of tickets certainly affects interstate or foreign commerce less directly than to provide a test of the locomotive engineer's skill, Smith v. Alabama, 124 U. S. 465; or eyesight, Nashville, Chattanooga, & St. Louis Ry. v. Alabama, 128 U. S. 96; or requiring that passenger cars be heated and guard posts placed on bridges, N. Y., N. H., & H. R. R. Co. v. New York, 165 U. S. 628; or requiring every railway to cause three of its regular passenger trains to stop each way daily at every village containing over three thousand inhabitants, Lake Shore & Michigan Southern R. R. Co. v. Ohio, 173 U. S. 285; or to require trains to limit within a city their speed to six miles an hour, Erb v. Morasch, 177 U. S. 584; or to establish a standard for the locomotive headlight, Atlantic Coast Line R. R. v. Georgia, 234 U. S. 280; or to prescribe "full crews," Chicago, Rock Island & Pacific Ry. v. Arkansas, 219 U. S. 453; St. Louis, Iron Mountain and Southern Ry. Co. v. Arkansas, 240 U. S. 518; or to compel the providing of separate coaches for whites and colored persons, South Covington, etc., Ry. v. Kentucky, 252 U. S. 399; or to compel a railroad to eliminate grade crossings, although the expense involved may imperil its solvency, Erie R. R. Co. v. Public Utility Commissioners, 254 U. S. 394, 409-412—state requirements sustained by this court. See also Engel v. O'Malley, 219 U. S. 128, 138.

It is said that McCall v. California, 136 U. S. 104, requires that the Pennsylvania statute be held void. McCall was an employee of the railroad, not an independent solicitor or dealer. Di Santo, as the state court found the facts, was not an employee of a steamship company, nor an agent authorized to act for one, and it ruled, as a matter of statutory construction, that, if he had been such, he would not have been required by the statute to be licensed. It found him to be an independent dealer or contractor, "a free lance" authorized by the several steamship companies "to sell tickets or orders entitling the persons therein named to passage upon steamers," but "with no obligation to any particular company," except to remit the net amount payable by him to the company for a ticket or order sold. Moreover, the fee imposed by the San Francisco ordinance was an occupation tax, not an inspection fee. Here the Pennsylvania court found that the statute did not produce any revenue. * * *

On the facts, the McCall Case is distinguishable from that at bar. If, because of its reasoning, it is thought not to be distinguishable, it should be disregarded. * * * While the question whether a particular statute has the effect of burdening interstate or foreign commerce directly presents always a question of law, the determination upon which the validity or invalidity of the statute depends is largely or wholly one of fact. The rule of law which governs the McCall Case and the one at bar is the same. It is that a state may not obstruct, discriminate against or directly burden interstate or foreign commerce. The question at bar is whether as applied to existing facts this particular statute is a direct burden. The decision as to state regulations of this character depends often, as was said in Southern Railway v. King, 217 U. S. 524, 533, "upon their effect upon interstate commerce." In that case, the Georgia blow post law was held constitutional, as not being a direct burden. In Seaboard Air Line Ry. v. Blackwell, 244 U. S. 310, the same statute was held, on other facts, to be void, because shown to be a direct burden. Each case required the decision of the question of law. Each involved merely an appreciation of the facts. Neither involved the declaration of a rule of law.

It is usually more important that a rule of law be settled, than that it be settled right. Even where the error in declaring the rule is a matter of serious concern, it is ordinarily better to seek correction by legislation. Often this is true although the question is a constitutional one. The human experience embodied in the doctrine of stare decisis teaches us, also, that often it is better to follow a precedent, although it does not involve the declaration of a rule. This is usually true so far as concerns a particular statute whether the error was made in construing it or in passing upon its validity. But the doctrine of stare decisis does not command that we err again when we have occasion to pass upon a different statute. In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken. This course seems to me imperative when, as here, the decision to be made involves the delicate adjustment of conflicting claims of the federal government and the states to regulate commerce.[4] The many cases on the commerce clause in which this court has overruled or explained away its earlier decisions show that the wisdom of this course has been heretofore recognized.[5] In the case at bar, also, the logic of words should yield to the logic of realities.

MR. JUSTICE STONE, dissenting.

I agree with all that Mr. Justice Brandeis has said, but I would add a word with respect to one phase of the matter which seems to me of some importance. We are not here concerned with a question of taxation to which other considerations may apply, but with state regulation of what may be conceded to be an instrumentality of foreign commerce. As this court has many times decided, the purpose of the commerce clause was not to preclude all state regulation of commerce crossing state lines, but to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign.

The recognition of the power of the states to regulate commerce within certain limits is a recognition that there are matters of local concern which may properly be subject to state regulation and which, because of their local character, as well as their number and diversity, can never be adequately dealt with by Congress. Such regulation, so long as it does not impede the free flow of commerce, may properly be and for the most part has been left to the states by the decisions of this court.

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[4] See "The Compact Clause of the Constitution.—A Study in Interstate Adjustments," by Felix Frankfurter and James M. Landis, 34 Yale Law Journal 685, 720-725, and cases there cited; "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action," by Henry Wolf Biklé, 38 Harvard Law Review 6.—Mr. Justice Brandeis.

[5] See Pierce v. New Hampshire, 5 How. 504, 554, 12 L. ed. 513, overruled by Leisy v. Hardin, 135 U. S. 100, 118, 34 L. ed. 128; Osborne v. Mobile, 16 Wall. 479, 21 L. ed. 470, overruled by Leloup v. Port of Mobile, 127 U. S. 640, 647-648, 32 L. ed. 311. See State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. ed. 164, qualified by Philadelphia &c. S. S. Co. v. Pennsylvania, 122 U. S. 326, 342, 30 L. ed. 1200; Peik v. Chicago & N. W. Ry. Co., 94 U. S. 164, 24 L. ed. 97, qualified by Wabash, St. L. & Pac. Ry. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613; qualified in Union Tank Line Co. v. Wright, 249 U. S. 275, 63 L. ed. 602; Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 35 L. ed. 994, qualified in Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031; Texas Co. v. Brown, 258 U. S. 466, 66 L. ed. 721; Bowman v. Continental Oil Co., 256 U. S. 642, 65 L. ed. 1139; Askren v. Continental Oil Co., 252 U. S. 444, 64 L. ed. 654, and Standard Oil Co. v. Graves, 249 U. S. 389, 63 L. ed. 662, all qualified in Sonneborn Bros. v. Cureton, 262 U. S. 506, 67 L. ed. 1095. Compare the discussion of City of New York v. Miln, 11 Pet. 101, 9 L. ed. 648, in Passenger Cases (Smith v. Turner; Norris v. Boston), 7 How. 283, 12 L. ed. 702; that of Ficklen v. Shelby Taxing District, 145 U. S. 1, 36 L. ed. 601, in Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 296, 62 L. ed. 295, and in Texas Transport &c. Co. v. City of New Orleans, 264 U. S. 150, 68 L. ed. 611, 34 A. L. R. 907, that of Gulf, Colorado & Santa Fe Ry. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, in Baltimore & Ohio Southwestern R. R. Co. v. Settle, 260 U. S. 166, 173, 67 L. ed. 189; that of Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 58 L. ed. 127, in Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 69 L. ed. 916, 44 A. L. R. 1219.—Mr. Justice Brandeis.

In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, "direct" and "indirect interference" with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached.

It is difficult to say that such permitted interferences as those enumerated in Mr. Justice Brandeis' opinion are less direct than the interference prohibited here. But it seems clear that those interferences not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines.

I am not persuaded that the regulation here is more than local in character or that it interposes any barrier to commerce. Until Congress undertakes the protection of local communities from the dishonesty of the sellers of steamship tickets, it would seem that there is no adequate ground for holding that the regulation here involved is a prohibited interference with commerce.

Mr. Justice Holmes and Mr. Justice Brandeis concur in this opinion.

Section 3.—Regulation of Rates.

WABASH, ST. LOUIS & PACIFIC R. CO. v. ILLINOIS.

1886. Supreme Court of the United States. 118 U. S. 557.

[Error to the Supreme Court of Illinois which had affirmed a judgment of the trial court that the state recover a penalty from the railroad company for violation of a state statute which forbade any railroad to charge the same or more for the transportation of any passenger or freight for any distance within the state than it charged for carrying a passenger or freight of like class and quantity for a greater distance over the same line in the same direction. The specific offense alleged was that the company charged one shipper 25 cents a hundred for a car-load of goods from Gilman, Illinois, to New York City while charging another shipper 15 cents a hundred for a car-load of like goods from Peoria, Illinois, to New York, the latter distance being 86 miles longer.]

MR. JUSTICE MILLER delivered the opinion of the court. * * *

The Supreme Court of Illinois in the case now before us, conceding that each of these contracts was in itself a unit, and that the pay received by the Illinois railroad company was the compensation for the entire transportation from the point of departure in the state of Illinois to the city of New York, holds that, while the statute of Illinois is inoperative upon that part of the contract which has reference to the transportation outside of the state, it is binding and effectual as to so much of the transportation as was within the limits of the state of Illinois (People v. Wabash, St. L. & P. R. Co., 104 Ill. 476); and, undertaking for itself to apportion the rates charged over the whole route, decides that the contract and the receipt of the money for so much of it as was performed within the state of Illinois violate the statute of the state on that subject.

If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois Legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the state, and is not commerce among the states, or interstate commerce, but is exclusively commerce within the state. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the states. * * *

The Supreme Court of Illinois does not place its judgment in the present case on the ground that the transportation and the charge are exclusively state commerce, but, conceding that it may be a case of commerce among the states, or interstate commerce, which Congress would have the right to regulate if it had attempted to do so, argues that this statute of Illinois belongs to that class of commercial regulations which may be established by the laws of a state until Congress shall have exercised its power on that subject. * * * [Here quotations are made from Munn v. Illinois, 94 U. S. 113, 135; Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 164, 177, and Peik v. Chicago & N. W. R. Co., 94 U. S. 164, 177.] These extracts show that the question of the right of the state to regulate the rates of fares and tolls on railroads, and how far that right was affected by the commerce clause of the Constitution of the United States, was presented to the court in those cases. And it must be admitted that, in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the states, in the absence of any legislation by Congress on the same subject. By the slightest attention to the matter, it will be readily seen that the circumstances under which a bridge may be authorized across a navigable stream within the limits of a state for the use of a public highway, and the local rules which shall govern the conduct of the pilots of each of the varying harbors of the coasts of the United States, depends upon principles far more limited in their application and importance than those which should regulate the transportation of persons and property across the half or the whole of the continent, over the territories of half a dozen states, through which they are carried without change of car or breaking bulk. * * *

It will be seen from the opinions themselves, and from the arguments of counsel presented in the reports, that the question did not receive any very elaborate consideration, either in the opinions of the court or in the arguments of counsel. * * * It was strenuously denied, and very confidently, by all the railroad companies, that any legislative body whatever had a right to limit the tolls and charges to be made by the carrying companies for transportation. And the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the state within which a railroad company did business to regulate or limit the amount of any of these traffic charges. * * *

At the very next term of the court after the delivery of these opinions the case of Hall v. De Cuir, 95 U. S. 485, was decided, in which the same point was considered, in reference to a statute of the state of Louisiana which attempted to regulate the carriage of passengers upon railroads, steam-boats, and other public conveyances, and which provided that no regulations of any companies engaged in that business should make any discrimination on account of race or color. * * * [Here paragraphs 2 and 3 ante, p. 1250, are quoted.]

The applicability of this language to the case now under consideration, of a continuous transportation of goods from New York to central Illinois, or from the latter to New York, is obvious, and it is not easy to see how any distinction can be made. Whatever may be the instrumentalities by which this transportation from the one point to the other is effected, it is but one voyage,—as much so as that of the steam-boat on the Mississippi river. It is not the railroads themselves that are regulated by this act of the Illinois legislature so much as the charge for transportation; and, in language just cited, if each one of the states through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word "regulation" can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. "It was," in the language of the court cited above, "to meet just such a case that the commerce clause of the Constitution was adopted." It cannot be too strongly insisted upon that the right of continuous transportation, from one end of the country to the other, is essential, in modern times, to that freedom of commerce from the restraints which the states might choose to impose upon it, that the commerce clause was intended to secure.

We must therefore hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the states, is a valid law.

Let us see precisely what is the degree of interference with transportation of property or persons from one state to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the state of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier: "I am free to make a fair and reasonable contract for this carriage to the line of the state of Illinois, but when the car which carries these goods is to cross the line of that state, pursuing at the same time this continuous track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that state, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other places of delivery." So that while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of 15 cents per hundred pounds, he is not permitted to do so, because the Illinois railroad company has already charged at the rate of 25 cents per hundred pounds for carriage to Gilman, in Illinois, which is 86 miles shorter than the distance to Peoria. So, also, in the present case, the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of 15 cents per hundred pounds for a car-load, but is compelled to pay at the rate of 25 cents per hundred pounds, because the railroad company has received from a person residing at Gilman 25 cents per hundred pounds for the transportation of a car-load of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois, in its endeavor to prevent unjust discrimination, as construed by the supreme court of that state. The effect of it is that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon, a distance of 23 miles, in which the loading and the unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York. The obvious injustice of such a rule as this, which railroad companies are by heavy penalties compelled to conform to, in regard to commerce among the states, when applied to transportation which includes Illinois in a long line of carriage through several states, shows the value of the constitutional provision which confides the power of regulating interstate commerce to the Congress of the United States, whose enlarged view of the interests of all the states, and of the railroads concerned, better fits it to establish just and equitable rules.

Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the state, it may be very just and equitable, and it certainly is the province of the state Legislature to determine that question; but when it is attempted to apply to transportation through an entire series of states a principle of this kind, and each one of the states shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the states, and upon the transit of goods through those states, cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character; and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution.

Judgment reversed.

[BRADLEY, J., gave a dissenting opinion, in which concurred WAITE, C. J., and GRAY, J.]

RAILROAD COMMISSION OF LOUISIANA v. TEXAS & PACIFIC R. CO.

1913. Supreme Court of the United States. 229 U. S. 336.

[Appeal from the Circuit Court of Appeals for the Fifth Circuit, which had affirmed a decree of the District Court enjoining the state railroad commission from penalizing the railroad for not charging the rates prescribed by that commission on the shipments described in the opinion.]

MR. JUSTICE MCKENNA delivered the opinion of the court. * * *

In the months of July, August and September, 1905, certain persons (their names are unimportant) delivered to the St. Louis, Iron Mountain & Southern Railway Company at certain stations on the line of its road, within the State, eighteen carloads of logs and staves. The logs and staves were transported by the railway from said stations and delivered to Alexandria and there delivered to the Texas & Pacific Railway Company, which transported them to New Orleans, where they were unloaded from the cars, put on board ship and exported to foreign countries. * * *

In March, 1905, a shipper delivered to the Kansas City Southern Railway Company at Leesville, Louisiana, on its line of road, three carloads of tank staves, which were loaded in cars of the Texas & Pacific Railway Company to be transported to a named consignee at New Orleans. The rate established by the State Railroad Commission was ten cents per hundred pounds; the interstate rate filed with the Interstate Commerce Commission was fifteen cents per hundred pounds. The staves were hauled to Shreveport, Louisiana, and there delivered to the Texas & Pacific Railway Company, which hauled them to New Orleans. The customary notice of their arrival was given to the consignee and they were directed by him to be delivered to a particular steamship, to which they were delivered, being switched to the lines of two other carriers and transported to Hamburg. The Texas & Pacific Railway Company collected freight charges thereon from the consignee at fifteen cents per hundred pounds. The consignee at the date of the shipment of the freight resided at New Orleans and was engaged in the business of shipping broker in negotiating for cargo space, routes, and attending to shipments for consignors in the United States. The consignees of the eighteen carloads of logs and staves was engaged at New Orleans in the business of exporting staves to foreign countries; the staves they deal in are not treated, manufactured or changed from the original shape in which they are received at New Orleans for export, and 98% of the shipments by them at New Orleans are exported to foreign countries.

At the time of the shipment the rules of the State Railroad Commission allowed four days' free time for unloading cars at New

Orleans, except where the consignment was for export, then twenty days were allowed. No demurrage was tendered by the shipper or consignee or received by the carrier on account of delays in handling beyond the four days allowed by the rules. Every one of the shipments paid to the carrier three-fourths of a cent per hundred pounds for handling charges, this being the amount paid on all export shipments. The shipments were in the physical custody of the railroad company until arrival at New Orleans and thereafter in the physical custody of the steamships, which issued bills of lading therefor to the shippers of the cargo.

The bills of lading in each instance provided for the delivery of freight from the initial point to New Orleans, there to be delivered to the shipper or consignee's order. But, notwithstanding this, the staves and logs were intended by the shippers to be exported to foreign countries, and were treated by both the shippers and the carriers accordingly, the shippers always holding the cars on the railroad track until they could accumulate cargo to fill their export orders and arrange for transportation. The railroad company allowed the shippers the usual twenty days' time for delivery, as in the case of export shipments, without charging demurrage, which the company would have had the right to charge, after the expiration of four days, if the shipments had been considered and treated as purely intrastate.

The sole question in the case is whether the shipments were foreign or intrastate commerce, or, speaking more accurately, whether they were within federal or state jurisdiction. The Circuit Court and the Circuit Court of Appeals both decided, as we have seen, that they were within federal jurisdiction.

Appellants attack the conclusion and rely on, as the master relied on, the case of Gulf, Colorado & Santa Fe R. R. Co. v. Texas, 204 U. S. 403. The argument is that the service rendered by the railroad companies was wholly within the state and had "no contractual or necessary relation to foreign transportation." It was, it is argued, "manifestly preliminary thereto, independently contracted for, and not necessarily connected therewith." And the principle is urged that "locality, therefore, determines the jurisdiction [separation between federal power and state power] unless it is shown that though the local movement is actually within, it is legally outside the State." To make the movement within legally outside of the State, appellants insist there must be bills of lading and other means of connection between the railroads and the ocean carriers. To make application of this principle, it is contended that "not a single fact appears or exists, physical or other which connects the railroads with the ocean carrier" and that the intention of the shippers or consignees is made absolutely controlling.

To the principle urged, so far as its applicability to the case at bar is concerned, we may oppose Southern Pacific Terminal Co. v.

Interstate Commerce Commission, 219 U. S. 498; Ohio Railroad Commission v. Worthington, 225 U. S. 101; and Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111.

In those cases there was necessarily a local movement of freight, and it necessarily terminated at the seaboard. But it was decided that its character and continuity as a movement in foreign commerce did not terminate, nor was it affected by being transported on local bills of lading. The principle enunciated in the cases was that it is the essential character of the commerce, not the accident of local or through bills of lading, which determines Federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country. The facts of the case at bar bring it within the ruling. The staves and logs were intended by the shippers to be exported to foreign countries, and there was no interruption of their transportation to their destination except what was necessary for transshipment at New Orleans.

Decree affirmed.[1]

WESTERN UNION TELEGRAPH CO. v. CALL PUBLISHING CO.

1901. Supreme Court of the United States. 181 U. S. 92.

[Action to recover from the telegraph company charges demanded and paid for interstate telegraph service in excess of the charges made for like service rendered another newspaper. The Supreme Court of Nebraska affirmed the state trial court's judgment for the plaintiff and this writ of error was taken.]

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[1] "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character. The reshipment of an interstate or foreign shipment does not necessarily establish a continuity of movement or prevent the shipment to a point within the same state from having an independent or intrastate character, even though it be in the same cars. Chicago, M. & St. P. Ry. Co. v. Iowa, 233 U. S. 334. The change from rail to ship has often been held consistent with a continuity of interstate or foreign commerce, even though there may be only local billing. Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111; Railroad Commission of Louisiana v. Texas & Pacific Ry. Co., 229 U. S. 336; Baer Bros. Mercantile Co. v. Denver & Rio Grande Railroad Co., 233 U. S. 479. On the other hand, in Chicago, M. & St. P. Ry. Co. v. Iowa, supra, the reshipment of an interstate shipment of coal after its arrival in the state in the same carload lots was held not inconsistent with the change from interstate to intrastate commerce. In Baltimore & Ohio S. W. R. R. Co. v. Settle, 260 U. S. 166, 170, a shipper billed his goods from one state to another, paying the interstate freight and reshipped them to another point in the second state, intending from the first to reach the latter destination, but interrupting the transportaion only to take advantage of a difference in his favor between the through rate and the sum of those paid. It was held that the essential nature of the entire movement was in interstate commerce and that the shipper must pay the only lawful rate, which was the interstate commerce rate to the final destination. These cases are illustrations to show that the determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it." TAFT, C. J. for the court, in Atlantic Coast Line R. Co. v. Standard Oil Co. (1927), 275 U. S. 257, 72 L. ed. 270.

Mr. Justice Brewer delivered the opinion of the court.

The contention of the telegraph company is substantially that the services which it rendered to the publishing company were a matter of interstate commerce; that Congress has sole jurisdiction over such matters, and can alone prescribe rules and regulations therefor; that it had not at the time these services were rendered prescribed any regulations concerning them; that there is no national common law, and that whatever may be the statute or common law of Nebraska is wholly immaterial; and that, therefore, there being no controlling statute or common law, the state court erred in holding the telegraph company liable for any discrimination in its charges between the plaintiff and the Journal company. * * *

Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least is startling. And yet, as we have seen, that is precisely the contention of the telegraph company. It contends that there is no federal common law, and that such has been the ruling of this court; there was no federal statute law at the time applicable to this case, and, as the matter is interstate commerce, wholly removed from state jurisdiction, the conclusion is reached that there is no controlling law, and the question of rates is left entirely to the judgment or whim of the telegraph company. * * *

Reference is also made to opinions in which it has been stated that there is no federal common law different and distinct from the common law existing in the several states. Thus, in Smith v. Alabama, 124 U. S. 465, 478, it was said by Mr. Justice Matthews, speaking for the court:

"There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several states, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. Wheaton v. Peters, 8 Pet. 591. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction where they are called upon to administer the law of the state in which they sit, or by which the transaction is governed, exercise an independent, though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of Railroad Co. v. Lockwood, 17 Wall. 357, where the common law prevailing in the state of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the state; but the law as applied is none the less the law of that state."

Properly understood, no exceptions can be taken to declarations of this kind. There is no body of federal common law separate and distinct from the common law existing in the several states, in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.

What is the common law? * * * In Black's Law Dictionary, page 232, it is thus defined: "As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England."

Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment." * * *

Judgment affirmed.

WILMINGTON TRANSPORTATION CO. v. RAILROAD COMMISSION OF CALIFORNIA.

1915. Supreme Court of the United States. 236 U. S. 151.

Mr. Justice Hughes delivered the opinion of the court.

The Wilmington Transportation Company, a corporation organized under the laws of the State of California, is engaged as a common carrier of passengers and goods by sea, between San Pedro, on the mainland, and Avalon, on Santa Catalina Island, both places being within the County of Los Angeles in that state. Merchants at Avalon, insisting that the rates charged for this transportation were unreasonable, presented their complaint to the Railroad Commission of the State of California and asked that reasonable rates be fixed under the Public Utilities Act of 1911. Stats. (Cal.) 1911, Ex. Sess., p. 18. The Transportation Company challenged the authority of the Commission upon the ground that the business was subject exclusively to the regulating power of Congress. The Commission overruled the contention and its authority to prescribe reasonable rates between these ports of the state was sustained on writ of review by the state court. 166 California, 741. The case has been brought here on error.

The vessels of the plaintiff in error, in their direct passage between the ports named, must traverse the high seas for upwards of twenty miles. Adopting the statement of the Commission, the Supreme Court of the state puts the case thus: "They do not touch at any other port, either of the United States or of any foreign country. They do not transfer their passengers or freight to any other vessel in their course. They do not on the voyage take on or put off any article of commerce. While a portion of the voyage is on the high seas, the navigation thereof is merely incidental to the real purpose of the voyage, which is to ply between two ports, both of which are located in the same county in this state."

Relying upon Lord v. Steamship Co., 102 U. S. 541,[2] the plaintiff in error contends that transportation over the high seas is "commerce with foreign nations" in the constitutional sense. (See Lehigh Valley R. R. v. Pennsylvania, 145 U. S. 192, 203; The Abby Dodge, 223 U. S. 166, 176.) But if it be assumed for the present purpose that the power of Congress extends to the subject of this controversy, the fact remains that the power has not been exercised. The provisions of the federal statutes relating to vessels do not go so far, and the Interstate Commerce Commission has not been authorized to prescribe rates for water transportation unconnected with transportation by railroad. 36 Stat. 539, 545. In this aspect, the question is whether the mere existence of the federal power, that is, while it is dormant, precludes the exercise of state authority to prevent exorbitant charges with respect to this traffic which has its origin and destination within the limits of the state.

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[2] In the cited case an act of Congress limiting the liability of owners of vessels for loss of goods, etc., was construed to apply to the Ventura which operated exclusively between San Francisco and San Diego, California, stopping only at those and intermediate ports in that state. While the statement of the case says that her cargo was "mostly" being shipped from San Francisco wholesalers to retailers in San Diego and other places in California, it does not say that any of the cargo was destined to points outside the state. On each voyage over her regular route she ran about 480 miles on the Pacific Ocean. As thus construed the act was held to be a valid exercise of power granted Congress by the commerce clause. Waite, C. J., for the court, said: "The Pacific Ocean belongs to no one nation, but is the common property of all. When, therefore, the Ventura went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed

It is urged that the fixing of rates is a regulation of the commerce involved, and hence of necessity is repugnant to the federal authority, although the latter be unexercised. This proposition, however, as has frequently been pointed out, is too broadly asserted if no regard be had to the differences in the subjects which, by virtue of the Commerce Clause, are within the control of Congress. Thus, vessels engaged in foreign commerce have been compelled to submit to state requirements as to pilotage and quarantine since the foundation of the Government, although it could not be denied that these requirements were regulations which Congress could at any time displace. Cooley v. Board of Wardens, 12 How. 299, 317, 319; * * *. The rule which the plaintiff in error invokes is not an arbitrary rule, with arbitrary exceptions, but is one that has its basis in a rational construction of the Commerce Clause. As repeatedly stated, it denies authority to the states in all cases where the subject is of such a nature as to demand that, if regulated at all, its regulation should be through a general or national system, and that it should be free from restraint or direct burdens save as it is constitutionally governed by Congress; and on the other hand, as to those matters which are distinctively local in character although embraced within the federal authority, the rule recognizes the propriety of the reasonable exercise of the power of the states, in order

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on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If in her navigation she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress.

"Navigation on the high seas is necessarily national in its character. Such navigation is clearly a matter of 'external concern,' affecting the nation as a nation in its external affairs. It must, therefore, be subject to the national government."

to meet the needs of suitable local protection, until Congress intervenes. * * *

It was by the application of these principles that it was decided that a state could not prescribe rates for interstate railroad transportation, even with respect to that portion of the route which was within its own territory. * * * Wabash &c. Ry. v. Illinois, 118 U. S. 557, * * *. And the same conclusion has been reached with respect to the fixing of rates for railroad transportation which, while beginning and ending in the same state, passes through the territory of another state. The regulation of such rates cannot be "split up" according to the jurisdiction of the respective states over the track; there must be one rate fixed by one authority. Hanley v. Kansas City Southern Ry., 187 U. S. 617, 620.

We are not here dealing with the case of property which is in course of continuous transportation to another state or to a foreign country. The Daniel Ball, 10 Wall. 557; Ohio Railroad Commission v. Worthington, Receiver, 225 U. S. 101; Texas & N. O. R. R. v. Sabine Tram Co., 227 U. S. 111, 124; Railroad Commission v. Texas & Pacific Ry., 229 U. S. 336. It must be assumed upon this record that the state claims the right to exercise its authority only as to transportation between the mainland and the island, and solely with respect to such shipments over this route as are local to the state, both as to the beginning and the end of the transportation. There is no passage through the territory of another state; the transportation, in its entire course, is subject to a single authority—either that of Congress or that of the state—and the latter would yield to the exercise of the former. The sovereignty of no other jurisdiction is encountered. It is plainly of importance to the people of the state that this local traffic should be carried upon reasonable terms; and if, in the case of a ferry, a state may protect its people from extortion although the ferriage is to the shore of another state, there is in our judgment no ground for saying that where the transportation is between two places in the same state it is less a subject for local action, in the absence of Federal interposition, because the voyage is over a stretch of open sea. Congress has not attempted to intervene, and we find no basis for the conclusion that the subject is one which must be deemed to be wholly free from regulation unless Congress deals with it. On the contrary, it is precisely of that local character which permits it to be left appropriately to the care of the state. * * *

Judgment affirmed.[3]

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[3] Compare Hanley v. Kansas City So. Ry Co. (1903) 187 U. S. 617, 47 L. ed. 333, where it was held that Arkansas could not regulate rates to be charged for carriage of goods between two points within her borders over a road which between those points ran partly through the Indian Territory. HOLMES, J., for the court said: "It may be assumed that this power of Congress over commerce between Arkansas and the Indian Territory is not less than its power over commerce among the states, Stoutenburgh v. Hennick, 129 U. S. 141 * * *. The

PORT RICHMOND AND BERGEN POINT FERRY CO. v. BOARD OF CHOSEN FREEHOLDERS OF HUDSON COUNTY.

1914. Supreme Court of the United States. 234 U. S. 317.

MR. JUSTICE HUGHES delivered the opinion of the court.

The plaintiff in error, Port Richmond and Bergen Point Ferry Company, was incorporated in 1848 (c. 306) by special act of the legislature of New York for the purpose of maintaining a ferry across the Kill von Kull from Port Richmond, Staten Island, New York, to Bergen Point, Hudson County, New Jersey. This act prescribed rates of ferriage as did also the amendatory acts of 1857 (c. 692) and 1868 (c. 778).

The ferry is not operated in connection with any railroad.

In July, 1905, the Board of Chosen Freeholders of the County of Hudson, New Jersey, passed two resolutions fixing the rates to be taken at the ferry of this company within the County of Hudson for the transportation of foot passengers for single trips to the New York terminal, and for round trips to that terminal and return, respectively. This action was taken under the authority of an act of the legislature of New Jersey passed in 1799, providing as follows: "That the board of chosen freeholders shall be, and they hereby are empowered and directed to fix the rates to be taken at the several ferries within their respective counties, and the same, from time to time, to revise, alter, amend, or make anew at their discretion." Comp. Stat. (N. J.) p. 2308. On certiorari, the Supreme Court of the State of New Jersey sustained the validity of these resolutions against the objection that they were repugnant to the commerce clause of the federal Constitution (80 N. J. Law, 614) and its judgment was affirmed by the Court of Errors and Appeals. 82 N. J. Law, 536. This writ of error is prosecuted.

The plaintiff in error contends that the action of the board is void for the reason that the transportation is interstate and the fixing of rates therefor is a direct regulation of interstate commerce.

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transportation of these goods certainly went outside of Arkansas, and we are of opinion that in its aspect of commerce it was not confined within the state. * * * No one contends that the regulation could be split up according to the jurisdiction of state or territory over the track, or that both state and territory may regulate the whole rate. There can be but one rate, fixed by one authority, whether that authority be Arkansas or Congress. Wabash, St. Louis & Pacific Railway Co. v. Illinois, 118 U. S. 557; Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204; Hall v. De Cuir, 95 U. S. 485. But it would be more logical to allow a division according to the jurisdiction over the track than to declare that the subject for regulation is indivisible, yet that the indivisibility does not depend upon the commerce being under the authority of Congress, but upon a fiction which attributes it wholly to Arkansas, although that fiction is quite beyond the power of Arkansas to enforce."

At common law, the right to maintain a public ferry lies in franchise; in England such a ferry could not be set up without the King's license, and, in this country, the right has been made the subject of legislative grant. Blissett v. Hart, Willes, 508; Fay, Petitioner, 15 Pick. 243, 249, 253; Mayor &c. of New York v. Starin, 106 N. Y. 1, 10, 11; 3 Kent's Com. 458; 2 Washburn, Real Prop., 4th ed., 292. The states have been accustomed to grant such franchises not only for ferries wholly intrastate but also for those to be operated from their shores to other states. Cooley, Const. Lim. 740. They have fixed the rates for such ferriage; and this has been done both directly by the legislature and also through designated courts and local boards acting under legislative sanction. The practice has had continuous illustration in a great variety of instances, from the foundation of the government to the present day.

The Court of Errors and Appeals of New Jersey in the case of Hudson County v. State (1853) 4 Zab. 718, sustained the authority of the board to prescribe ferry rates between New Jersey and New York. Speaking through Elmer, J., the court thus described conditions existing at the time of the passage of the above-mentioned act of 1799 and its purpose: "The owner or keeper resided on the one bank or the other of the river over which the ferry passed, and kept his boats and other apparatus where he resided. * * * Probably but few, if any, of the keepers, had a boat constantly running, or started at any particular hour. In some cases, there were ferry owners on both sides of the river; but the ferry or ferries on each side were considered and spoken of as distinct ferries, and had distinct owners or keepers. * * * The act meant to authorize, and did authorize, the boards of freeholders in the several counties, to regulate the fares to be taken at the ferry situate within that county; that is, at the ferry establishment of the owner or keeper. * * * Even if it might happen, upon this construction, that one board might establish one set of rates at one side, and another board another set on the other side, or that each state might have different regulations, where the ferry was over one of the rivers forming the boundary between this and another state, I do not see that there would be any important conflict of authority. Each power regulated what was done within its own jurisdiction, and left to others to regulate what was done in theirs. * * *" This decision was followed by the state court in the present case. * * *

The authority of the state to grant franchises for ferries to be operated from its shores across boundary waters was distinctly recognized in Fanning v. Gregoire, 16 How. 524; Conway v. Taylor's Executor, 1 Black, 603; and Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365. While in Fanning v. Gregoire, supra, the plaintiff's license for a ferry across the Mississippi river from Dubuque, Iowa, was held under the terms of the grant not to be exclusive as against the subsequent licensee, the court said that the commercial power of Congress did not "interfere with the police power of the states in granting ferry licenses." In Conway v. Taylor's Executor, supra, the court upheld a judgment which restrained the appellants (the owners of a ferry from Cincinnati, Ohio, to Newport, Kentucky) from conducting the ferry from the Kentucky shore to Ohio in violation of the rights of the appellees under their Kentucky franchise. Referring to the latter, the court said (p. 631): "The franchise is confined to the transit from the shore of the state. The same rights which she claims for herself she concedes to others. * * * It was shown in the argument at bar that similar laws exist in most, if not all, the states bordering upon those streams. They exist in other states of the Union bounded by navigable waters." With respect to "ordinary commercial navigation" the authority of the appellants to transport persons and property from the Kentucky shore was undoubted. The owners of the Kentucky franchise, it was said, had no right to exclude or restrain those who were prosecuting "the business of commerce in good faith, without the regularity or purposes of ferry trips"; but, as the appellants' boat was run "openly and avowedly as a ferry-boat," as "that was her business," the injunction was sustained. After referring to the commerce clause, the opinion concluded, (p. 634): "Undoubtedly, the states, in conferring ferry rights, may pass laws so infringing the commercial power of the nation that it would be the duty of this court to annul or control them. * * * There has been now nearly three-quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its birth, the states have exercised the power to establish and regulate ferries; Congress never. We have sought in vain for any act of Congress which involves the exercise of this power. That the authority lies within the scope of 'that immense mass' of undelegated powers which 'are reserved to the states respectively,' we think too clear to admit of doubt." * * *

It is manifest, however, that the transportation of persons and property from one state to another is none the less interstate commerce because conducted by ferry; and it is not open to question that ferries maintained for that purpose are subject to the regulating power of Congress. It necessarily follows that whatever may properly be regarded as a direct burden upon interstate commerce, as conducted by ferries operating between states, it is beyond the competency of the states to impose. This was definitely decided to Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196. * * *

In Covington Bridge Co. v. Kentucky, 154 U. S. 204, the question related to the power of the State of Kentucky to regulate tolls upon an interstate bridge built pursuant to the concurrent action of Kentucky and Ohio. The power was denied under the commerce clause. Reviewing the authorities, the opinion was expressed that the principle involved was identical with that applied in Wabash &c. Railway Co. v. Illinois, 118 U. S. 557, with respect to interstate railroad rates, and that (at least in the absence of mutual action) it was impossible for either state to fix a tariff of charges. It was said that it did not follow that because a state might "authorize a ferry or bridge from its own territory to that of another State" it might "regulate the charges upon such bridge or ferry." It was pointed out, however, that the State of Kentucky, by the statute in question attempted "to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky," a right which practically nullified "the corresponding right of Ohio to fix tolls from her own state." (Id. p. 220.) And this was an adequate basis for the judgment. Four of the justices of the court, concurring in the judgment, announced their view that "the several states have the power to establish and regulate ferries and bridges, and the rates of toll thereon, whether within one state, or between two adjoining states, subject to the paramount authority of Congress over interstate commerce." * * *

Coming then to the question now presented—whether a state may fix reasonable rates for ferriage from its shore to the shore of another state,—regard must be had to the basic principle involved. That principle is, as repeatedly declared, that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive; that, in other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and that, when Congress does act, the exercise of its authority overrides all conflicting state legislation. Cooley v. Board of Wardens, 12 How. 299, 319; * * * Minnesota Rate Cases, 230 U. S. 352, 399, 400. It is this principle that is applied in holding that a state may not impose direct burdens upon interstate commerce, for this is to say that the states may not directly regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed by valid federal rule. (Gloucester Ferry Co. v. Pennsylvania, supra.) It was this principle which governed the decision in Wabash &c. Railway Co. v. Illinois, 118 U. S. 557, as to interstate railroad rates. Considering the conditions of interstate railroad transportation, which might extend not only from one state to another but through a series of states, or across the continent, and the consequences which would ensue if each state should undertake to fix rates for such portions of continuous interstate hauls as might be within its territory, the conclusion was reached that "this species of regulation" was one "which must be, if established at all, of a general and national character" and could not be "safely and wisely remitted to local rules." (Id. p. 577.)

But, in the case of ferries, we have a subject of a different character. We dismiss from consideration those ferries which are operated in connection with railroads, and cases, if any, where the ferriage is part of a longer and continuous transportation. Ferries, such as are involved in the present case are simply means of transit from shore to shore. These have always been regarded as instruments of local convenience which, for the proper protection of the public, are subject to local regulation; and where the ferry is conducted over a boundary stream, each jurisdiction with respect to the ferriage from its shore has exercised this protective power. There are a multitude of such ferries throughout the country and, apart from certain rules as to navigation, they have not engaged the attention of Congress. We also put on one side the question of prohibitory or discriminatory requirements, or burdensome exactions imposed by the state, which may be said to interfere with the guaranteed freedom of interstate intercourse or with constitutional rights of property. The present question is simply one of reasonable charges. It is argued that the mere fact that interstate transportation is involved is sufficient to defeat the local regulation of rates because, it is said, that it amounts to a regulation of interstate commerce. But this would not be deemed a sufficient ground for invalidating the local action without considering the nature of the regulation and the special subject to which it relates. Quarantine and pilotage regulations may be said to be quite as direct in their operation, but they are not obnoxious when not in conflict with federal rules. The fundamental test, to which we have referred, must be applied; and the question is whether, with regard to rates, there is any inherent necessity for a single regulatory power over these numerous ferries across boundary streams; whether, in view of the character of the subject and the variety of regulation required, it is one which demands the exclusion of local authority. Upon this question we can entertain no doubt. It is true that in the case of a given ferry between two states there might be a difference in the charge for ferriage from one side, as compared with that for ferriage from the other. But this does not alter the aspect of the subject. The question is still one with respect to a *ferry,* which necessarily implies transportation for a short distance, almost invariably between two points only, and unrelated to other transportation. It thus presents a situation essentially local, requiring regulation according to local conditions. It has never been supposed that because of the absence of federal action the public interest was unprotected from extortion, and that in order to secure reasonable charges in a myriad of such different local instances, exhibiting an endless variety of circumstance, it would be necessary for Congress to act directly, or to establish for that purpose a federal agency. The matter is illuminated by the consideration of this alternative, for the point of the contention is that, there being no federal regulation, the ferry rates are to be deemed free from all control. The practical advantages of having the matter dealt with by the states are obvious, and are illustrated by the practice of one hundred and twenty-five years. And in view of the character of the subject, we find no sound objection to its continuance. If Congress at any time undertakes to regulate such rates, its action will, of course, control.

If the state may exercise this power, it necessarily follows that it may not, in its exercise, derogate from the similar authority of another state. The state power can extend only to the transactions within its own territory and the ferriage from its own shore. It follows that the fact that rates were fixed by New York did not preclude New Jersey from establishing reasonable rates with respect to the ferry establishment maintained on its side.

With respect to the rates for round trips, we do not construe the ordinance as requiring the company to issue round-trip tickets at its office in New Jersey. We may not look into the testimony, and it does not appear that such a construction has been placed upon the ordinance by the state court. Viewed as a limitation upon rates charged for such round-trip tickets, when sold by the company in New Jersey, we think that the ordinance is valid, being one relating to the transactions of the company in New Jersey, and the charges there enforced. Whether it would be competent for the state, through the local board, to require the company to issue round-trip tickets, is a question not presented by the record, and we express no opinion upon it.

The judgment is affirmed.[4]

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[4] Shrader v. Steubenville, E. L. &c. Trac. Co. (1919) 84 W. Va. 1, 13, 99 S. E. 207: "If a ferry is of local importance, a bridge such as we are assuming is equally so. One bridges a stream or body of water by a movable surface, the other by a fixed and stationary surface. Each implies transportation for a short distance only. By analogy to the decision in the case last cited and to the reasoning upon which it is based, we are of opinion that the regulatory authority of this state extends at least as far as to declare illegal the use of a pass on trip across the bridge originating from this shore.

"But what of its use on return trips from Ohio to West Virginia? Plaintiff is a resident of this state and uses his pass as he would a round-trip ticket to go to the Ohio side and return. His trip primarily emanates from this side, and we do not deem it a derogation of the regulatory authority of the state of Ohio to hold that our statute prohibits the use of such a pass on the bridge not only on the trip from this shore to Ohio, but the return as well, the latter being an incident of the former, and the entire passage across and back being one primarily emanating from the West Virginia shore.

"Prohibition of the issuance and use of passes does not burden such traffic directly or indirectly."

TOWN OF VIDALIA v. McNEELY.

1927. Supreme Court of the United States. 274 U. S. 676.

[McNeely, a citizen and resident of Mississippi, for more than 20 years had been operating a public ferry across the Mississippi River between Natchez, Mississippi, and Vidalia, Louisiana. Prior to 1924, he had ferry licenses from both Natchez and Vidalia. His licenses then expired. He landed his boats at a floating wharf moored at or near the foot of Concordia street in Vidalia, which was designated by Vidalia as his landing place when he began operating. Subsequently he acquired the land for several hundred feet both above and below Concordia street and sometimes moored his wharf above, and at other times below that street. In 1924 Vidalia granted a ferry license to the city of Natchez for ten years, at $1,000 a year, and agreed to give Natchez a preferred right to receive any other license that Vidalia might decide to give for another ferry between Vidalia and Natchez. Vidalia consented to the transfer of this license to a private corporation, the Royal Route Company; assigned the foot of Concordia street as its landing place and by ordinance forbade any other person to moor or anchor any craft within 150 feet of this landing place. McNeely was arrested for continuing to operate his ferry at his usual landing place. He brought this suit in the United States District Court to restrain further interference with his operation. That court decreed that the Royal Route Company should have the use of the bank and water beginning at a point 10 feet north of the north line of Concordia street and extending upstream 300 feet; and McNeely, the bank and water beginning at a point 10 feet south of Concordia street and extending downstream. Cross appeals were taken.]

MR. JUSTICE VAN DEVANTER delivered the opinion of the court. * * *

The town renews the contention made below that, consistently with the commerce clause, it may grant or withhold a license to operate such a ferry, guided only by its judgment of what is in keeping with the public interest, and may prohibit the operation of such a ferry without a license from it. The argument advanced in support of the contention is that if local authorities may not control ferriage over boundary streams like the Mississippi by granting or withholding licenses the ferriage will be subject to no restrictions and the public may suffer from extortionate rates and an absence of provisions for safe carriage, because the nature of the business and varying local conditions make it impracticable for Congress to prescribe effective general regulations. We think the argument confuses power to license and therefore to exclude from the business with power to regulate it, and also that the contention is unsound.

The transportation of persons and property from one state to another is none the less interstate commerce because conducted by ferry; and it does not admit of question that ferries so employed are subject to congressional regulation. Congress has adopted some measures to promote the safety of this form of transportation, Rev. Stat. §§ 4233 (Rule 7), 4426; and also a measure regulating rates on ferries operated in connection with railroads, New York Central R. R. Co. v. Hudson County, 227 U. S. 248, 263.

But, while holding that such interstate transportation is subject to congressional regulation, this court always has recognized that ferries operated across boundary waters between states simply as a means of transit from shore to shore should be deemed instruments of local convenience and subject to local regulation to the extent that in the absence of congressional action each state may act with respect to the ferriage from its shore. * * * In Port Richmond Ferry Co. v. Hudson County, 234 U. S. 317, 332, which related to a ferry between two states, there was express affirmation of the authority of each state to fix reasonable rates for the ferriage from its shore. * * *

The case of City of Sault Ste. Marie v. International Transit Co., 234 U. S. 333, is specially in point here. That was a suit by a Canadian corporation conducting a ferry between Sault Ste. Marie, Ontario, and Sault Ste. Marie, Mich., to prevent the enforcement against it of an ordinance of the city of Sault Ste. Marie, Mich., prohibiting the operation of a ferry from that city to the opposite shore of the St. Mary's river, except under a license from that city and on the payment of a license fee of $50. The ordinance was assailed as being in conflict with the commerce clause of the Constitution and with a treaty with Great Britain. The court sustained the constitutional objection and the plaintiff's right to an injunction, without considering the treaty question. It said:

"The fundamental principle involved has been applied by this court in recent decisions in a great variety of circumstances, and it must be taken to be firmly established that one otherwise enjoying full capacity for the purpose cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce [citing cases].

"Assuming that, by reason of the local considerations pertinent to the operation of ferries, there exists, in the absence of federal action, a local protective power to prevent extortion in the rates charged for ferriage from the shore of the state, and to prescribe reasonable regulations necessary to secure good order and convenience, we think that the action of the city in the present case in requiring the appellee to take out a license, and to pay a license fee, for the privilege of transacting the business conducted at its wharf, was beyond the power which the state could exercise either directly or by delegation."

The action of the town in this case is on the same plane. The complainant, according to the record, has full capacity to operate, and is operating, a serviceable ferry over the Mississippi and the town is attempting to exclude his ferry on the ground that he is operating it without a local license. The question is not whether the town may fix reasonable rates applicable to ferriage from its river front or may prescribe reasonable regulations calculated to secure safety and convenience in the conduct of the business, but whether it may make its consent and license a condition precedent to a right to engage therein. This we hold it may not do.

Both parties complain of the part of the decree designating the landing places to be used by the competing ferries—the town on the ground that it alone is clothed with authority to make such designations, and the complainant on the ground that the designation was made without proper regard for his ownership of the land or his prior use and improvements.

It must be conceded that the designation of places for ferry landings along the river bank within the town limits is a function which primarily belongs to the town and is not ordinarily subject to judicial control. But here the town proceeded on the erroneous theory that the complainant's ferry need not be considered. Not only was no new landing place assigned for his ferry, but the place theretofore and then in actual use for it was assigned to the competing ferry. In this the town plainly deviated from its duty in the premises, for it was under the same legal obligation to accord a landing place to one ferry as to the other. We perceive no ground for holding that relief from such a deviation may not be had in a suit in equity. No case brought to our attention so holds. Certainly Watson v. Turnbull, 34 La. Ann. 856, cited by the town, does not do so.

The complainant's objection to the court's designation appears meritorious at first, but it is otherwise when consideration is given to the settled rule in Louisiana that the banks of navigable streams are subject to a servitude permitting their use for public purposes including those incident to navigation, and that "Riparian proprietors have no right to appropriate to their exclusive use these banks, and they have no private property in the use thereof, which is public." Rev. Civ. Code, articles 455, 457, 665; Watson v. Turnbull, supra. This servitude has existed in Louisiana since before the creation of the state and has been recognized by this court and held consistent with the Fourteenth Amendment. Eldridge v. Trezevant, 160 U. S. 452. Thus the complainant's ownership of the adjacent lots does not entitle him to be preferred over others in the use of the bank as a landing place. Nor does his prior use entitle him to have the other ferry excluded; for the evidence indicates that there is sufficient room on the two sides of Concordia street for both. And so far as appears the ramp constructed by him still may be used in going to and from his docks. In these circumstances we think the court's designation of the landing places should not be disturbed. Decree affirmed.

PUBLIC UTILITIES COMMISSION OF STATE OF RHODE ISLAND ET AL. v. ATTLEBORO STEAM & ELEC. CO.

1927. Supreme Court of the United States. 273 U. S. 83.

Certiorari to the Supreme Court of Rhode Island.

Mr. Justice Sanford delivered the opinion of the court. * * *

The Narragansett Electric Lighting Company is a Rhode Island corporation engaged in manufacturing electric current at its generating plant in the city of Providence and selling such current generally for light, heat and power. The Attleboro Steam & Electric Company is a Massachusetts corporation engaged in supplying electric current for public and private use in the city of Attleboro and its vicinity in that state.

In 1917, these companies entered into a contract by which the Narragansett Company agreed to sell, and the Attleboro Company to buy, for a period of twenty years, all the electricity required by the Attleboro Company for its own use and for sale in the city of Attleboro and the adjacent territory, at a specified basic rate; the current to be delivered by the Narragansett Company at the state line between Rhode Island and Massachusetts and carried over connecting transmission lines to the station of the Attleboro Company in Massachusetts, where it was to be metered. The Narragansett Company filed with the Public Utilities Commission of Rhode Island a schedule setting out the rate and general terms of the contract and was authorized by the Commission to grant the Attleboro Company the special rate therein shown; and the two companies then entered upon the performance of the contract. Current was thereafter supplied in accordance with its terms; and the generating plant of the Attleboro Company was dismantled.

In 1924 the Narragansett Company—having previously made an unsuccessful attempt to obtain an increase of the special rate to the Attleboro Company—filed with the Rhode Island Commission a new schedule, purporting to cancel the original schedule and establish an increased rate for electric current supplied, in specified minimum quantities, to electric lighting companies for their own use or sale to their customers and delivered either in Rhode Island or at the state line. The Attleboro Company was in fact the only customer of the Narragansett Company to which this new schedule would apply.

The commission thereupon instituted an investigation as to the contract rate and the proposed rate. After a hearing at which both companies were represented, the Commission found that, owing principally to the increased cost of generating electricity, the Narragansett Company in rendering service to the Attleboro Company was suffering an operating loss, without any return on the investment devoted to such service, while the rates to its other customers yielded a fair return; that the contract rate was unreasonable and a continuance of service to the Attleboro Company under it would be detrimental to the general public welfare and prevent the Narragansett Company from performing its full duty to its other customers; and that the proposed rate was reasonable and would yield a fair return, and no more, for the service to the Attleboro Company. And the Commission thereupon made an order putting into effect the rate contained in the new schedule.

From this order the Attleboro Company prosecuted an appeal to the Supreme Court of Rhode Island which—considering only one of the various objections urged—held, on the authority of Missouri v. Kansas Gas Co., 265 U. S. 298, that the order of the Commission imposed a direct burden on interstate commerce and was invalid because of conflict with the commerce clause of the Constitution; and entered a decree reversing the order and directing that the rate investigation be dismissed. 46 R. I. 496.

It is conceded, rightly, that the sale of electric current by the Narragansett Company to the Attleboro Company is a transaction in interstate commerce, notwithstanding the fact that the current is delivered at the state line. The transmission of electric current from one state to another, like that of gas, is interstate commerce, Coal & Coke Co. v. Pub. Serv. Comm., 84 W. Va. 662, 669, and its essential character is not affected by a passing of custody and title at the state boundary, not arresting the continuous transmission to the intended destination. Peoples' Gas Co. v. Pub. Serv. Comm'n, 270 U. S. 550, 554.

The petitioners contend, however, that the Rhode Island Commission cannot effectively exercise its power to regulate the rates for electricity furnished by the Narragansett Company to local consumers, without also regulating the rates for the other service which it furnishes; that if the Narragansett Company continues to furnish electricity to Attleboro Company at a loss this will tend to increase the burden on the local consumers and impair the ability of the Narragansett Company to give them good service at reasonable prices; and that, therefore, the order of the Commission prescribing a reasonable rate for the interstate service to the Attleboro Company should be sustained as being essentially a local regulation, necessary to the protection of matters of local interest, and affecting interstate commerce only indirectly and incidentally. In support of this contention, they rely chiefly upon Pennsylvania Gas Co. v.

Pub. Serv. Comm., 252 U. S. 23; and the controlling question presented is whether the present case comes within the rule of the Pennsylvania Gas Co. case or that of the Kansas Gas Co. case upon which the Attleboro Company relies.

In the Pennsylvania Gas Co. case, the Company transmitted natural gas by a main pipe line from the source of supply in Pennsylvania to a point of distribution in a city of New York, which it there subdivided and sold at retail to local consumers supplied from the main by pipes laid through the streets of the city. In holding that the New York Public Service Commission might regulate the rate charged to these consumers, the court said that while a state may not "directly" regulate or burden interstate commerce, it may in some instances, until the subject-matter is regulated by Congress, pass laws "indirectly" affecting such commerce, when needed to protect or regulate matters of local interest; that the thing which the New York Commission had undertaken to regulate, while part of an interstate transmission, was "local in its nature," pertaining to the furnishing of gas to local consumers, and the service rendered to them was "essentially local," being similar to that of a local plant furnishing gas to consumers in a city; and that such "local service" was not of the character which required general and uniform regulation of rates by congressional action, even if the local rates might "affect" the interstate business of the Company.

In the Kansas Gas Co. case, the company, whose business was principally interstate, transported natural gas by continuous pipe lines from wells in Oklahoma and Kansas into Missouri, and there sold and delivered it to distributing companies, which then sold and delivered it to local consumers. In holding that the rate which the company charged for the gas sold to the distributing companies—those at which these companies sold to the local consumers not being involved—was not subject to regulation by the Public Utilities Commission of Missouri, the court said that, while in the absence of congressional action a state may generally enact laws of internal police, although they have an indirect effect upon interstate commerce, "the commerce clause of the Constitution, of its own force, restrains the states from imposing direct burdens upon interstate commerce," and a state enactment imposing such a *"direct burden"* must fall, being a direct restraint of that which in the absence of federal regulation should be free, Minnesota Rate Cases, 230 U. S. 352, 396; that the sale and delivery to the distributing companies was "an inseparable part of a transaction in interstate commerce—not local but essentially national in character—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve;" that in the Pennsylvania Gas Co. case, the decision rested on the ground that the service to the consumers for which the regulated charge was made, was "essentially local," and the things done were after the business in its essentially national aspect had come to an end—the supplying of local consumers being "a local business," even though the gas be brought from another state, in which the local interest is paramount and the interference with interstate commerce, if any, indirect and of minor importance; but that in the sale of gas in wholesale quantities, not to consumers, but to distributing companies for resale to consumers, where the transportation, sale and delivery constitutes an unbroken chain, fundamentally interstate from beginning to end, "the paramount interest is not local but national, admitting of and requiring uniformity of regulation," which, "even though it be the uniformity of governmental non-action, may be highly necessary to preserve equality of opportunity and treatment among the various communities and states concerned."

It is clear that the present case is controlled by the Kansas Gas Co. case. The order of the Rhode Island Commission is not, as in the Pennsylvania Gas Co. case, a regulation of the rates charged to local consumers, having merely an incidental effect upon interstate commerce, but is a regulation of the rates charged by the Narragansett Company for the interstate service to the Attleboro Company, which places a direct burden upon interstate commerce. Being the imposition of a direct burden upon interstate commerce, from which the state is restrained by the force of the Commerce Clause, it must necessarily fall, regardless of its purpose. Shafer v. Farmers Grain Co., 268 U. S. 189, 199; Real Silk Mills v. Portland, 268 U. S. 325, 336; Di Santo v. Pennsylvania, 273 U. S. 34. It is immaterial that the Narragansett Company is a Rhode Island corporation subject to regulation by the Commission in its local business, or that Rhode Island is the state from which the electric current is transmitted in interstate commerce, and not that in which it is received, as in the Kansas Gas Co. case. The forwarding state obviously has no more authority than the receiving state to place a direct burden upon interstate commerce. Pennsylvania v. West Virginia, 262 U. S. 553, 596. Nor is it material that the general business of the Narragansett Company appears to be chiefly local, while in the Kansas Gas Co. case the Company was principally engaged in interstate business. The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character; and if the regulation places a direct burden upon its interstate business it is none the less beyond the power of the state because this may be the smaller part of its general business. Furthermore, if Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that state, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either state, but is essentially national in character. The rate is therefore not subject to regulation by either of the two states in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress. See Covington Bridge Co. v. Kentucky, 154 U. S. 204, 220; Hanley v. Kansas City S. Ry. Co., 187 U. S. 617, 620.

The decree is accordingly Affirmed.[5]

[Dissenting opinion of Brandeis, J., omitted.]

Section 4.—Motor-Bus Regulation.

BUCK v. KUYKENDALL.

1925. Supreme Court of the United States. 267 U. S. 307.

Mr. Justice Brandeis delivered the opinion of the court. * * *

Section 4 of chapter III of the Laws of Washington, 1921, * * * prohibits common carriers for hire from using the highways by auto vehicles between fixed termini or over regular routes, without having first obtained from the Director of Public Works a certificate declaring that public convenience and necessity require such operation. The highest court of the state has construed the section as applying to common carriers engaged exclusively in interstate commerce. Northern Pacific Ry. Co. v. Schoenfeldt, 123 Wash. 579; Schmidt v. Department of Public Works, 123 Wash. 705. The main question for decision is whether the statute so construed and applied is consistent with the federal constitution and the legislation of Congress.

Buck, a citizen of Washington, wished to operate an auto stage line over the Pacific Highway between Seattle, Washington, and Portland, Oregon, as a common carrier for hire exclusively for through interstate passengers and express. He obtained from Oregon the license prescribed by its laws. Having complied with the laws of Washington relating to motor vehicles, their owners and drivers (Carlsen v. Cooney, 123 Wash. 441), and alleging willingness to comply with all applicable regulations concerning common carriers, Buck applied there for the prescribed certificate of public convenience and necessity. It was refused. The ground of refusal was that, under the laws of the state, the certificate may not be granted for any territory which is already being adequately served by the holder of a certificate; and that, in addition to frequent steam railroad service, adequate transportation facilities between Seattle and Portland were already being provided by means of four connecting auto stage lines, all of which held such certificates from the State of Washington. Re Buck, P. U. R. 1923 E, 737. To enjoin interference by its officials with the operation of the projected line, Buck brought this suit against Kuykendall, the Director of Public Works [in the United States District Court. His bill was dismissed.]

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[5] On state regulation of the sale of interstate shipped gas, in addition to the leading cases discussed in the opinion above, see Public Utilities Comm. v. Landon (1919) 249 U. S. 236, 63 L. ed. 577; Peoples Natural Gas Co. v. Public Serv. Comm. (1926) 270 U. S. 550, 70 L. ed. 726.

That part of the Pacific Highway which lies within the State of Washington was built by it with federal aid pursuant to the Act of July 11, 1916, c. 241, 39 Stat. 355, as amended February 28, 1919, c. 69, 40 Stat. 1189, 1200, and the Federal Highway Act, November 9, 1921, c. 119, 42 Stat. 212. * * * In support of the decree dismissing the bill this argument is made: * * * The highways belong to the state. It may make provision appropriate for securing the safety and convenience of the public in the use of them. Kane v. New Jersey, 242 U. S. 160. * * * With the increase in number and size of the vehicles used upon a highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject. Vandalia R. R. Co. v. Public Service Commission, 242 U. S. 255; Missouri Pacific Ry. Co. v. Larabee Flour Mills Co., 211 U. S. 612. Neither the recent federal highway acts, nor the earlier post road acts, Rev. Stat. § 3964; Act of March 1, 1884, c. 9, 23 Stat. 3, do that. * * *

The argument is not sound. It may be assumed that § 4 of the state statute is consistent with the Fourteenth Amendment; and also, that appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the Commerce Clause, where the indirect burden imposed upon interstate commerce is not unreasonable. Compare Michigan Public Utilities Commission v. Duke, 266 U. S. 571. The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of federal action—the existence of adequate facilities for conducting interstate commerce. The vice of the legislation is dramatically exposed by the fact that the State of Oregon had issued its certificate which may be deemed equivalent to a legislative declaration that, despite existing facilities, public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause. It also defeats the purpose of Congress expressed in the legislation giving federal aid for the construction of interstate highways. * * *

Reversed.[1]

[Mr. Justice Reynolds delivered a dissenting opinion. See 267 U. S. 325.]

KANE v. STATE OF NEW JERSEY.

1916. Supreme Court of the United States. 242 U. S. 160.

Mr. Justice Brandeis delivered the opinion of the court.

The New Jersey automobile law of 1906, as amended in 1908 (P. L. 1908, p. 613), provides in substance that no person, whether a resident or nonresident of the state, shall drive an automobile upon a public highway unless he shall have been licensed so to do and the automobile shall have been registered under the statute; and also that a nonresident owner shall appoint the Secretary of State his attorney upon whom process may be served "in any action or legal proceeding caused by the operation of his registered motor vehicle, within this state, against such owner." The statute fixes the driver's license fee for cars of less than thirty horse power at two dollars and more than thirty horse power at four dollars. It fixes the registration fee at three dollars for cars of not more than ten horse power; five dollars for those from eleven to twenty-nine horse power; and ten dollars for those of thirty or greater horse power. Both license fees and registration fees, whensoever issued, expire at the close of the calendar year. The moneys received from license and registration fees in excess of the amount required for the maintenance of the Motor Vehicle Department are to be applied to the maintenance of the improved highways. Penalties are prescribed for using the public highways without complying with the requirements of the act. * * *

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[1] Brandeis, J., for the court in Bush & Sons Co. v. Maloy (1925) 267 U. S. 317, 324-325, 69 L. ed. 627: "This case presents two features which were not present in Buck v. Kuykendall, decided this day. The first is that the highways here in question were not constructed or improved with federal aid. This difference does not prevent the application of the rule declared in the Buck Case. The federal-aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, but because those acts make clear the purpose of Congress that state highways shall be open to interstate commerce. The second feature is that here the permit was refused by the Commission, not in obedience to a mandatory provision of the state statute, but in the exercise, in a proper manner, of the broad discretion vested in it. This difference also is not of legal significance in this connection. The state action in the Buck Case was held to be unconstitutional, not because the statute prescribed an arbitrary test for the granting of permits, or because the Director of Public Works had exercised the power conferred arbitrarily or unreasonably, but because the statute as construed and applied invaded a field reserved by the Commerce Clause for federal regulation."

Kane, a resident of New York, was arrested while driving his automobile on the public highways of New Jersey, and tried in the Recorder's Court. The following facts were stipulated: Kane had been duly licensed as a driver under the laws of both New York and New Jersey. He had registered his car in New York, but not in New Jersey. He had not filed with the secretary of state of New Jersey the prescribed instrument appointing that official his attorney upon whom process might be served. When arrested he was on his way from New York to Pennsylvania. The aggregate receipts from license and registration fees for the year exceeded the amount required to defray the expenses of the Motor Vehicle Department, so that a large sum became available for maintenance of the improved roads of the state. Kane contended that the statute was invalid as to him, a nonresident, because it violated the Constitution and laws of the United States regulating interstate commerce, and also because it violated the Fourteenth Amendment. These contentions were overruled, and he was fined $5. The conviction was duly reviewed both in the supreme court and by the Court of Errors and Appeals. The contentions were repeated in both of those courts; and both courts affirmed the conviction. Kane v. New Jersey, 81 N. J. L. 594. The case was brought here by writ of error.

The power of a state to regulate the use of motor vehicles on its highways has been recently considered by this court and broadly sustained. It extends to nonresidents as well as to residents. It includes the right to exact reasonable compensation for special facilities afforded as well as reasonable provisions to ensure safety. And it is properly exercised in imposing a license fee graduated according to the horse power of the engine. Hendrick v. Maryland, 235 U. S. 610. Several reasons are urged why that case should not be deemed controlling:

1. The Maryland law did not require the nonresident to appoint an agent within the state upon whom process may be served. But it

was recognized in discussing it, that "the movement of motor vehicles over the highways is attended by constant and serious dangers to the public" (p. 622). We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the state, any financial liability of nonresident owners, was essential to public safety.[2] There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against nonresidents, denying them equal protection of the law. On the contrary, it puts nonresident owners upon an equality with resident owners.

2. The Maryland law contained a reciprocal provision by which nonresidents whose cars are duly registered in their home state are given, for a limited period, free use of the highways in return for similar privileges granted to residents of Maryland. Such a provision promotes the convenience of owners and prevents the relative hardship of having to pay the full registration fee for a brief use of the highways. It has become common in state legislation; and New Jersey has embodied it in her law since the trial of this case in the lower court. But it is not an essential of valid regulation. Absence of it does not involve discrimination against nonresidents; for any resident similarly situated would be subjected to the same imposition. A resident desiring to use the highways only a single day would also have to pay the full annual fee. The amount of the fee is not so large as to be unreasonable; and it is clearly within the discretion of the state to determine whether the compensation for the use of its highways by automobiles shall be determined by way of a fee, payable annually or semiannually, or by a toll based on mileage or otherwise. Our decision sustaining the Maryland law was not dependent upon the existence of the reciprocal provision. Indeed, the plaintiff in error there was not in a position to avail himself of the reciprocal clause; and it was referred to only because of the contention that the law discriminated between nonresidents; that is, that Maryland extended to residents of other states privileges it denied to residents of the District of Columbia.

3. In Hendrick v. Maryland, it appeared only that the nonresident drove his automobile *into* the state. In this case it is admitted that he was driving *through* the state. The distinction is of no significance. As we there said (622): "In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others."

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[2] Compare Wuchter v. Pizzutti, ante, p. 586, decided with respect to due process of law.

4. In the Hendrick case it did not appear, as here, that the fees collected under the motor vehicle law exceeded the amount required to defray the expense of maintaining the regulation and inspection department. But the Maryland statute, like that of New Jersey, contemplated that there would be such excess and provided that it should be applied to the maintenance of improved roads. And it was expressly recognized that the purpose of the Maryland law "was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious."

The judgment should be

Affirmed.

MORRIS ET AL. V. DUBY ET AL., COMMISSIONERS.

1927. Supreme Court of the United States. 274 U. S. 135.

[This was a bill in the United States District Court by a motor truck operator to restrain enforcement of an order of the Oregon Highway Commission which reduced the maximum combined weight of a truck and its load, permitted on the Columbia River Highway in Oregon, from 22,000 pounds to 16,500 pounds. Oregon had accepted federal aid in construction of rural post roads in the state and provided by statute for the cooperation required by the Federal Highway Act. The bill was dismissed and this appeal taken.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

* * *

The Secretary of Agriculture, by virtue of three Acts of Congress, one of July 11, 1916, c. 241, 39 Stat. 355, an amendment thereto of February 28, 1919, c. 69, 40 Stat. 1189, 1200, and the Federal Highway Act of November 9, 1921, c. 119, 42 Stat. 212, is authorized to cooperate with the states, through their respective highway departments, in the construction of rural post roads. These require that no money appropriated under their provisions shall be expended in any state until it shall by its legislature have assented to the provisions of the Acts. They provide that the Secretary of Agriculture and the state highway department of each state shall agree upon the roads to be constructed therein and the character and method of their construction. The construction work in each state is to be done in accordance with its laws, and under the supervision of the state highway department, subject to the inspection and approval of the Secretary and in accord with his rules and regulations made pursuant to the federal acts. The states are required to maintain the roads so constructed according to their laws. In case of failure of a state to maintain any highway within its boundaries after construction or reconstruction, the Secretary is authorized to proceed on notice to have the highway placed in proper condition of maintenance, at the charge and cost of the federal funds alloted to the state, and henceforth to refuse any further project in such state until the state shall reimburse the Government for such maintenance and shall pay into the Federal Highway Fund for reapportionment among all the states the sum thus expended. * * *

The order complained of, set forth as an exhibit to the amended bill of complaint, recites that the Commission, as a result of due investigation, finds that the road is being damaged and injured on account of the kind and character of traffic now being hauled over it, and that the loads of maximum weight moved at the maximum speed are breaking up, damaging and deteriorating the road, and that it will therefore be for the best interests of the state highway that the maximum weight be reduced from 22,000 to 16,500, and that changes be made with respect to tires and their width.

The amended bill gives a history of the highway and its continued use for a weight of 22,000 pounds for four years, which has been availed of by the appellants as common carriers and as members of an Auto Freight Transportation Association of Oregon and Washington, with costly terminals in Portland established by requirement of that city; it alleges that the twenty-two miles of the Columbia River Highway here involved is a part of the interstate highway from Astoria, Oregon, into the State of Washington, and all subject to the Federal Highway Acts, and that this order will interfere with interstate commerce thereon. The amended bill denies the damage to the road as found by the Highway Commission, and says that the reduction of the limit will be unreasonable, arbitrary and discriminatory. It avers that the plaintiffs have been engaged in active competition with steam railroads paralleling the Columbia River Highday and charging rates of traffic which, unless the appellants can use trucks combined with loads of 22,000 pounds, will prevent their doing business except at a loss. It alleges that the acts of Congress and of Oregon constitute a contract by which the permission for the use of a truck of five tons capacity without regard to weight of the truck itself, is a term which can not be departed from by the State Highway Commission, and constitutes a protection to the plaintiffs of which they may avail themselves in this action.

An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the state its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens. Hendrick v. Maryland, 235 U. S. 610, 622, et seq.; Kane v. New Jersey, 242 U. S. 160, 167. Of course the state may not discriminate against interstate commerce. Buck v. Kuykendall, 267 U. S. 307. * * *

The mere fact that a truck company may not make a profit unless it can use a truck with load weighing 22,000 or more pounds does not show that a regulation forbidding it is either discriminatory or unreasonable. That it prevents competition with freight traffic on parallel steam railroads may possibly be a circumstance to be considered in determining the reasonableness of such a limitation, though that is doubtful, but it is necessarily outweighed when it appears by decision of competent authority that such weight is injurious to the highway for the use of the general public and unduly increases the cost of maintenance and repair. In the absence of any averments of specific facts to show fraud or abuse of discretion, we must accept the judgment of the Highway Commission upon this question, which is committed to their decision, as against merely general averments denying their official finding.

Nor is there anything either in the federal or state legislation to support the argument that the agreement between the national and state governments requires that the weight of truck and load which was permitted by the state when the agreement was made binds the state contractually to continue such permission. Conserving limitation is something that must rest with the road supervising authorities of the state, not only on the general constitutional distinction between national and state powers, but also for the additional reason, having regard to the argument based on a contract, that under the convention between the United States and the state, in respect of these jointly aided roads, the maintenance after construction is primarily imposed on the state. Regulation as to the method of use, therefore, necessarily remains with the state and can not be interfered with unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems of the Union and to facilitating the carrying of the mails over them. There is no averment of the bill or any showing by affidavit making out such a case.

The temporary injunction was rightly refused and the motion to dismiss the bill was properly granted.

Affirmed.[3]

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[3] Sprout v. South Bend (1928) 277 U. S. 163, 167, 172, 72 L. ed. 833, 62 A. L. R. 45, holding a city ordinance invalid for other reasons, Brandeis, J., for the court:

"The ordinance prescribes license fees varying with the seating capacity of the bus. That for a bus with seats for twelve persons is $50 a year. Before the license can issue, the applicant must file with the city a contract of liability insurance providing for the payment of any final judgment that may be rendered for damages to property or the person resulting from the negligent operation of the bus within the city. The amount of insurance required is limited to a liability of $1,000 to any one person and of $2,500 for damages arising from a single

Section 5.—Authorizing Establishment of Facilities.

LUXTON v. NORTH RIVER BRIDGE COMPANY.

1894. Supreme Court of the United States. 153 U. S. 525.

[The North River Bridge Company, incorporated by the act of Congress of July 11, 1890, c. 699, applied to the United States Circuit Court for New Jersey for the appointment of commissioners, as

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accident. The insurance must be furnished by a company authorized to do business within the state. These requirements apply alike to busses operating wholly within the city and to those operating from points within it to points without. The ordinance makes no distinction between busses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce. Nor does the ordinance, in its requirement of liability insurance, distinguish in terms between liability to passengers traveling interstate and other liability resulting from negligent operation. * * *

"Objection under the commerce clause is made also to the requirement of liability insurance. There being grave dangers incident to the operation of motor vehicles, a state may require users of such vehicles on the public highways to file contracts providing adequate insurance for the payment of judgments recovered for certain injuries, resulting from their operation. Packard v. Banton, 264 U. S. 140. Compare Kane v. New Jersey, 242 U. S. 160, 167; Hess v. Pawloski, 274 U. S. 352; Clark v. Poor, 274 U. S. 554, 557. It may, consistently with the federal Constitution, delegate by appropriate legislation a part of this power to a municipality. Such provisions for insurance are not, even as applied to busses engaged exclusively in interstate commerce, an unreasonable burden on that commerce, if limited to damages suffered within the state by persons other than the passenger. Whether the insurance here prescribed is, because of its scope, obnoxious to the commerce clause, we need not inquire. Compare Adams Express Co. v. New York, 232 U. S. 14, 33; Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 577."

Interstate Busses Corp. v. Holyoke Street Ry. Co. (1927) 273 U. S. 45, 71 L. ed. 530: A Massachusetts statute forbade any person to operate for hire any public motor-bus parallel with and in competition with a street railway without first obtaining a license from the state's Department of Public Utilities which was authorized to issue licenses only after finding that public convenience and necessity required the new transportation. Licenses were not required for transportation exclusively interstate. Sustaining the requirement as to the appellant whose route ran from Hartford, Connecticut, to Springfield, Massachusetts, with numerous stations in Massachusetts where it carried passengers for both interstate and intrastate trips, the court said: "The burden is upon appellant to show that enforcement of the Act operates to prejudice interstate carriage of passengers. The stipulated facts do not so indicate. The threatened enforcement is to prevent appellant from carrying intrastate passengers without license over that part of its route which is parallel to the street railway. Its right to use the highways between Springfield and Hartford is not in controversy. While it appears that in Massachusetts both classes of passengers are carried in the same vehicles, it is not shown what part of the total number are intrastate or interstate. The record contains no information as to the number of persons, if any, travelling in interstate commerce on appellant's busses over the part of the route competing with the street railway. It is not shown that the two classes of business are so commingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried efficiently and economically in busses used exclusively for that purpose or that appellant's interstate business is dependent in any degree upon the local business in question. Appellant may not evade the Act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employees."

authorized by that act, to assess damages for the appropriation and condemnation for the approaches to its bridge across the Hudson or North River, between the states of New York and New Jersey, of the land of Sarah Luxton in the city of Hoboken, New Jersey. Commissioners were appointed and awarded $2000. From the court's judgment approving this award she took this writ of error.]

MR. JUSTICE GRAY delivered the opinion of the court. * * *

The Congress of the United States, being empowered by the Constitution to regulate commerce among the several states, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end. As said by Chief Justice Marshall: "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished." Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the states. McCulloch v. Maryland, 4 Wheat. 316, 411, 422; Osborn v. Bank, 9 Wheat. 738, 861, 873; Pacific Railroad Removal Cases, 115 U. S. 1, 18; California v. Pacific Railroad, 127 U. S. 1, 39. Congress has likewise the power, exercised early in this century by successive acts in the case of the Cumberland or National road from the Potomac across the Alleghenies to the Ohio, to authorize the construction of a public highway connecting several states. See Indiana v. United States, 148 U. S. 148. And whenever it becomes necessary, for the accomplishment of any object within the authority of Congress, to exercise the right of eminent domain, and take private lands, making just compensation to the owners, Congress may do this with or without a concurrent act of the state in which the lands lie. Van Brocklin v. Tennessee, 117 U. S. 151, 154, and cases cited; Cherokee Nation v. Kansas Railway, 135 U. S. 641, 656.

From these premises, the conclusion appears to be inevitable that, although Congress may, if it sees fit, and as it has often done, recognize and approve bridges erected by authority of two states across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water. 1 Hare's Constitutional Law, 248, 249. See Acts of July 14, 1862, c. 167; 12 Stat. 569; February 17, 1865, c. 38; 13 Stat. 431; July 25, 1866, c. 246; 14 Stat. 244; March 3, 1871, c, 121, § 5; 16 Stat. 572, 573; June 16, 1886, c. 417; 24 Stat. 78. * * *

In California v. Central Pac. R. Co., 127 U. S. 1, it was directly adjudged that Congress has authority, in the exercise of its power to regulate commerce among the several states, to authorize corporations to construct railroads across the states as well as the territories of the United States; and Mr. Justice Bradley, again speaking for the court, and referring to the acts of Congress establishing corporations to build railroads across the continent, said: "It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several states, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed, and led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress over the territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the east with the Pacific, traversing states as well as territories, and employing the agency of state as well as federal corporations." 127 U. S. 39, 40. * * *

In the light of the foregoing principles and authorities, the objection made to the constitutionality of this act cannot be sustained.[1]

Judgment affirmed.

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[1] Congress may authorize the erection of a bridge over a navigable river though both abutments are within a single state, the bridge to be used by a railroad engaged in interstate and intrastate transportation; and the state is powerless to require a single span bridge if Congress directs a two-span bridge. People v. Hudson River Connecting R. Corp. (1920) 228 N. Y. 203, 126 N. E. 801.

PENSACOLA TELEGRAPH CO. v. WESTERN UNION TELEGRAPH CO.

1877. Supreme Court of the United States. 96 U. S. 1.

[Appeal from dismissal by a United States Circuit Court of a bill brought by the Pensacola Company to restrain the Western Union Company from operating its line in two counties of Florida in violation of the monopoly therein granted the plaintiff by the State of Florida.]

MR. CHIEF JUSTICE WAITE delivered the opinion of the court. * * *

The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. * * *

It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly, as against hostile state legislation. In fact, from the beginning, it seems to have been assumed that Congress might aid in developing the system; for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore, only a little more than thirty years ago, with money appropriated by Congress for that purpose (5 Stat. 618); and large donations of land and money have since been made to aid in the construction of other lines (12 Stat. 489, 772; 13 id. 365; 14 id. 292). It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, and exclude all others from its use. The present case is satisfied, if we find that Congress has power, by appropriate legislation, to prevent the states from placing obstructions in the way of its usefulness.

The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.

The State of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. This embraces the two westernmost counties of the state, and extends from Alabama to the Gulf. No telegraph line can cross the state from east to west, or from north to south, within these counties, except it passes over this territory. * * * The state, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other states, and to control the transmission of all telegraphic correspondence within its own jurisdiction.

It is unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted. The statute[2] of July 24, 1866, in effect, amounts to a prohibition of all state monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the National Government for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the states, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide, that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.

It is insisted, however, that the statute extends only to such military and post roads as are upon the public domain; but this, we think, is not so. * * * There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military and post roads,[3] and the navigable waters of the United

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[2] The statute reads: "Any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States: Provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads."

[3] "Post roads" is defined to include "all railroads or parts of railroads," "all the waters of the United States" over which mail is carried, "all letter-carrier

States. These are all within the dominion of the National Government to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation. No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized.[4] State sovereignty under the Constitution is not interfered with. Only national privileges are granted.

The state law in question, so far as it confers exclusive rights upon the Pensacola Company, is certainly in conflict with this legislation of Congress. To that extent it is, therefore, inoperative as against a corporation of another state entitled to the privileges of the Act of Congress. Such being the case, the charter of the Pensacola Company does not exclude the Western Union Company from the occupancy of the right of way of the Pensacola and Louisville Railroad Company under the arrangement made for that purpose. * * * Decree affirmed.

INTERNATIONAL BRIDGE COMPANY v. STATE OF NEW YORK.

1920. Supreme Court of the United States. 254 U. S. 126.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the State of New York to recover penalties from the Bridge Company for failure to place upon its bridge a roadway for vehicles and a pathway for pedestrians between Squaw Island in Niagara River and the mainland of New York State as required by c. 666 of the Laws of 1915 of the State of New York. The defendant set up that the act was contrary to the Constitution of the United States in specified respects, but the plaintiff got judgment in the Supreme Court, which was affirmed by the Court of Appeals. 223 N. Y. 137.

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routes, established in any city or town," U. S. C. A. Title 39, § 481, and "all public roads and highways," ibid. § 482, and these definitions apply in determining the scope of the telegraph statute of July 24, 1866. Essex v. New England Tel. Co. (1916) 239 U. S. 313, 321, 60 L. ed. 301; Western Union Tel. Co. v. Richmond (1912) 224 U. S. 160, 56 L. ed. 710. That a city may impose conditions upon use of its streets by interstate telegraphs and subject them to reasonable regulation, see the two cases just cited. In general, for annotation of the act of July 24, 1866, see U. S. C. A. Title 47, §§ 1-6.

[4] See Louisville & N. R. Co. v. Western Union Tel. Co. (1919) 250 U. S. 363, 63 L. ed. 1032, discussing a condemnation by the telegraph company, under state law, of portions of the right of way of an interstate railroad.

The Bridge Company originally was incorporated by a special charter from the State of New York. Laws of 1857, c. 753. As the bridge was to cross the Niagara River from Buffalo to Canada, a similar corporation was created under the laws of Canada, 20 Vict. c. 277, and subsequently the two corporations were consolidated, pursuant to Laws of New York, 869, c. 550, and a Canadian Act, 32 and 33 Vict. c. 65, subject to all the duties of each of the consolidated companies. By the Act of Congress of June 30, 1870, c. 176, 16 Stat. 173, any bridge constructed across the Niagara River in pursuance of the New York Act of 1857 and any acts of the New York legislature then in force amending the same was authorized as a lawful structure subject to the supervision of the Secretary of War and his approval of the plans. By the New York Act of 1857, "Said bridge may be constructed as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains," § 15. And "whenever the said bridge shall be complete for the passage of ordinary teams and carriages" the company may erect toll gates and charge tolls not exceeding certain rates for foot passengers, carriages, &c. The original Canadian Act had words similar to those just quoted from § 15, except that it said "shall be constructed" instead of "may be," a fact to which we shall advert again.

Between 1870 and 1874 the bridge was built as required by the charter with one draw across Black Rock Harbor and one across the main channel of the river. It crossed Squaw Island on a trestle, afterwards filled in, but was built as a railroad bridge exclusively without any provision for footpaths or roadways. By the Act of Congress of June 23, 1874, c. 475, 18 Stat. 275, it was declared a lawful structure and an established post route for the mail of the United States. In the year 1899 a plan for rebuilding the bridge with wings for roadways and footpaths was approved by the Secretary of War subject to changes at the expense of the Company if the Secretary should deem them advisable. The rebuilding took place in 1899-1901, but omitted the wings, and this modification was assented to by the Secretary of War.

The Niagara River is navigable at this point. In pursuance of plans for improvement adopted by the United States, in 1906 it acquired from the State of New York the land under Black Rock Harbor, lying on the New York side of Squaw Island, and the adjacent portions of the Erie Canal, both being within the limits of the state and crossed by the bridge. Thereafter the improvements were carried out.

In 1907 the Secretary of War gave notice to the Company that the bridge over Black Rock Harbor and Erie Canal obstructed navigation and that changes were required. The Company submitted plans again showing in dotted lines wings for roadways and footpaths, noting that they were not to be put in at present but that provision was made in the design for their future construction. The plans were approved and the bridge was built without the wings, the completion being reported by his resident representative to the Secretary of War.

By c. 666 of the laws of New York for 1915, the charter of the Company was amended so as to require the construction of a roadway for vehicles and a pathway for pedestrians upon the draw across Black Rock Harbor, the Company being allowed to charge tolls not exceeding specified sums. The Company failed to comply with the requirement and the time limit had expired before this suit was brought to recover penalties imposed by the act. It is found that the construction was necessary for the public interest and convenience; that the cost of the changes is insignificant in comparison with the assets and net earnings of the Company, and that it does not appear that the investment would not yield a reasonable return.

The first objections, to the new requirement made by the state, are that it impairs the obligation of the contract in the original charter and takes the Company's property without due process of law. The argument is based partly upon a reduction of the tolls from those mentioned in the charter of 1857, made by the Act of 1915. Concerning this it is enough to say that the objection is premature. The clause relating to the construction of the roadway and pathway is distinct from and independent of that which fixes the maximum rates to be charged. The latter might be invalid and the former good. If the rates are too low they can be changed at any time. The only question now before us is whether the additions shall be built. As to that it would be going very far in the way of limiting the reserved right to amend such charters, if it should be held that the state had not power to require what originally was contemplated in permissive words as part of the scheme. But however that might be, the New York Act authorizing consolidation subjected this consolidated corporation to the duties of the Canadian as well as of the New York charter, and the Canadian Act made the arrangement for foot passengers and carriages a duty. The words that we have quoted plainly impose one. The opinion in Attorney-General v. International Bridge Co., 6 Ont. App. 537, 543, implies that they do so by speaking of the abandonment of a portion of the work as probably an abuse of the Act of Parliament, and the same is clearly stated in Canada Southern Ry. Co. v. International Bridge Co., 8 App. Cases, 723, 729.

It is argued that, the Canadian Act governing only the Canadian side, its adoption by New York carried the obligation no farther. But it appears to us that it would be quibbling with the rational understanding of the duty assumed to say that the Company could have supposed that it had a contract or property right to confine its building of the footpath and carriage-way to the Canada side of the boundary line.

The New York legislature of course confined its command to the half of the bridge within its jurisdiction. It may be presumed that if that command is obeyed either Canada or the Company will see the propriety of carrying the way and path across to the other shore. At all events the power of New York to insist upon its rights is not limited by speculation upon that point. As we agree with the Court of Appeals that this amendment to the charter was within the power reserved to the state the objection under the contract clause of the Constitution of course must fail, and, it would seem, that under the Fourteenth Amendment also. But as to the latter we may add, as the Court of Appeals added, that there is nothing to show that the addition to the structure will not yield a reasonable return; if that be essential in view of the charter. Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262. Chesapeake & Ohio Ry. Co. v. Public Service Commission, 242 U. S. 603.

The only argument that impresses us and the one that was most pressed is that this is an international bridge, and that Congress has assumed such control of it as to exclude any intermeddling by the state. It is said that the bridge as constructed was and is devoted wholly to international commerce and that when Congress authorized it in that form in 1874 that authority must be regarded as the charter under which it was maintained. Without repeating the considerations urged in support of this conclusion we will state the reasons that prevail with us.—The part of the structure with which we are concerned is within the territorial jurisdiction of the State of New York. There was no exercise of the power of eminent domain by the United States. The state was the source of every title to that land and, apart from the special purposes to which it might be destined, of every right to use it. Any structure upon it considered merely as a structure is erected by the authority of New York. The nature and qualifications of ownership are decided by the state and although certain supervening uses consistent with those qualifications cannot be interfered with by the state, still the foundation of a right to use the land at all must be laid by state law. Not only the existence of the Company but its right to build upon New York land came from New York, as was recognized by the form of the original Act of Congress of 1870, which speaks of any bridge built "in pursuance of" the New York statutes. It did not, as perhaps the New York Consolidation Act did, refer to those statutes simply as documents and incorporate them, it referred to them as the source of the Company's power.

From an early date the state has been recognized as the source of authority in the absence of action by Congress. Willson v. Blackbird Creek Marsh Co., 2 Pet. 245. Escanaba Co. v. Chicago, 107 U. S. 678. And this Court has been slow to interpret such action as intended to exclude the source of rights from all power in the premises. In a case of navigable waters wholly within a state, over which a right of way had been conveyed to the United States and which the United States was spending considerable sums to improve, it was held that, whether or not Congress had power to authorize private persons to build in such waters without the consent of the state, an act making comprehensive regulations of work within them did not manifest a purpose to exclude the previously existing authority of the state over such work. Cummings v. Chicago, 188 U. S. 410, 413, 428, et seq.

But it is said that a different rule applies to an international stream and that Congress has recognized the distinction by the Act of March 3, 1899, c. 425, § 9, 30 Stat. 1151. It is true that that statute makes a distinction, but the distinction is that bridges may be built across navigable waters wholly within the state if approved by the Chief of Engineers and the Secretary of War, but, with regard to waters not wholly within the state, only after the consent of Congress has been obtained. The act does not make Congress the source of the right to build but assumes that the right comes from another source, that is, the state. It merely subjects the right supposed to have been obtained from there to the further condition of getting from Congress consent to action upon the grant.

No doubt in the case of an international bridge the action of a state will be scrutinized in order to avoid any possible ground for international complaint, but the mere fact that the bridge was of that nature would not of itself take away the power of the state over its part of the structure if Congress were silent, any more than the fact that it was a passageway for interstate commerce or crossed a navigable stream. When Congress has acted we see no reason for not leaving the situation as Congress has seemed to leave it, if on the most critical examination we discover no intent to withdraw state control, but on the contrary an assumption that the control is to remain. We have adverted to the implications of the general law of 1899 and have mentioned the statutes that deal specifically with this bridge. The Act of 1874 declaring the existing bridge lawful was a confirmation which it was natural to seek but was not a repeal of the authority given to the Company in 1870 to build subject to the approval of the Secretary of War. The superstructure has been rebuilt since 1874 and the Secretary of War twice has approved plans showing the carriage and footways. It is true that the Company never has sought to execute that part of the plan, but on the facts that we have stated it appears to us a strange contention that it has contract or property rights not to be required to build the bridge or that Congress by implication has forbidden the state to demand that the plan recognized by everyone from the beginning should at last be carried out.

The conveyance of a part of the land under the bridge to the United States for a public purpose not connected with the administration of the Government did not affect the authority of New York over the residue within the state, and taken in connection with the acts of the Government before and after the grant does not invalidate the statute of 1915 even in part. See Cummings v. Chicago, 188 U. S. 410, 413. Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 525. Omaechevarria v. Idaho, 246 U. S. 343, 346.

Judgment affirmed.[5]

The Chief Justice [White], Mr. Justice McKenna and Mr. Justice McReynolds, dissent.

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[5] In Wilson v. Blackbird Creek Marsh Co. (1829) 2 Pet. (U. S.) 245, 7 L. ed. 412, an act of Delaware was held valid which authorized the building of a dam across a small navigable creek although it abridged the use of the creek for interstate commerce. Marshall, C. J., for the court said: "We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed [by Congress] on the subject."

Likewise the authorization of bridges over navigable waters within a state was held to be a local matter within the power of the state, until superseded by Congressional legislation. Gilman v. Philadelphia (1866) 3 Wall. (U. S.) 713, 18 L. ed. 96. The court said:

"It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The states have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the state shall be exerted within the sphere of the commercial power which belongs to the nation."

Accord: Pound v. Turck (1878) 95 U. S. 459, 24 L. ed. 525 (dam); Manigault v. Springs (1905) 199 U. S. 473, 50 L. ed. 274 (same); Willamette Iron Bridge Co. v. Hatch (1888) 125 U. S. 1, 31 L. ed. 629; Mobile County v. Kimball (1881) 102 U. S. 691, 26 L. ed. 238 (harbor improvements). So a state may prohibit obstructions to navigable waters, not authorized by the United States. North Shore Boom &c. Co. v. Nicomen Boom Co. (1909) 212 U. S. 406, 53 L. ed. 574. See also Cummings v. Chicago (1903) 188 U. S. 410, 47 L. ed. 525 and Montgomery v. Portland (1903) 190 U. S. 89, 47 L. ed. 965, holding that the acts of Congress of Sept. 19, 1890, and of March 3, 1899, (U. S. C. A. Title 33, §§ 401, 403) which require approval of the Secretary of War before any bridge, dam, wharf, pier, etc., lawfully may be built in or over navigable waters of the United States, did not withdraw from the states all power with respect thereto. In the case last cited, the court said: "We hold that, under existing enactments, the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a state, cannot be said to be complete and absolute without the concurrent or joint assent of both the general and state governments. Of course, the right of the government to erect public structures in a navigable water of the United States rests upon different grounds."

Bridges and other structures or improvements authorized by a state over or in navigable waters of the United States, though built and owned by private persons, may be altered or removed by Congress, if in its judgment they have become obstructions to navigation, the state authorization affording no immunity, and no compensation is required. Monongahela Bridge Co. v. United States (1910) 216 U. S. 177, 54 L. ed. 435; Willamette Iron Bridge Co. v. Hatch (1888) 125 U. S. 1, 12, 31 L. ed. 629 (semble); Greenleaf-Johnson Lumber Co. v. Garrison (1915) 237 U. S. 251, 59 L. ed. 939, 944 and cases there cited. See

SANITARY DISTRICT OF CHICAGO v. UNITED STATES.

1925. Supreme Court of the United States. 266 U. S. 405.

Appeal from a decree of the District Court enjoining the appellant from diverting water from Lake Michigan in excess of 250,000 cubic feet per minute, the amount authorized by the Secretary of War.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity brought by the United States to enjoin the Sanitary District of Chicago, a corporation of Illinois, from diverting water from Lake Michigan in excess of 250,000 cubic feet per minute; the withdrawal of that amount having been authorized by the Secretary of War. It is alleged that the withdrawal of more, viz., from 400,000 to 600,000 cubic feet per minute, has lowered and will lower the level of the water of Lake Michigan, Lake Huron, Lake St. Clair, Lake Erie, Lake Ontario, Sault Ste. Marie, St. Mary's River, St. Clair River, Detroit River, Niagara River, St. Lawrence River, and all the harbors, etc., connected therewith, all of which are alleged to be navigable waters of the United States, and will thus create an obstruction to the navigable capacity of said waters; and that it will alter and modify the condition and capacity of the above named and their ports, etc., connected with them. The prohibition of such alterations and obstructions in the Act of March 3, 1899, c. 425, § 10; 30 Stat. 1121, 1151, is set out at length and relied upon but the frame of the bill does not exclude a reliance upon more general principles if they were needed in order to maintain it.

The withdrawal practiced and threatened is through an artificial channel that takes the place of the Chicago River, formerly a little stream flowing into Lake Michigan, and of a part of its branches.

Louisville Bridge Co. v. United States (1917) 242 U. S. 409, 61 L. ed. 395. For discussion of the authority given the Secretary of War see Union Bridge Co. v. United States, ante, p. 953.

Railroads. The Transportation Act of 1920, § 1, paragraphs 18 to 22, U. S. C. A., Title 49, § 1 (18)-(22), requires an interstate railroad to obtain from the Interstate Commerce Commission a certificate of public convenience and necessity before extending its line, constructing a new line or acquiring a line.

"The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest. * * * The mere fact that a railroad lies wholly within one state and is to be built by an independent corporation, does not, of course, prevent the application of paragraphs 18 to 22. If it undertakes to engage in interstate commerce, its operation becomes immediately a matter of national concern and it comes within the purview of those paragraphs. But Congress did not in terms prohibit wholly intrastate carriers from building lines to be used wholly in intrastate commerce. As long as the Northside Company confines its operations to intrastate commerce, it will not violate the federal law." Texas & N. O. R. Co. v. Northside Belt R. Co. (1928) 276 U. S. 475, 479-480, 72 L. ed. 661.

The channel instead of adding water to the Lake has been given an opposite incline, takes its waters from the Lake, flows into the Desplaines River, which empties into the Illinois River, which in turn empties into the Mississippi. The channel is at least twenty-five feet deep and at least one hundred and sixty-two feet wide; and while its interest to the defendant is primarily as a means to dispose of the sewage of Chicago, Missouri v. Illinois, 200 U. S. 496, it has been an object of attention to the United States as opening water communication between the Great Lakes and the Mississippi and the Gulf.

The answer shows that the defendant is proceeding under a state act of May 29, 1889, by which it was provided that a channel should be made of size sufficient to take care of the sewage and drainage of Chicago as the increase of population might require, with a capacity to maintain an ultimate flow of not less than 600,000 cubic feet of water per minute, and a continuous flow of not less than 20,000 cubic feet for each 100,000 of the population within the sanitary district. It denies that the defendant has abstracted from 400,000 to 600,000 feet per minute, but as it alleges the great evils that would ensue if the flow were limited to the amount fixed by the Secretary of War or to any amount materially less than that required by the state act of May 29, 1889, and as it admits present conditions to be good, the denial cannot be taken very seriously. The act sufficiently indicates what the state threatens and intends to do unless stopped. * * *

This brief summary of the pleadings is enough to show the gravity and importance of the case. It concerns the expenditure of great sums and the welfare of millions of men. But cost and importance, while they add to the solemnity of our duty, do not increase the difficulty of decision except as they induce argument upon matters that with less mighty interests no one would venture to dispute. The law is clear, and when it is known the material facts are few.

This is not a controversy between equals. The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction. It has a standing in this suit not only to remove obstruction to interstate and foreign commerce, the main ground, which we will deal with last, but also to carry out treaty obligations to a foreign power bordering upon some of the Lakes concerned, and, it may be, also on the footing of an ultimate sovereign interest in the Lakes. * * *

The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. There is no question that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants. In matters where the states may act the action of Congress overrides what they have done. Monongahela Bridge Co. v. United States, 216 U. S. 177.

Second Employers' Liability Cases, 223 U. S. 1, 53. But in matters where the national importance is imminent and direct even where Congress has been silent the states may not act at all. Kansas City Southern Ry. Co. v. Kaw Valley Drainage District, 233 U. S. 75, 79. Evidence is sufficient, if evidence is necessary, to show that a withdrawal of water on the scale directed by the statute of Illinois threatens and will affect the level of the Lakes, and that is a matter which cannot be done without the consent of the United States, even were there no international covenant in the case.

* * *

The parties have come to this court for the law, and we have no doubt that as the law stands the injunction prayed for must be granted. As we have indicated, a large part of the evidence is irrelevant and immaterial to the issues that we have to decide. Probably the dangers to which the City of Chicago will be subjected if the decree is carried out are exaggerated, but in any event we are not at liberty to consider them here as against the edict of a paramount power. The decree for an injunction as prayed is affirmed, to go into effect in sixty days—without prejudice to any permit that may be issued by the Secretary of War according to law.[6]

Affirmed.

Section 6.—Protecting from Outside Harms.

IN RE DEBS, PETITIONER.

1895. Supreme Court of the United States. 158 U. S. 564.

[During the great railroad strike in Chicago in 1894 the United States, by the United States district attorney for the Northern District of Illinois, filed a bill in the federal court for that district complaining that Debs and others, officers and members of the

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[6] "One should have in mind the doctrine, heretofore firmly settled, that the power to regulate interstate and foreign commerce, which the Constitution vests in Congress, includes the power to control, for the purposes of such commerce, all navigable waters which are accessible to it and within the United States, whether within or without the limits of a state, and to that end to adopt all appropriate measures to free such waters from obstructions to navigation and to preserve and even enlarge their navigable capacity; and that the authority and rights of a state in respect of such waters within its limits, and in respect of the lands under them, are subordinate to this power of Congress. Philadelphia v. Stimson, 223 U. S. 605, 634-638; United States v. Chandler-Dunbar Co., 229 U. S. 53, 62-65; Lewis Blue Point Oyster Co. v. Briggs, 229 U. S. 82, 88; Greenleaf Lumber Co. v. Garrison, 237 U. S. 251, 258, et seq.; Willink v. United States, 240 U. S. 572, 580; United States v. Rio Grande Irrigation Co., 174 U. S. 690, 703." Van Devanter, J., in New Jersey v. Sargent (1926) 269 U. S. 328, 337, 70 L. ed. 289.

American Railway Union, on account of a dispute between the Pullman Company and its employees, conspired to prevent the hauling of Pullman cars by railroads, induced railroad employees to go out on strike, and by acts of violence prevented railroads from employing substitute workers, and by various acts of violence obstructed, derailed, wrecked and stopped trains, both passenger and freight, engaged in interstate commerce and in transporting United States mails. On the same day, July 2, 1894, the court issued a decree enjoining further obstruction or interference with such trains. On July 17 Debs and three other officers of the union were arrested, brought before the court, found guilty of contempt of the injunction and sentenced to imprisonment. They now petitioned the Supreme Court for a writ of habeas corpus alleging unlawfulness of their detention.]

MR. JUSTICE BREWER delivered the opinion of the court.

The case presented by the bill is this: The United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are presented: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty? * * *

As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress, by virtue of such grant, has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of Congress to prescribe by legislation that any interferences with these matters shall be offenses against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. By article 3, § 2, cl. 3, of the federal Constitution, it is provided: "The trial of all crimes except in cases of impeachment shall be by jury; and such trial shall be held in the state where the said crime shall have been committed." If all the inhabitants of a state, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offenses had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the national government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single state.

But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation, to compel obedience to its laws.

But, passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced, and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated, either at the instance of the authorities, or by any individual suffering private damage therefrom. The existence of this right of forcible abatement is not inconsistent with, nor does it destroy, the right of appeal, in an orderly way, to the courts for a judicial determination, and an exercise of their powers, by writ of injunction and otherwise, to accomplish the same result. * * *

Neither can it be doubted that the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property, and that the government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill. * * * We do not care to place our decision upon this ground alone. Every government, intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is not sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court. * * * While it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control. * * * Indeed, the obstruction of a highway is a public nuisance (4 Bl. Comm. 167), and a public nuisance has always been held subject to abatement at the instance of the government. * * *

It is said that the jurisdiction heretofore exercised by the national government over highways has been in respect to waterways, —the natural highways of the country,—and not over artificial highways, such as railroads; but * * * the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other. * * *

Petition denied.

SOUTHERN RAILWAY COMPANY v. UNITED STATES.

1911. Supreme Court of the United States. 222 U. S. 20.

Error to the District Court of the United States.

[This was a civil action by the United States to recover penalties for hauling five cars having defective couplers in violation of the federal Safety Appliance Act, which as amended March 2, 1903, 32 Stat. 943, c. 976, applied to all cars used on "any railroad engaged in interstate commerce." The defendant's road was used for both interstate and intrastate transportation. The trial court gave judgment for penalties as to all five cars, three of which were moving intrastate traffic only and it did not appear that they were being hauled in connection with any car or cars moving interstate traffic.]

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

* * *

It must be held that the original act, as enlarged by the amendatory one, is intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce.

We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic, and the object which the acts obviously are designed to attain; namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.

Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees,, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains.

And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others.

These practical considerations make it plain, as we think, that the questions before stated must be answered in the affirmative.

Judgment affirmed.

RAILROAD COMMISSION OF WISCONSIN ET AL. v. CHICAGO, BURLINGTON & QUINCY R. CO.

1922. Supreme Court of the United States. 257 U. S. 563.

The proceeding out of which this case has grown, known as the "Wisconsin Passenger Fares," began in an investigation by the Interstate Commerce Commission, under paragraphs 3 and 4 of § 13 of the Interstate Commerce Act as amended by § 416 of the Transportation Act of 1920 (41 Stat. 484), into alleged undue and unreasonable discrimination against interstate commerce arising out of intrastate railroad rates in Wisconsin. The interstate carriers by steam railroad of the state were made respondents, and the Governor and State Railroad Commission were duly notified. The Interstate Commerce Commission made its report and order November 27, 1920. Wisconsin Passenger Fares, 59 I. C. C. 391.

The Commission had investigated the interstate rates of carriers in the United States, in a proceeding known as Ex parte 74, Increased Rates, 58 I. C. C. 220, for the purpose of complying with § 15a of the Interstate Commerce Act, as amended by § 422 of the Transportation Act of 1920 (41 Stat. 488). That section requires that the Commission so adjust rates that the revenues of the carriers shall enable them as a whole or by groups to earn a fixed net income on their railway property. The Commission ordered an increase for the carriers in the group of which the Wisconsin carriers were a part, of 35 per cent. in interstate freight rates, and 20 per cent. in interstate passenger fares and excess baggage charges, and a surcharge upon passengers in sleeping cars amounting to 50 per cent. of the charge for space in such cars to accrue to the rail carriers. Thereupon the carriers applied to the Wisconsin Railroad Commission for corresponding increases in intrastate rates. The state commission granted increases in intrastate freight rates of 35 per cent., but denied any in intrastate passenger fares and charges on the sole ground that a state statute prescribed a maximum for passengers of 2 cents a mile.

In the Wisconsin Passenger Fares, the Interstate Commerce Commission found that all of the respondent carriers of Wisconsin transported both intrastate and interstate passengers on the same train, with the same service and accommodations; that the state passenger paying the lower rate rode on the same train, in the same car, and perhaps in the same seat with the interstate passenger who paid the higher rate; that the circumstances and conditions were substantially similar for interstate as for intrastate passenger service in Wisconsin; that travelers destined to, or coming from, points outside the state, found it cheaper to pay the intrastate fare within Wisconsin and the interstate fare beyond the border than to pay the through interstate fare; that undue preference and prejudice were shown by the falling off of sales of tickets from border line points in Minnesota and Michigan to stations in Wisconsin, and by a marked increase in sales of local tickets from corresponding border line points in Wisconsin to stations in Wisconsin; that the evidence as to the practice with respect to passenger fares applied in like manner to the surcharge upon passengers in sleeping and parlor cars and to excess baggage charges.

The Commission further found that the fare necessary to fulfill the requirement as to net income of this interstate railroad group under § 15a was 3.6 cents per mile, and that this was reasonable, that the direct revenue loss to the Wisconsin carriers, due to their failure to secure the 20 per cent. increase in intrastate fares, would approximate $2,400,000 per year if the 3-cent fare fixed by the President under federal war control were continued, and $6,000,000 per year if the 2-cent fare named in the state statute should become effective.

[Thereupon the Commission fixed a minimum for intrastate passenger fares in Wisconsin at 3.6 cents per mile. The carriers filed bills in the United States District Court to enjoin the State Railroad Commission and other state officials from interference with their charging the rates thus fixed, and applied for an interlocutory injunction. From a decree granting the latter this appeal was taken.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

* * *

Paragraph 4 of § 13 of the Interstate Commerce Act, as amended by the Transportation Act of 1920 * * * authorizes the Interstate Commerce Commission, after a prescribed investigation, to remove "Any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce."

We have two questions to decide:

First. Do the intrastate passenger fares work undue prejudice against persons in interstate commerce, such as to justify a horizontal increase of them all?

Second. Are these intrastate fares an undue discrimination against interstate commerce as a whole which it is the duty of the Commission to remove? * * *

First. The report and findings of the Commission undoubtedly show that the intrastate fares work an undue discrimination against travelers in interstate commerce and against localities (Houston, East & West Texas Ry. Co. v. United States, 234 U. S. 342) in typical instances numerous enough to justify a general finding against a large class of fares. In a general order thus supported, possible injustice can be avoided by a saving clause allowing any one to except himself from the order by proper showing. This practice is fully sustained by precedent in what was done as a sequence of the Shreveport Case (Houston, East & West Texas Ry. Co. v. United States, supra). * * *

The order in this case, however, is much wider than the orders made in the proceedings following the Shreveport and Illinois Central Cases. There, as here, the report of the Commission showed discrimination against persons and localities at border points, and the orders were extended to include all rates or fares from all points in the state to border points. But this order is not so restricted. It includes fares between all interior points although neither may be near the border and the fares between them may not work a discrimination against interstate travelers at all. Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. In such a case, the saving clause by which exceptions are permitted cannot give the order validity. * * * We cannot sustain the sweep of the order in this case on the showing of discriminations against persons or places alone.

Second. The report of the Commission shows that if the intrastate passenger fares in Wisconsin are to be limited by the statute of that state to 2 cents per mile, and charges for extra baggage and sleeping car accommodations are to be reduced in a corresponding degree, the net income of the interstate carriers of the state will be cut six millions of dollars below what it would be under intrastate rates on the same level with interstate rates. Under * * * the Transportation Act of 1920 are such reduction and disparity an "undue, unreasonable or unjust discrimination against interstate or foreign commerce" which the Interstate Commerce Commission may remove by raising the intrastate fares? A short reference to the circumstances inducing the legislation and a summary of its relevant provisions will aid the answer to this question.

The Interstate Commerce Act of 1887, 24 Stat. 379, was enacted by Congress to prevent interstate railroad carriers from charging unreasonable rates and from unjustly discriminating between persons and localities. The railroads availed themselves of the weakness and cumbrous machinery of the original law to defeat its purpose, and this led to various amendments culminating in the amending Act of 1910, 36 Stat. 539, in which the authority of the Commission in dealing with the carriers was made summary and effectively complete. Whatever the causes, the fact was that the carrying capacity of the railroads did not thereafter develop proportionately with the growth of the country, and it became difficult for them to secure additional investment of capital on feasible terms. When the extraordinary demand for transportation arose in 1917, the Congress and the President concluded to take over all the railroads into the management of the federal government, and by joint use of facilities, which the Anti-Trust Law was thought to forbid under private management, and by use of government credit, to increase their effectiveness. This was done by appropriate legislation and executive action under the war power. From January 1, 1918, until March 1, 1920, when the Transportation Act went into effect, the common carriers by steam railroad of the country were operated by the federal government. Due to the rapid rise in the prices of material and labor in 1918 and 1919, the expense of their operation had enormously increased by the time it was proposed to return the railroads to their owners. The owners insisted that their properties could not be turned back to them by the government for useful operation without provision to aid them to meet a situation in which they were likely to face a demoralizing lack of credit and income. Congress acquiesced in this view. The Transportation Act of 1920 was the result. It was adopted after elaborate investigations by the Interstate Commerce Committees of the two Houses.

Under Title II it made provision for the termination of federal control March 1, 1920, for the refunding of the carriers' indebtedness to the United States, and for a guaranty for six months to the carriers of an income equal to the war-time rental for their properties, and directed that for two years following the termination of federal control, the Secretary of the Treasury, upon certificate of the Commission might make loans to the carriers not exceeding the maximum amount recommended in the certificate, out of a revolving fund of $300,000,000.

Under Title IV amendments were made to the Interstate Commerce Act which included § 13, paragraphs 3 and 4, and § 15a, * * *. The former for the first time authorizes the Commission to deal directly with intrastate rates where they are unduly discriminating against interstate commerce—a power already indirectly exercised as to persons and localities, with approval of this court in the Shreveport and other cases. The latter, the most novel and most important feature of the act, requires the Commission so to prescribe rates as to enable the carriers as a whole or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation. For two years, the return is to be 5½ per cent., with ½ per cent. for improvements, and thereafter is to be fixed by the Commission.

The act sought to avoid excessive incomes accruing, under the operation of § 15a, to the carriers better circumstanced by using the excess for loans to the others and for other purposes. The act further put under the control of the Interstate Commerce Commission, 1st, the issuing of future railroad securities by the interstate carriers; 2nd, the regulation of their car supply and distribution and the joint use of terminals; and, 3rd, their construction of new lines, and their abandonment of old lines. The validity of some of these provisions has been questioned. Upon that we express no opinion. We only refer to them to show the scope of the congressional purpose in the act.

It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in § 15a to be one of the purposes of the bill.

Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic, and 50 per cent. of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission "in the exercise of its powers to prescribe just and reasonable rates," i. e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, § 13, however, and find the Commission for the first time vested with a direct power to remove "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," it is impossible to escape the dovetail relation between that provision and the purpose of § 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an "undue, unreasonable, or unjust discrimination against interstate or foreign commerce," within the ordinary meaning of those words. * * *

Counsel for appellants are driven by the logic of their position to maintain that the valuation required for the purposes of § 15a to be ascertained pursuant to § 19a of the Interstate Commerce Act (37 Stat. 701; amended, 41 Stat. 493) is to be only of that part of the property and equipment of the interstate carriers which is used in commerce among the states and must be segregated from that used in intrastate commerce. This is contrary to the construction which since the enactment of § 19a, March 1, 1913, the Commission has put upon that section in carrying out its injunction. It is inadmissible. The language of § 15a refutes such interpretation. The percentage is to be calculated on "the aggregate value of the railway property of such carriers held for and used in the service of transportation." To impose on the Commission the duty of separating property used in the two services when so much of it is used in both, and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This, of itself, prevents our giving the words such a construction unless they clearly require it. They certainly do not.

It is objected here, as it was in the Shreveport Case, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate the specific proviso of the original Interstate Commerce Act repeated in the amending acts, that the Commission is not to regulate traffic wholly within a state. To this, the same answer must be made as was made in the Shreveport Case (234 U. S. 342, 358), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso. * * *

Counsel for the appellants have not contested the constitutional validity of the statute construed as we have construed it, although the counsel for the state commissions whom we permitted to file briefs as amici curiæ have done so. The principles laid down by this court in the Minnesota Rate Cases, 230 U. S. 352, 432, 433, the Shreveport Case, 234 U. S. 342, 351, and the Illinois Central Case, 245 U. S. 493, 506, which are rates cases, and in the analogous cases of Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 618; Southern Ry. Co. v. United States, 222 U. S. 20, 26, 27; Second Employers' Liability Cases, 223 U. S. 1, 48, 51, we think, leave no room for discussion on this point. Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The states are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. Wilson v. Shaw, 204 U. S. 24; Luxton v. North River Bridge Co., 153 U. S. 525; California v. Central Pacific R. R. Co., 127 U. S. 1, 39. In such development, it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce, it deems necessary or desirable. This is because of the supremacy of the national power in this field.

In Minnesota Rate Cases, 230 U. S. 399, where relevant cases were carefully reviewed, it was said:

"The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.

It may well turn out that the effect of a general order in increasing all rates, like the one at bar, will, in particular localities, reduce income instead of increasing it, by discouraging patronage. Such cases would be within the saving clause of the order herein, and make proper, an application to the Interstate Commerce Commission for appropriate exception. So, too, in practice when the state commissions shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference between the Interstate Commerce Commission and the state commissions may dispense with the necessity for any rigid federal order as to the intrastate rates, and leave to the state commissions power to deal with them and increase them or reduce them in their discretion.

The order of the District Court granting the interlocutory injunction is

Affirmed.[1]

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[1] The Erie Canal, owned by the State of New York, had at its terminal in Buffalo switching tracks connecting with its wharves. The lines of the New York Central Railroad Company had a physical connection with these switch tracks. The Interstate Commerce Commission ordered the railroad company to furnish cars and motive power to carry goods from the wharves over the switches and its own tracks to the various stations on its line. It was particularly objected that this order included goods shipped wholly intrastate. Holding the order valid, the court, by Stone, J., said:

"The commission having jurisdiction over the carriers and the facilities by which the transportation is carried on, the question is narrowed to whether its jurisdiction extends to the entire current of commerce flowing through this terminal although intrastate in part. When we consider the nature and extent of the commingling of interstate and intrastate commerce, and the difficulty of segregating the freight passing through the terminal, we think it clear that Congress in employing such broad language as 'the commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated' intended to confer upon the commission power to regulate the entire stream of commerce. Where, as here, interstate and intrastate transactions are interwoven, the regulation of the latter is so incidental to and inseparable from the regulation of the former as properly to be deemed included in the authority over interstate commerce conferred by statute." United States v. New York Central R. Co. (1926) 272 U. S. 457, 464, 71 L. ed. 350.

See also Dayton-Goose Creek R. Co. v. United States (1924) 263 U. S. 456, 485, 68 L. ed. 388, 33 A. L. R. 472.

That a state still has power to regulate intrastate rates when its action is not in conflict with a valid federal regulation, see Arkansas Railroad Comm. v. Chicago, R. I. & P. R. Co. (1927) 274 U. S. 597, 71 L. ed. 1224. Compare Chicago, M. & St. P. R. Co. v. Public Utilities Comm. (1927) 274 U. S. 344, 71 L. ed. 1085.

COLORADO v. UNITED STATES.

1926. Supreme Court of the United States. 271 U. S. 153.

Mr. Justice Brandeis delivered the opinion of the court.

This suit was brought by Colorado against the United States, in the federal court for that state, to enjoin and set aside, in part, an order of the Interstate Commerce Commission issued February 11, 1924. The order is a certificate that present and future public convenience and necessity permit the abandonment by the Colorado & Southern Railway Company, six months thereafter, of a branch line located wholly in that state. The certificate was issued under Interstate Commerce Act, § 1, pars. 18-20, as amended by Transportation Act, 1920, c. 91, § 402, 41 Stat. 456, 477.

The Company is a Colorado corporation. It owns and operates in intrastate and interstate commerce a railroad system located partly in Colorado and partly in other states. The branch was constructed under the authority of Colorado and was acquired by the Company under its authority. The line is a narrow gauge. It is now physically detached from other lines of the Company; but it is operated in both intrastate and interstate commerce as a part of the system by means of connections with other railroads. The certificate was granted on the ground that the local conditions are such that public convenience and necessity do not require continued operation; that for years operation of the branch had resulted in large deficits; that future operation would likewise result in large deficits; that the operating results of the branch are reflected in the Company's accounts; that it would have to make good the deficits incurred in operating the branch; and that thus continued operation would constitute an undue burden upon interstate commerce. Abandonment of Branch Line by Colorado & Southern Ry., 72 I. C. C. 315; 82 I. C. C. 310; 86 I. C. C. 393. * * *

Crux

First. The main contention of the state is that the commission lacks power to authorize the company to abandon, as respects intrastate traffic, a part of its line lying wholly within the state. The argument is this. While a railroad cannot, in the absence of express statutory provision or contract, be compelled by a state to continue operating its lines at a loss when there is no reasonable prospect of future profit, and may, therefore, without such consent, abandon all lines within the state, Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396; Bullock v. Florida, 254 U. S. 513, 520; Railroad Commission v. Eastern Texas R. R. Co., 264 U. S. 79, 85; it has no right to abandon a part of the lines, merely because operation will be attended by pecuniary loss, and still continue to enjoy the privilege of operating other parts within the state; Chesapeake & Ohio Ry. Co. v. Public Service Commission, 242 U. S. 603; Fort

Smith Light & Traction Co. v. Bourland, 267 U. S. 330. The charter of the Colorado & Southern is a contract with the state. By accepting the charter, the Company assumed the obligation of providing intrastate service on every part of its line within the State, Colorado & Southern Ry. v. Railroad Commission, 54 Colo. 64, 92-3. The extent and character of this service is subject to regulation by the state. The inherent power of a state to regulate intrastate traffic by requiring the railroad to operate every part of its line, like its power to order a particular service, is, of course, subject to the limitation that the order must not be unreasonable. But the fact that operation of the branch will necessarily result in financial loss, would, in no event, be more than an important circumstance bearing upon the reasonableness of the state's order requiring the service. In the case at bar no question of the reasonableness of the state's action can arise, because the state has not issued any order; it has merely protested against the Commission's releasing this Colorado corporation from the primary duty voluntarily assumed of maintaining some service on the branch. This, the Commission cannot do as respects intrastate commerce. Transportation Act, 1920, did not purport to take from the state its powers to control intrastate commerce. Nor did it confer upon the Commission power to release a corporation chartered by the state from its primary obligation to furnish service. If par. 18 of § 1 should be construed as authorizing the Commission to do so without the consent of the state, the provision would be unconstitutional. Compare Texas v. Eastern Texas R. R. Co., 258 U. S. 204, 217. Such is the argument.

The argument rests upon a misconception of the nature of the power exercised by the Commission in authorizing abandonment under paragraphs 18-20. The certificate issues, not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss.

The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which are found to result from operating a branch at a large loss. Congress has power to authorize abandonment, because the state's power to regulate and promote intrastate commerce may not be exercised in such a way as to prejudice interstate commerce. The exertion of the federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a state establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service, Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563; Nashville, Chattanooga & St. Louis Ry. v. Tennessee, 262 U. S. 318; or when the state authorities seek to compel the erection of a union station so expensive as unduly to deplete the financial resources of the carriers, Railroad Commission v. Southern Pacific Co., 264 U. S. 331; or when one railroad seeks to construct an intrastate branch line, which will deplete its own financial resources or those of another interstate carrier, Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., 270 U. S. 266. The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in the Shreveport Case, 234 U. S. 342, a power to prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce. But there is a broader basis for federal control.

This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole. Congress did not, in the respect here under consideration, assume exclusive regulation of the common instrumentality, as it did in respect to safety coupling devices. Compare Southern Ry. Co. v. United States, 222 U. S. 20; Atlantic Coast Line v. Georgia, 234 U. S. 280, 293. It expressly excluded from federal control that part of the railroad which consists of "spur, industrial, team, switching or side tracks located * * * wholly within one state." See Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., supra. But as to the rest of every railroad line used in interstate commerce, Congress reserved the full authority to determine whether, and to what extent, public convenience and necessity permit of abandonment.

Recognition of the effect upon interstate commerce of the use of the same instrumentality in intrastate commerce is manifested also in other provisions of Transportation Act, 1920. It is a reason for the exclusive jurisdiction conferred upon the Commission by § 20a over the issuance of securities. Compare Venner v. Michigan Central R. R. Co., ante, p. 127. It is the ground upon which the validity of the recapture clause, as applied to surplus profits derived from intrastate operations, was sustained in Dayton-Goose Creek Ry. v. United States, 263 U. S. 456, 485. It is the justification for those provisions of the Interstate Commerce Act which require carriers engaged in both intrastate and interstate commerce to render accounts of all their business. Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194. And upon it rests likewise the power exerted by this court in setting aside the state regulations involved in Union Pacific R. R. Co. v. Public Service Commission, 248 U. S. 67, and St. Louis & San Francisco Ry. Co. v. Public Service Commission, 254 U. S. 535. See also United States v. Ferger, 250 U. S. 199; Stafford v. Wallace, 258 U. S. 495; Chicago Board of Trade v. Olsen, 262 U. S. 1.

The exercise of federal power in authorizing abandonment is not an invasion of a field reserved to the state. The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the state is subordinate to the performance by it of its federal duty, also assumed, efficiently to render transportation services in interstate commerce. There is no contention here that the railroad by its charter agreed in terms to continue to operate this branch regardless of loss. Compare Railroad Commission v. Eastern Texas R. R. Co., 264 U. S. 79. But even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce. New York v. United States, 257 U. S. 591, 601. Because the same instrumentality serves both, Congress has power to assume not only some control, but paramount control, insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission. * * *

Affirmed.

STAFFORD v. WALLACE, SECRETARY OF AGRICULTURE.

1922. Supreme Court of the United States. 258 U. S. 495.

These cases involve the constitutionality of the Packers and Stockyards Act of 1921, approved August 15, 1921, c. 64, 42 Stat. 159, so far as that act provides for the supervision by federal authority (1) of the business of the commission men and (2) of the live stock dealers in the great stockyards of the country. They are appeals from the orders of the District Court for the Northern District of Illinois refusing to grant interlocutory injunctions as prayed. The bills sought to restrain enforcement of orders of the Secretary of Agriculture in carrying out the act, directed against the appellants in No. 687, as the commission men in the Union Stockyards of Chicago, and against the appellants in No. 691, as dealers in the same yards. The ground upon which the prayers for relief are based is that the Secretary's orders are void, because made under an act invalid as to each class of appellants. The bill in No. 687 makes defendants the Secretary of Agriculture and the United States attorney for the Northern District of Illinois, averring that the latter is charged with the duty of enforcing the severe penalties imposed by the act for failure to comply with orders of the Secretary thereunder. The bill in No. 691 makes the United States attorney the only defendant, with the same averment.

The two bills in substance allege that the Union Stockyards & Transit Company was incorporated by the state of Illinois in 1865, and given authority to acquire, construct, and maintain inclosures, structures, and railway lines for the reception, safe-keeping, feeding, watering, and for weighing, delivery, and transfer, of cattle and live stock of every description, and to carry on a public live stock market, with all the necessary appurtenances and facilities; that it is the largest stockyards in the world, and in 1920 handled fifteen million head of live stock of all descriptions, including cattle, calves, hogs, and sheep, shipped mainly from outside the state of Illinois; that the live stock are loaded at the point of origin and shipped under a shipping contract which is a straight bill of lading, consigning them to the commission merchants at the yard; that on arrival the live stock are at once driven from the cars by the commission merchant, who is the consignee, to the pens assigned by the stockyards company to such merchant for his use; that they are then in the exclusive possession of the commission merchant, are watered and fed by the stockyards company at his request; that with the delivery to the commission merchant the transportation is completely ended; that all the live stock consigned to commission merchants are sold by them for a commission or brokerage, and not on their own account; that they are sold at the stockyards, and nowhere else; that the commissions are fixed at an established rate per head; that the commission men remit to the owners and shippers the proceeds of sale, less their commission and the freight and yard charges paid by them; that the live stock are sold (1) to purchasers, who buy the same for slaughter at packing houses, located at the stockyards or adjacent thereto; (2) to purchasers, who buy to ship to packing houses outside the state of Illinois for slaughter; (3) to purchasers, who buy to feed and fatten the same; and (4) to dealers or traders; that about one-third of all the live stock received are sold to the dealers; that not until after the delivery of the live stock to the commission merchants and the transportation has completely ceased, does the business of the dealers begin; that they do not buy or sell on commission, but buy and sell for cash exclusively for their own profit; that the greater part of live stock received by commission men at the yards are in carload or trainload lots, and a substantial part are not graded or conditioned to meet the specific requirements of the buyers; that the dealers, after purchase, put the live stock in pens assigned to them by the stockyards owner and do the sorting and classification; that the dealers buy in open market in competition with each other; that they pay the expense of the custody, care, and feeding and watering the stock while they hold them; that they sell promptly, and have nothing to do with the shipment of the live stock they sell from the yards to points outside.

In the bill in No. 691, the appellants aver that they are members of the Chicago Live Stock Exchange and of the National Live Stock Exchange, the members of which are dealers in all the stockyards of the country, numbering 2,000, and that they bring their bill for all of them who may choose to join and take the benefit of the litigation.

The chairman of the Committee of Agriculture, in reporting to the House of Representatives the bill, which became the act here in question (May 18, 1921, 67th Congress, 1st Session, Report No. 77, to accompany H. R. 6320), referred to the testimony printed in the House Committee Hearings on the 66th Congress, 2d Session, Committee on Agriculture, vol. 220-2 and 220-3, as furnishing the contemporaneous history and information of the evils to be remedied upon which the bill was framed.

It appeared from the data before the committee that for more than two decades it had been charged that the five great packing establishments of Swift, Armour, Cudahy, Wilson, and Morris, called the "Big Five," were engaged in a conspiracy in violation of the Anti-Trust Law, to control the business of the purchase of the live stock, their preparation for use in meat products, and the distribution and sale thereof in this country and abroad. * * * It further appeared that on February 7, 1917, the President directed the Federal Trade Commission to investigate and report the facts relating to this industry and kindred subjects. The Commission reported that the "Big Five" packing firms, had complete control of the trade from the producer to the consumer, had eliminated competition, and that one of the essential means by which this was made possible was their ownership of a controlling part of the stock in the stockyards companies of the country. The Commission stated its conclusions as follows: * * *

"The packers' power is increased by the fact that they control all the facilities through which live stock is sold to themselves. Control of stockyards comprehends control of live stock exchange buildings, where commission men have their offices; control of assignment of pens to commission men; control of banks and cattle loan companies; control of terminal and switching facilities; control of yardage services and charges; control of weighing facilities; control of the disposition of dead animals and other profitable yard monopolies; and in most cases control of all packing house and other business sites." * * *

It appears from these committee hearings [House Committee Hearings, 66th Congress, 2nd Session] that the dealers do not buy fat cattle generally, or largely compete with packers in such purchases. They buy either the thin cattle, known as "stockers and feeders," which they dispose of to farmers and stock feeders, to be taken to the country for farm use and fattening, or they buy mixed lots, and cull out of them the fat cattle. These they dispose of to packers, either directly or through commission men. The proportion of all the hogs passing through the yards in 1919 handled by these traders, speculators, or scalpers, as they are indifferently called, was 30 per cent. Of all the butcher cattle they handled 20 per cent., of the beef cattle 10 per cent., and of "the stockers and feeders" 80 per cent. At Kansas City, this last figure was higher, reaching 95 per cent. (Committee Hearings, p. 2140.)

It was conceded that, of all the live stock coming into the Chicago stockyards and going out, only a small percentage, less than 10 per cent., is shipped from or to Illinois.

The complaints of the shippers of live stock against the charges and practices, working to their prejudice in the conduct of the stockyards, the commission men, and the dealers, were: First, suppression of competition in purchases through agreement, by which one packer would buy a carload or trainload of cattle and turn over half of it to the only other packer buying in the local market. Second, "wiring on." A shipper would send a carload or trainload of stock to one stockyard. Finding the market unsatisfactory, he would ship them further east. The packers' agents were promptly advised at the second stockyards and, controlling the price there, they made it the same as at the first stockyards, though the shipper had paid the freight, and had to stand the "shrink" of the cattle from the journey. Third, the charges in the stockyards for hay and other facilities were excessive. Fourth, the duplication of commissions through the collusion of the commission men and the dealers, by which commission men would sell at a lower price to dealers than to outside buyers, and drive the latter to buying from dealers through commission men, forcing two commissions. Fifth, the monopoly conferred by the stockyards owner on a company in which packers were largely interested, of buying at a fixed price of $5 a head all dead cattle for rendering purposes, when they were worth more. Sixth, the frequency with which commission men reported to shippers that live stock had been crippled and had to be sold in that condition at a lower price, arousing suspicion as to the fact and if it was a fact, as to the cause of the crippling.

Mr. Chief Justice Taft, after making the foregoing statement of the case, delivered the opinion of the court. * * *

We have framed the statement of the case, not for the purpose of deciding the issues of fact mooted between the packers and their accusers before the Federal Trade Commission or the Committees of Agriculture in Congress, but only to enable us to consider and discuss the act whose validity is here in question in the light of the environment in which Congress passed it. It was for Congress to decide from its general information and from such special evidence as was brought before it, the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted. Chicago Board of Trade v. United States, 246 U. S. 231, 238; Danciger v. Cooley, 248 U. S. 319, 322.

The Packers and Stockyards Act of 1921 seeks to regulate the business of the packers done in interstate commerce and forbids them to engage in unfair, discriminatory, or deceptive practices in such commerce, or to subject any person to unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly in the business. It constitutes the Secretary of Agriculture a tribunal to hear complaints and make findings thereon, and to order the packers to cease any forbidden practice. An appeal is given to the Circuit Court of Appeals from these findings and orders. They are to be enforced by the District Court by penalty if not appealed from and if disobeyed. Title III concerns the stockyards and provides for the supervision and control of the facilities furnished therein in connection with the receipt, purchase, sale on commission basis, or otherwise, of live stock, and its care, shipment, weighing, or handling in interstate commerce. A stockyards is defined to be a place conducted for profit as a public market, with pens in which live stock are received and kept for sale or shipment in interstate commerce. Yards with a superficial area less than 20,000 square feet are not within the act. Stockyard owners, commission men, and dealers are recognized and defined, and the two latter are required to register. The act requires that all rates and charges for services and facilities in the stockyards and all practices in connection with the live stock passing through the yards shall be just, reasonable, nondiscriminatory, and nondeceptive, and that a schedule of such charges shall be kept open for public inspection, and only be changed after ten days' notice to the Secretary of Agriculture, who is made a tribunal to inquire as to the justice, reasonableness, and nondiscriminatory or nondeceptive character of every charge and practice, and to order that it cease, if found to offend, with the same provisions for appeal and enforcement in court as in the case of offending packers. The Secretary is given power to make rules and regulations to carry out the provisions, to fix rates, or a minimum or maximum thereof, and to prescribe how every packer, stockyard owner, commission man, and dealer shall keep accounts.

The bills aver that the Secretary has given the notice which requires appellants to register, and has announced proposed rules and regulations, prescribing the form of rate schedules, the required reports, including daily accounts of receipts, sales, and shipments, forbidding misleading reports to depress or enhance prices, prescribing proper feed and care of live stock, and forbidding a commission man to sell live stock to another in whose business he is interested, without disclosing such interest to his principal.

The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still, as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.

The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil, which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers, on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce. The shipper, whose live stock are being cared for and sold in the stockyards market, is ordinarily not present at the sale, but is far away in the West. He is wholly dependent on the commission men. The packers and their agents and the dealers, who are the buyers, are at the elbow of the commission men, and their relations are constant and close. The control that the packers have had in the stockyards by reason of ownership and constant use, the relation of landlord and tenant between the stockyards owner, on the one hand, and the commission men and the dealers, on the other, the power of assignment of pens and other facilities by that owner to commission men and dealers, all create a situation full of opportunity and temptation, to the prejudice of the absent shipper and owner in the neglect of the live stock, in the mala fides of the sale, in the exorbitant prices obtained, and in the unreasonableness of the charges for services rendered.

The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out, to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales, without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity. The origin of the live stock is in the West; its ultimate destination, known to, and intended by, all engaged in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce.

The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion. That has been settled since the case of Munn v. Illinois, 94 U. S. 113. Nor is there any doubt that in the receipt of live stock by rail and in their delivery by rail the stockyards are an interstate commerce agency. United States v. Union Stock Yards Co., 226 U. S. 286. The only question here is whether the business done in the stockyards, between the receipt of the live stock in the yards and the shipment of them therefrom, is a part of interstate commerce, or is so associated with it as to bring it within the power of national regulation. A similar question has been before this court and had great consideration in Swift v. United States, 196 U. S. 375. * * * [There the court said:]

"Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another state from that of the seller and of the cattle."

The application of the commerce clause of the Constitution in the Swift Case was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another, which are ever flowing, are in their very essence the commerce among the states and with foreign nations, which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the noninterstate character of some of its necessary incidents and facilities, when considered alone and without reference to their association with the movement of which they were an essential but subordinate part.

The principles of the Swift Case have become a fixed rule of this court in the construction and application of the commerce clause. Its latest expression on the subject is found in Lemke v. Farmers Grain Co., 258 U. S. 50. In that case it was held, on the authority of the Swift Case, that the delivery and sale of wheat by farmers to local grain elevators in North Dakota, to be shipped to Minneapolis, when practically all the wheat purchased by such elevators was so shipped, and the price was fixed by that in the Minneapolis market, less profit and freight, constituted a course of business, and determined the interstate character of the transaction. Accordingly a state statute, which sought to regulate the price and profit of such sales, and was found to interfere with the free flow of interstate commerce, was declared invalid as a violation of the commerce clause. Similar confirmation of the principle of the Swift Case is to be found in Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282; Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265; United Fuel Gas Co. v. Hallanan, 257 U. S. 277; Western Union Telegraph Co. v. Foster, 247 U. S. 105, 113; United States v. Reading Co., 226 U. S. 324, 367, 368; Ohio R. R. Commission v. Worthington, 225 U. S. 101, 108; and Loewe v. Lawlor, 208 U. S. 274, 301.

It is manifest that Congress framed the Packers and Stockyards Act in keeping with the principles announced and applied in the opinion in the Swift Case. * * * The act deals with the same current of business, and the same practical conception of interstate commerce.

Of course, what we are considering here is not a bill in equity or an indictment charging conspiracy to obstruct interstate commerce, but a law. The language of the law shows that what Congress had in mind primarily was to prevent such conspiracies by supervision of the agencies which would be likely to be employed in it. If Congress could provide for punishment or restraint of such conspiracies after their formation through the Anti-Trust Law as in the Swift Case, certainly it may provide regulation to prevent their formation. The reasonable fear by Congress that such acts, usually lawful and affecting only intrastate commerce when considered alone, will probably and more or less constantly be used in conspiracies against interstate commerce or constitute a direct and undue burden on it, expressed in this remedial legislation, serves the same purpose as the intent charged in the Swift indictment to bring acts of a similar character into the current of interstate commerce for federal restraint. Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.

In United States v. Ferger, 250 U. S. 199, the validity of an act of Congress punishing forgery and utterance of bills of lading for fictitious shipments in interstate commerce was in question. It was contended that there was and could be no commerce in a fraudulent and fictitious bill of lading, and therefore that the power of Congress could not embrace such pretended bill. In upholding the act, this court, speaking through Chief Justice White, answered the objection by saying:

"But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained, it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (In re Debs, 158 U. S. 564), and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves."

The Transportation Act of 1920 presents a close analogy to this case. It authorizes supervision by the Interstate Commerce Commission of intrastate commerce, where it is so carried on as to work undue, unreasonable advantage or preference in favor of persons or localities in intrastate commerce, as against those in interstate commerce, or any undue, unjust, or unreasonable discrimination against interstate commerce itself. Railroad Commission v. Chicago, Burlington & Quincy Railroad Co., 257 U. S. 563.

[The court here distinguished Hopkins v. United States, 171 U. S. 578, and Anderson v. United States, 171 U. S. 604.]

The case of Blumenstock Brothers Advertising Agency v. Curtis Publishing Co., 252 U. S. 436, is easily distinguished from the one at the bar. There it was merely held that an attempt of a publisher to monopolize the business of publishing advertising matter in magazines, resulting in refusal of such publisher to accept advertisements in his magazines, was too remote in its relation to the interstate commerce of circulating magazines. The court said:

"This case is wholly unlike International Text-Book v. Pigg, 217 U. S. 91, wherein there was a continuous interstate traffic in textbooks and apparatus for a course of study pursued by means of correspondence, and the movements in interstate commerce were held to bring the subject matter within the domain of federal control, and to exempt it from the burden imposed by state legislation."

Pennsylvania R. R. Co. v. Knight, 192 U. S. 21, relied on by counsel for appellants and said to be exactly applicable to the case at bar, was an effort by the Pennsylvania Railroad Company to secure immunity from city regulation for a cab system which it ran in New York to and from its station to points in New York City, on the ground that it was part of interstate commerce. This court held that, because it was independent of the railroad transportation, and not included in the contract of railroad carriage, it did not come within interstate commerce. The case was distinguished in the Swift Case, p. 401, from cartage for delivery of the goods when part of the contemplated transit. There is nothing in the case to indicate that if such an agency could be and were used in a conspiracy unduly and constantly to monopolize interstate passenger traffic, it might not be brought within federal restraint.

As already noted, the word "commerce," when used in the act, is defined to be interstate and foreign commerce. Its provisions are carefully drawn to apply only to those practices and obstructions which in the judgment of Congress are likely to affect interstate commerce prejudicially. Thus construed and applied, we think the act clearly within Congressional power and valid. * * *

The orders of the District Court refusing the interlocutory injunctions are

Affirmed.[2]

Mr. Justice McReynolds dissents.

Section 7.—Prohibition of Interstate[1] Commerce.

COMMONWEALTH OF PENNSYLVANIA v. STATE OF WEST VIRGINIA.

1923. Supreme Court of the United States. 262 U. S. 553.

[For the facts, procedure and the gist of the statute involved see ante, pp. 90, 92, middle paragraph.]

Mr. Justice Van Deventer. * * * We turn now to the principal issue, whether a state wherein natural gas is produced and is a recognized subject of commercial dealings may require that in its sale and disposal consumers in that state shall be accorded a preferred right of purchase over consumers in other states,—when the requirement necessarily will operate to withdraw a large volume of the gas from an established interstate current whereby it is supplied in other states to consumers there. Of course, in the last analysis, the question is whether the enforced withdrawal for the benefit of local consumers is such an interference with interstate commerce as is forbidden to a state by the Constitution. The question is an important one; for what one state may do others may, and there are ten states from which natural gas is exported for consumption in other states. Besides, what may be done with one natural product may be done with others, and there are several states in which the earth yields products of great value which are carried into other states and there used. But, notwithstanding the importance of the question, its solution is not difficult. The controlling principles have been settled by many adjudications,—some so closely in point that the discussion here may be relatively brief.

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[2] The federal government may fix the rate of commission to be charged by stock-yards commission-men on sales of cattle made by them as agents. Tagg Bros. & Moorhead v. United States (1930) 280 U. S. 420, the court saying: "Plaintiffs perform an indispensable service in the interstate commerce in live stock. They enjoy a substantial monopoly at the Omaha Stock Yards. They had eliminated rate competition and had substituted therefor rates fixed by agreement among themselves, without consulting the shippers and others who pay the rates. They had bound themselves to maintain uniform charges, regardless of the differences in experience, skill, and industry. The purpose of the regulation attacked is to prevent their service from thus becoming an undue burden upon, and obstruction of, that commerce. Stafford v. Wallace, 258 U. S. 495, 515, 516; Chicago Board of Trade v. Olsen, 262 U. S. 1, 34. There is here no attempt to fix any one's wages or to limit any one's net income. Differences in skill, industry, and experience will continue to be factors in the earning power of the several plaintiffs. For, the order fixes only the charges to be made in individual transactions."

Congress can prescribe the number of hours per day or week that railroad employees shall be permitted to work in interstate commerce, and prescribe the wages to be paid them during a period of emergency when because of a failure of employers and employees to agree upon a scale of wages a strike of such employees throughout the United States is threatened, which would stop interstate transportation. Wilson v. New (1917) 243 U. S. 332, 61 L. ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024.

Following the broad concept of protecting the interstate flow of commodities, see Board of Trade of Chicago v. Olsen (1923) 262 U. S. 1, 67 L. ed. 839, sustaining the federal Grain Futures Act of Sept. 21, 1922.

Compare Industrial Assn. of San Francisco v. United States (1925) 268 U. S. 64, 69 L. ed. 849, with United Mine Workers v. Coronado Coal Co. (1922) 259 U. S. 344, 408, 66 L. ed. 975, 27 A. L. R. 762. See also Coronado Coal Co. v. United Mine Workers (1925) 268 U. S. 295, 305-310, 69 L. ed. 963; United Leather Workers International Union v. Herkert & Meisel Trunk Co. (1924) 265 U. S. 457, 68 L. ed. 1104, 33 A. L. R. 566.

[1] Foreign Commerce. In United States v. The William (1808) 2 Hall L. J. 255, Fed. Cas. No. 16,700, an act of Congress of Dec. 22, 1807, forbidding any

* * *

Natural gas is a lawful article of commerce and its transmission from one state to another for sale and consumption in the latter is interstate commerce. A state law, whether of the state where the gas is produced or that where it is to be sold, which by its necessary

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vessel to clear from United States ports for foreign ports, and an act of March 12, 1808, prohibiting exportation of any commodities, were held valid. Accord: United States v. Marigold (1850) 9 How. (U. S.) 560, 566, 13 L. ed. 257 (semble).

"Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly, as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines, and chemicals entitled to admission into the United States and excluding such as did not equal the standards adopted. 9 Stat. 237; Rev. Stat, § 2933 et seq. * * * We entertain no doubt that it was competent for Congress, by statute, under the power to regulate foreign commerce, to establish standards and provide that no right should exist to import teas from foreign countries into the United States, unless such teas should be equal to the standards.

"As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution." White, J., for the court in Buttfield v. Stranahan (1904) 192 U. S. 470, 492-493, 48 L. ed. 525. Likewise as to the exclusion of aliens. Nishimura Ekiu v. United States (1892) 142 U. S. 651, 35 L. ed. 1146.

operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce,—a prohibited interference. * * * The West Virginia act is such a law. Its provisions and the conditions which must surround its operation are such that it necessarily and directly will compel the diversion to local consumers of a large and increasing part of the gas heretofore and now going to consumers in the complainant states, and therefore will work a serious interference with that commerce.

But it is urged that there are special considerations which take the act out of the general rule and sustain its validity, even though there be an interference.

One of these is that the pipe line companies are engaged in supplying the gas to the public in West Virginia, that this is a quasi-public business and that the act does no more than require the companies to furnish a reasonably adequate service within reasonable territorial limits. It is true that the business is of a quasi-public character, but it is so in Pennsylvania and Ohio as well as in West Virginia. The obligations inhering in it and the power to insist on an adequate service are the same in all three states. The supply of gas necessarily marks the extent of the service that can be rendered. Much of the business is interstate and has grown up through a course of years. West Virginia encouraged and sanctioned the development of that part of the business and has profited greatly by it. Her present effort, rightly understood, is to subordinate that part to the local business within her borders. In other words, it is in effect an attempt to regulate the interstate business to the advantage of the local consumers. But this she may not do. A direction to one of her railroads when short of facilities for moving coal to haul intrastate coal to the exclusion of interstate coal would not be different in kind or force.

Another consideration advanced to the same end is that the gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of the people of the state. If the situation be as stated, it affords no ground for the assumption by the state of power to regulate interstate commerce, which is what the act attempts to do. That power is lodged elsewhere. A contention, in essence the same, was presented and considered in West v. Kansas Natural Gas Co., 221 U. S. 229, a case involving the validity of an Oklahoma statute designed to accomplish the retention of natural gas within the state. In the District Court the case had been heard on bill and answer, a proceeding in which the allegations of fact in the answer are taken as true. The hearing resulted in a decree adjudging the statute invalid and enjoining its enforcement. The decree was affirmed here. In the answer, as the opinion shows, it was alleged that physical conditions made it apparent that the gas field was of relatively short duration, that cities were near the field and their people needed the gas, that the state embodied only prairie land devoid of timber and there was no local fuel supply excepting coal and natural gas, that the production of coal was growing rapidly more costly, that "substantially, the only natural, practical, usable fuel, both for domestic and industrial use, is natural gas," and that if pipe lines, such as the plaintiffs were intending to construct and put in operation, were permitted to carry gas into other states the supply would be speedily exhausted. Referring to these allegations and to a contention that the ruling principle of the statute was conservation of a needed natural resource, the court said (p. 255):

"The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the state, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the states, a new power appears and a new welfare, a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all of the states and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court."

Finally, it is urged that this court can not prescribe and execute regulations respecting the apportionment and use of the gas among the three states, and therefore that the bills should be dismissed. The conclusion does not follow from the premise. The object of the suits is not to obtain decretal regulations, but to enjoin the enforcement of the West Virginia act on the ground that it is an unconstitutional enactment and its intended enforcement will subject the complainant states to injury of serious magnitude. On full consideration, we reach the conclusion that the act is unconstitutional, that the apprehensions of the complainant states respecting the injury which will ensue from its enforcement are well founded and that it obviously will operate most inequitably against those states. In this situation the appropriate decree is one declaring the act invalid and enjoining its enforcement. To dismiss the bills and leave the act to be enforced would be quite inadmissible. If there be need for regulating the interstate commerce involved, the regulation should be sought from the body in whom the power resides.

Decrees for complainants.[2]

Mr. Justice Holmes. The statute seeks to reach natural gas before it has begun to move in commerce of any kind. It addresses itself to gas hereafter to be collected and states to what uses it first must be applied. The gas is collected under and subject to the law, if valid, and at that moment it is not yet matter of commerce among the states. I think that the products of a state until they are actually started to a point outside it may be regulated by the state notwithstanding the commerce clause. * * *

In Sligh v. Kirkwood, 237 U. S. 52, a state law was sustained that made it criminal to sell or offer for shipment citrus fruits that were immature or otherwise unfit for consumption. That, upon grounds of local policy, intercepted before it got into the stream, what would have been an object of interstate commerce. The local interest in the present case is greater and more obvious than in that of green oranges. Again, the power of the state to preserve a food supply for its people by game laws notwithstanding an indirect interference with interstate commerce is established. Geer v. Connecticut, 161 U. S. 519, 534; Silz v. Hesterberg, 211 U. S. 31, 42. * * *

I see nothing in the commerce clause to prevent a state from giving a preference to its inhabitants in the enjoyment of its natural advantages. If the gas were used only by private persons for their own purposes I know of no power in Congress to require them to devote it to public use or to transport it across state lines. * * *

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[2] In Geer v. Connecticut (1896) 161 U. S. 519, 40 L. ed. 793, because of the peculiar power of a state over wild game it could prohibit killing for shipment out of the state and prohibit such shipment, though permitting killing for other purposes. Accord: Foster Fountain Packing Co. v. Haydel (1928) 278 U. S. 1, 73 L. ed. 147, semble, a state may prohibit shipment from the state of shrimp taken in its waters, but holding that if a state permits persons to take shrimp and ultimately ship out all parts after meat and shell are separated in the state it cannot forbid shipping out whole shrimp. See also Hudson Water Co. v. McCarter (1908) 209 U. S. 349, 52 L. ed. 828, 14 Ann. Cas. 560 (state may forbid transportation from the state of water by pipes or ditches from its lakes or streams).

I am aware that there is some general language in Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229, 255, a decision that I thought wrong, implying that Pennsylvania might not keep its coal, or the Northwest its timber, etc. But I confess that I do not see what is to hinder. Certainly if the owners of the mines or the forests saw fit not to export their products the Constitution would not make them do it.

[Brandeis, J., concurred in the opinion of Holmes, J. McReynolds, J., confined his dissent to the question of jurisdiction of the court.]

Bowman v. Chicago & N. W. R. Co. (1888) 125 U. S. 465, 31 L. ed. 700, holding invalid the Iowa statute summarized in the opinion, the court, by Mr. Justice Matthews, in part said:

"The provisions of the statute * * * prohibiting the transportation by a common carrier of intoxicating liquor from a point within any other state for delivery at a place within the State of Iowa, is intended to more effectually carry out the general policy of the law of that state with respect to the suppression of the illegal manufacture and sale of intoxicating liquor within the state as a nuisance. It may, therefore, fairly be said that the provision in question has been adopted by the State of Iowa, not expressly for the purpose of regulating commerce between its citizens and those of other states, but as subservient to the general design of protecting the health and morals of its people, and the peace and good order of the state, against the physical and moral evils resulting from the unrestricted manufacture and sale within the state of intoxicating liquors. * * *

"It cannot be doubted that the law of Iowa now under examination, regarded as a rule for the transportation of merchandise, operates as a regulation of commerce among the states. Beyond all question, the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the Constitution when to Congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by any state was the thing desired. * * *

"We have seen that in the case of the State Freight Tax, 15 Wall. 232, a tax imposed by one state upon freight transported to or from another state was held to be void as a regulation of commerce among the states, on the ground that the transportation of passengers or merchandise through a state, or from one state to another, was in its nature national, so that it should be subjected to one uniform system or plan of regulation under the control of one regulating power. * * * If the state has not power to tax freight and passengers passing through it, or to or from it, from or into another state, much less would it have the power directly to regulate such transportation, or to forbid it altogether. If in the present case the law of Iowa operated upon all merchandise sought to be brought from another state into its limits, there could be no doubt that it would be a regulation of commerce amông the states and repugnant to the Constitution of the United States. In point of fact, however, it applies only to one class of articles of a particular kind, and prohibits their introduction into the state upon special grounds. It remains for us to consider whether those grounds are sufficient to justify it as an exception from the rule which would govern if they did not exist. * * *

"The law of the State of Iowa under consideration, while it professes to regulate the conduct of carriers engaged in transportation within the limits of that state, nevertheless materially affects, if allowed to operate, the conduct of such carriers, both as respects their rights and obligations, in every other state into or through which they pass, in the prosecution of their business of interstate transportation. In the present case, the defendant is sued as a common carrier in the State of Illinois, and the breach of duty alleged against it is a violation of the law of that state in refusing to receive and transport goods which, as a common carrier, by that law, it was bound to accept and carry. It interposes as a defense a law of the State of Iowa which forbids the delivery of such goods within that state. Has the law of Iowa any extraterritorial force which does not belong to the law of the State of Illinois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter? * * *

"It is impossible to justify this statute of Iowa by classifying it as an inspection law. * * * It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature, and the injurious consequences of its use or abuse.

"For similar reasons the statute of Iowa under consideration cannot be regarded as a regulation of quarantine, or a sanitary provision for the purpose of protecting the physical health of the community, or a law to prevent the introduction into the state of disease, contagious, infectious, or otherwise. Doubtless, the states have power to provide by law suitable measures to prevent the introduction into the states of articles of trade which, on account of their existing condition, would bring in and spread disease, pestilence, and death; such as rags or other substances infected with the germs of yellow fever, or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed, as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution.

"Upon this point, the observations of Mr. Justice Catron in The License Cases, 5 How. 504, 599, are very much to the point. * * * 'What, then, is the assumption of the state court? Undoubtedly, in effect, that the state had the power to declare what should be an article of lawful commerce in the particular state; and having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of Congress could not interfere. The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the state is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the states, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the states determine what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one.' * * *

" 'It may also be admitted,' as was said in the case of Railroad Co. v. Husen, 95 U. S. 465, 471, 'that the police power of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in The Passenger Cases, 7 How. 283, by Mr. Justice Grier, in the sacred law of self-defense. Vide 3 Sawyer, 283. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive. But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to Congress by the federal Constitution. It cannot invade the domain of the national government * * *. Neither the unlimited powers of a state to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution.' * * *

"It may be said, however, that the right of the state to restrict or prohibit sales of intoxicating liquor within its limits, conceded to exist as part of its police power, implies the right to prohibit its importation, because the latter is necessary to the effectual exercise of the former. The argument is that a prohibition of the sale cannot be made effective except by preventing the introduction of the subject of the sale; that, if its entrance into the state is permitted, the traffic in it cannot be suppressed. But the right to prohibit sales, so far as conceded to the states, arises only after the act of transportation has terminated, because the sales which the state may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it. It might be very convenient and useful, in the execution of the policy of prohibition within the state, to extend the powers of the state beyond its territorial limits. But such extraterritorial powers cannot be assumed upon such an implication. On the contrary, the nature of the case contradicts their existence. For, if they belong to one state, they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the Constitution, by its delegations of national power, to prevent.

"It is easier to think that the right of importation from abroad, and of transportation from one state to another, includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates; for the very purpose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported. Such, indeed, was the point decided in the case of Brown v. Maryland, 12 Wheat. 419, as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among the states. But it is not necessary now to express any opinion upon the point, because that question does not arise in the present case. The precise line which divides the transaction, so far as it belongs to foreign or interstate commerce, from the internal and domestic commerce of the state, we are not now called upon to delineate.[3] It is enough to say that the power to regulate or forbid the sale of a commodity, after it has been brought into the state, does not carry with it the right and power to prevent its introduction by transportation from another state."

[Field, J., concurred, delivering a separate opinion. Waite, C. J., Harlan and Gray, JJ., dissented.]

PLUMLEY v. MASSACHUSETTS.

1894. Supreme Court of the United States. 155 U. S. 461.

[Plumley was convicted for selling in Massachusetts, in violation of the state statute stated in the opinion, ten pounds of oleomargarine colored in imitation of yellow butter, in the unbroken original package sent to him from Illinois by his principal. From the denial by the state supreme court of his habeas corpus petition this writ of error was taken.]

Mr. Justice Harlan delivered the opinion of the court. * * *

It will be observed that the statute of Massachusetts which is alleged to be repugnant to the commerce clause of the Constitution does not prohibit the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure unadulterated milk or cream of such milk. If free from coloration or ingredient that "causes it to look like butter," the right to sell it "in a separate and distinct form, and in such manner as will advise the consumer of its real character," is neither restricted nor prohibited. It appears in this case that oleomargarine, in its natural condition, is of "a light yellowish color," and that the article sold by the accused was artificially colored "in imitation of yellow butter." Now, the real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear to be what it is not, and thus induce unwary purchasers, who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from unadulterated milk, or cream from such milk. The suggestion that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded, by such coloration, into believing that they are getting genuine butter. If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty, under the statute of Massachusetts, to manufacture it in that state, or to sell it there in such manner as to inform the customer of its real character. He is only forbidden to practice, in such matters, a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the states demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country? * * * Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one state to another state. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the states. * * *

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[3] This line was more precisely drawn in Leisy v. Hardin (1890) 135 U. S. 100, 34 L. ed. 128, where it was held that a state law prohibiting the sale of intoxicating liquor could not apply to a sale in the original package made by the consignee of an interstate shipment.

The court said that intoxicating liquors were traditionally commercial commodities, that the interstate shipment of commercial commodities is a national phase of interstate commerce to which the rule applied that the silence of Congress manifested its will that the states should leave it free; that freedom to ship liquor in, or to have it shipped in, carried with it freedom to make at least one sale (by the consignee, in the unbroken original package in which it was shipped) because otherwise the freedom to bring in would be an empty privilege, that not until the original package was broken or sold by the consignee did the liquor come within the police power of the state "unless placed there by Congressional action." (See also the summary of this case on p. 1350, post.)

But the case most relied on by the petitioner to support the proposition that oleomargarine, being a recognized article of commerce, may be introduced into a state, and there sold in original packages, without any restriction being imposed by the state upon such sale, is Leisy v. Hardin, 135 U. S. 100.

The majority of the court in that case held that ardent spirits, distilled liquors, ale and beer, were subjects of exchange, barter, and traffic, and, being articles of commerce, their sale while in the original packages in which they are carried from one state to another state, could not without the assent of Congress be forbidden by the latter state; that the parties in that case, who took beer from Illinois into Iowa, had the right, under the Constitution of the United States, to sell it in Iowa in such original packages, any statute of that state to the contrary notwithstanding; and that Iowa had no control over such beer until the original packages were broken and the beer in them became mingled in the common mass of property within its limits. "Up to that point of time," the court said, "we hold that in the absence of Congressional permission to do so, the state had no power to interfere by seizure, or any other action in prohibition of importation and sale by the foreign or non-resident importer." p. 124.

It is sufficient to say of Leisy v. Hardin that it did not in form or in substance present the particular question now under consideration. The article which the majority of the court in that case held could be sold in Iowa in original packages, the statute of that state to the contrary notwithstanding, was beer manufactured in Illinois, and shipped to the former state, to be there sold in such packages. So far as the record disclosed, and so far as the contentions of the parties were concerned, the article there in question was what it appeared to be, namely, genuine beer, and not a liquid or drink colored artificially so as to cause it to look like beer. The language we have quoted from Leisy v. Hardin must be restrained in its application to the case actually presented for determination, and does not justify the broad contention that a state is powerless to prevent the sale of articles manufactured in or brought from another state, and subjects of traffic and commerce, if their sale may cheat the people into purchasing something they do not intend to buy, and which is wholly different from what its condition and appearance import.

* * *

In view of the complex system of government which exists in this country * * * the judiciary of the United States should not strike down a legislative enactment of a state—especially if it has direct connection with the social order, the health, and the morals of its people—unless such legislation plainly and palpably violates some right granted or secured by the national Constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern. * * *

Judgment affirmed.[4]

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[4] Armour & Co. v. North Dakota (1916) 240 U. S. 510, 60 L. ed. 771, Ann. Cas. 1916D, 548: A state statute is valid which requires lard sold at retail, if not sold in bulk, to be packed in containers of 1, 3 or 5 pounds, net weight, the label to state the true net weight, notwithstanding wholesalers of other states are forced to conform to these requirements in order to retain their trade.

Mutual Film Corporation v. Ohio Industrial Comm. (1915) 236 U. S. 230, 59 L. ed. 552, 561, Ann. Cas. 1916C, 296: A state statute is valid which subjects all motion picture films, including films shipped from other states, to censorship by a state board, and penalizes exhibitors of disapproved films.

Hygrade Provision Co. v. Sherman (1925) 266 U. S. 497, 69 L. ed. 402: A New York statute is valid which penalizes all sales of meat misbranded as kosher meat and misrepresentation of non-kosher meat as kosher, including sales in the original package of interstate shipment.

Savage v. Jones (1912) 225 U. S. 501, 56 L. ed. 1182, sustained an Indiana statute which provided for state inspection of prepared foods for domestic animals when offered for sale within the state and required labels to indicate ingredients, the purpose being to prevent fraud. See also Corn Products Ref. Co. v. Eddy (1919) 249 U. S. 427, 63 L. ed. 689. Compare Minnesota v. Barber (1890) 136 U. S. 313, 34 L. ed. 455, holding invalid a state inspection law, designed to prevent sale of meat from diseased animals, because a requirement that inspection be in Minnesota and within twenty-four hours before the animals were slaughtered operated as a discrimination against, and effected an exclusion of, meats from other states.

Hall v. Geiger-Jones Co. (1917) 242 U. S. 539, 61 L. ed. 480, L. R. A. 1917F,

Mr. Chief Justice Fuller, with whom concurred **Mr. Justice Field** and **Mr. Justice Brewer**, dissenting. * * *

Upon this record oleomargarine is conceded to be a wholesome, palatable, and nutritious article of food, in no way deleterious to the public health or welfare. It is of the natural color of butter and looks like butter, and is often colored, as butter is, by harmless ingredients, a deeper yellow, to render it more attractive to consumers. The assumption that it is thus colored to make it appear to be a different article, generically, than it is, has no legal basis in this case to rest on. * * * This [statute] prohibits its sale in its natural state of light yellow, or when colored a deeper yellow, because in either case it looks like butter. The statute is not limited to imitations made for a fraudulent purpose, that is, intentionally made to deceive. The act of Congress requiring, under penalty, oleomargarine to be sold only in designated packages, marked, stamped, and branded as prescribed, and numerous acts of Massachusetts, minutely providing against deception in that respect, * * * amply protect the public from the danger of being induced to purchase oleomargarine for butter. The natural and reasonable effect of this statute is to prevent the sale of oleomargarine because it looks like butter. How this resemblance, although it might possibly mislead a purchaser, renders it any the less an article of commerce, it is difficult to see.

I deny that a state may exclude from commerce legitimate subjects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities. In the language of Knowlton, J., in the dissenting opinion below, I am not "prepared to hold that no cloth whose fabric is so carded and spun and woven and finished as to give it the appearance of being wholly wool, when in fact it is in part cotton, can be a subject of

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514, holding valid the Ohio Blue Sky Law which required sellers of corporate securities to obtain licenses (obtainable only upon proof of good business repute), as applicable to sale of securities of corporations of other states sent into Ohio for sale, the court, by McKenna, J., saying:

"We might, indeed, ask, When do the designated securities cease migration in interstate commerce and settle to the jurisdiction of the State? Material things, choses in possession, pass out of interstate commerce when they emerge from the original package. Do choses in action have a longer immunity? It is to be remembered that though they may differ in manner of transfer, they are in the same form in the hands of the purchaser as they are in the hands of the seller, and in the hands of both as they are brought into the state. We ask again, Do they never pass out of interstate commerce? Have they always the freedom of the state? Is there no point of time at which the state can expose the evil that they may mask? Is anything more necessary for the supremacy of the national power than that they be kept free when in actual transportation, subjected to the jurisdiction of the state only when they are attempted to be sold to the individual purchaser? The questions are pertinent, the answers to them one way or the other, of consequence; but we may pass them, for regarding the securities as still in interstate commerce after their transportation to the state is ended and they have reached the hands of dealers in them, their interstate character is only incidentally affected by the statute."

With these cases, particularly the last one, compare Di Santo v. Pennsylvania, ante, p. 1261.

commercial transactions, or that no jewelry which is not gold, but is made to resemble gold, and no imitations of precious stones, however desirable they may be considered by those who wish to wear them, shall be deemed articles of merchandise in regard to which Congress may make commercial regulations." * * *

LOTTERY CASE.

1903. Supreme Court of the United States. 188 U. S. 321.

[Champion was indicted by a federal grand jury on a charge of conspiracy to violate an act of Congress of March 2, 1895, c. 191. That act made it a criminal offense to cause to be brought into the United States, to deposit in the mails, or cause to be carried from one state to another, any lottery ticket. It was charged that in furtherance of the conspiracy Champion and others deposited lottery tickets with an express company for carriage from Dallas, Texas, to Fresno, California. His petition for habeas corpus, before trial, was denied in the United States District Court and he appealed.]

MR. JUSTICE HARLAN delivered the opinion of the court. * * *

What is the import of the word "commerce" as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one state to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several states include something more? Does not the carrying from one state to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified, also constitute commerce among the states? * * * [Quotations and citations omitted.]

The cases cited sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce clause. They show that commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several states is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed. * * *

It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. * * * These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. * * * We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states.

But it is said that * * * the authority given Congress was not to *prohibit,* but only to *regulate.* * * *

We have said that the carrying from state to state of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is, in effect, a *prohibition* of the carriage of such articles from state to state is not a fit or appropriate mode for the *regulation* of that particular kind of commerce? If lottery traffic, *carried on through interstate commerce,* is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the states, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the states?

In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2, 1895, to suppress cannot be overlooked. * * *

If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one state to another that which will harm the public morals? We cannot think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from state to state except the one providing that no person shall be deprived of his liberty without due process of law. * * * But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the states an element that will be confessedly injurious to the public morals.

If it be said that the act of 1895 is inconsistent with the Tenth Amendment, reserving to the states respectively, or to the people, the powers not delegated to the United States, the answer is that the power to regulate commerce among the states has been expressly delegated to Congress.

Besides, Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any state, but has in view only commerce of that kind among the several states. It has not assumed to interfere with the completely internal affairs of any state, and has only legislated in respect of a matter which concerns the people of the United States. As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "wide-spread pestilence of lotteries" and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those states—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. * * *

We know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and state legislation in the early history of the country, has grown into disrepute, and has become offensive to the entire people of the nation. It is a kind of traffic which no one can be entitled to pursue as of right.

That regulation may sometimes appropriately assume the form of prohibition is * * * illustrated by the case of diseased cattle, transported from one state to another. * * * Reid v. State of Colorado, 187 U. S. 137, [sustaining an act of Congress which prohibited such transportation.]

It is said, however, that if, in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the states any article, commodity, or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one state to another. It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the states. We may, however, repeat, in this connection, what the court has heretofore said, that the power of Congress to regulate commerce among the states, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and be hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce among the several states. But, as often said, the possible abuse of a power is not an argument against its existence. There is probably no governmental power that may not be exerted to the injury of the public. * * * We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another is therefore interstate commerce; that under its power to regulate commerce among the several states Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.

Judgment affirmed.

[Fuller, C. J., and Brewer, Shiras and Peckham, JJ., dissented.]

BROOKS v. UNITED STATES.

1925. Supreme Court of the United States. 267 U. S. 432.

Mr. Chief Justice Taft delivered the opinion of the court.

This is a writ of error to the District Court for the District of South Dakota brought by Rae Brooks to reverse a judgment against him of conviction under two indictments for violation of the Act of Congress, of October, 1919, known as the National Motor Vehicle Theft Act. The writ of error issued under § 238 of the Judicial Code, because the case involves the construction or application of the Constitution, in that the chief assignment of error is the invalidity of the Act. The Act became effective October 29, 1919 (41 Stat. 324), and is as follows:

"Chap. 89.—An Act to punish the transportation of stolen motor vehicles in interstate or foreign commerce. * * *

"Sec. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

"Sec. 4. That whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

"Sec. 5. That any person violating this act may be punished in any district in or through which such motor vehicle has been transported or removed by such offender."

The objection to the act cannot be sustained. Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215. In Reid v. Colorado, 187 U. S. 137, it was held that Congress could pass a law excluding diseased stock from interstate commerce in order to prevent its use in such a way as thereby to injure the stock of other states. In the Lottery Case, 188 U. S. 321, it was held that Congress might pass a law punishing the transmission of lottery tickets from one state to another, in order to prevent the carriage of those tickets to be sold in other states and thus demoralize, through a spread of the gambling habit, individuals who were likely to purchase. In Hipolite Egg Co. v. United States, 220 U. S. 45, it was held that it was within the regulatory power of Congress to punish the transportation in interstate commerce of adulterated articles which, if sold in other states than the one from which they were transported, would deceive or injure persons who purchased such articles. In Hoke v. United States, 227 U. S. 308, and Caminetti v. United States, 242 U. S. 470, the so-called White Slave Traffic Act, which was construed to punish any person engaged in enticing a woman from one state to another for immoral ends, whether for commercial purposes or otherwise, was valid because it was intended to prevent the use of interstate commerce to facilitate prostitution or concubinage, and other forms of immorality. In Clark Distilling Co. v. Western Maryland Railway Co., 242 U. S. 311, it was held that Congress had power to forbid the introduction of intoxicating liquors into any state in which their use was prohibited, in order to prevent the use of interstate commerce to promote that which was illegal in the state. In Weber v. Freed, 239 U. S. 325, it was held that Congress had power to prohibit the importation of pictorial representations of prize fights designed for public exhibition, because of the demoralizing effect of such exhibitions in the state of destination.

In Hammer v. Dagenhart, 247 U. S. 251, it was held that a federal law forbidding the transportation of articles manufactured by child labor in one state to another was invalid because it was really not a regulation of interstate commerce but a congressional attempt to regulate labor in the state of origin by an embargo on its external trade. Articles made by child labor and transported into other states were harmless and could be properly transported without injuring any person who either bought or used them. In referring to the cases already cited, upon which the argument for the validity of the Child Labor Act (Comp. St. §§ 8819a-8819f) was based, this court pointed out that in each of them the use of interstate commerce had contributed to the accomplishment of harmful results to people of other states, and that the congressional power over interstate transportation in such cases could only be effectively exercised by prohibiting it. The clear distinction between authorities first cited and the Child Labor Case leaves no doubt where the right lies in this case. It is known of all men that the radical change in transportation of persons and goods effected by the introduction of the automobile, the speed with which it moves, and the ease with which evil-minded persons can avoid capture have greatly encouraged and increased crimes. One of the crimes which have been encouraged is the theft of the automobiles themselves and their immediate transportation to places remote from homes of the owners. Elaborately organized conspiracies for the theft of automobiles and the spiriting them away into some other state and their sale or other disposition far away from the owner and his neighborhood have roused Congress to devise some method for defeating the success of these widely spread schemes of larceny. The quick passage of the machines into another state helps to conceal the trail of the thieves, gets the stolen property into another police jurisdiction and facilitates the finding of a safer place in which to dispose of the booty at a good price. This is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation by any one with knowledge of the theft, because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions.

The fourth section merely makes more effective the regulation contained in the third section. The third section punishes the transportation of a stolen automobile with knowledge of the theft. The fourth section punishes the receipt, the concealment, the storing, the bartering, the sale, or the disposition of such stolen vehicle, moving as interstate commerce, or as a part thereof, with knowledge of its having been stolen. Of course, this section can and does apply only to the storing or concealment of a stolen automobile with knowledge of its theft, as a final step in the use of interstate transportation to promote the scheme of its unlawful disposition and the withholding of it from its owner. For these reasons, we think that §§ 3 and 4 are within the power of Congress. * * *

The judgment of the District Court is affirmed.

HAMMER v. DAGENHART.

1918. Supreme Court of the United States. 247 U. S. 251.

Mr. Justice Day delivered the opinion of the court.

A bill was filed in the United States District Court for the Western District of North Carolina by a father in his own behalf and as next friend of his two minor sons, one under the age of fourteen years and the other between the ages of fourteen and sixteen years, employees in a cotton mill at Charlotte, North Carolina, to enjoin the enforcement of the act of Congress intended to prevent interstate commerce in the products of child labor. Act of Sept. 1, 1916, c. 432, 39 Stat. 675.

The District Court held the act unconstitutional and entered a decree enjoining its enforcement. This appeal brings the case here. * * *

The controlling question for decision is: Is it within the authority of Congress in regulating commerce among the states to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock P. M. or before the hour of 6 o'clock A. M.? * * *

In Gibbons v. Ogden, 9 Wheat. 1, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power, said, "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed." In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroying it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate.

The first of these cases is Champion v. Ames, 188 U. S. 321, the so-called Lottery Case, in which it was held that Congress might pass a law having the effect to keep the channels of commerce free from use in the transportation of tickets used in the promotion of lottery schemes. In Hipolite Egg Co. v. United States, 220 U. S. 45, this court sustained the power of Congress to pass the Pure Food and Drug Act (Act June 30, 1906, c. 3915, 34 Stat. 768) which prohibited the introduction into the states by means of interstate commerce of impure foods and drugs. In Hoke v. United States, 227 U. S. 308, this court sustained the constitutionality of the so-called "White Slave Traffic Act" (Act June 25, 1910, c. 395, 36 Stat. 825), whereby the transportation of a woman in interstate commerce for the purpose of prostitution was forbidden. In that case we said, having reference to the authority of Congress, under the regulatory power, to protect the channels of interstate commerce: "If the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to, and the enslavement in prostitution and debauchery of women, and, more insistently, of girls."

In Caminetti v. United States, 242 U. S. 470, we held that Congress might prohibit the transportation of women in interstate commerce for the purposes of debauchery and kindred purposes. In Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311, the power of Congress over the transportation of intoxicating liquors was sustained. In the course of the opinion it was said:
* * *

"The exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace."

In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.

Commerce "consists of intercourse and traffic * * * and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities." The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. Delaware, Lackawanna & Western R. R. Co. v. Yurkonis, 238 U. S. 439.

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation.

"When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state." (Mr. Justice Jackson in In re Green, 52 Fed. Rep. 113.) This principle has been recognized often in this court. Coe v. Errol, 116 U. S. 517; Bacon v. Illinois, 227 U. S. 504, and cases cited. If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the states, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the states. Kidd v. Pearson, 128 U. S. 1, 21.

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other states where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the state of production. In other words, that the unfair competition, thus engendered, may be controlled by closing the channels of interstate commerce to manufacturers in those states where the local laws do not meet what Congress deems to be the more just standard of other states.

There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one state, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions. In some of the states laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other states and approved by Congress.

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution. * * *

A statute must be judged by its natural and reasonable effect. Collins v. New Hampshire, 171 U. S. 30, 33, 34. The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. Pipe Line Case, 234 U. S. 548, 560. The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the federal Constitution.

In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. * * * To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.

We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the states. * * * In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities to regulate the hours of labor of children in factories and mines within the states, a purely state authority. * * * The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed. * * *

Affirmed.

MR. JUSTICE HOLMES, dissenting.

The single question in this case is whether Congress has power to prohibit the shipment in interstate or foreign commerce of any product of a cotton mill situated in the United States, in which within thirty days before the removal of the product children under fourteen have been employed, or children between fourteen and sixteen have been employed more than eight hours in a day, or more than six days in any week, or between seven in the evening and six in the morning. The objection urged against the power is that the states have exclusive control over their methods of production and that Congress cannot meddle with them, and taking the proposition in the sense of direct intermeddling I agree to it and suppose that no one denies it. But if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void.

The first step in my argument is to make plain what no one is likely to dispute—that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects and that if invalid it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid. At all events it is established by the Lottery Case and others that have followed it that a law is not beyond the regulative power of Congress merely because it prohibits certain transportation out and out. Champion v. Ames, 188 U. S. 321, 355, 359, et seq. So I repeat that this statute in its immediate operation is clearly within the Congress's constitutional power.

The question then is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the states in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any state.

The manufacture of oleomargarine is as much a matter of state regulation as the manufacture of cotton cloth. Congress levied a tax upon the compound when colored so as to resemble butter that was so great as obviously to prohibit the manufacture and sale. In a very elaborate discussion the present Chief Justice excluded any inquiry into the purpose of an act which apart from that purpose was within the power of Congress. McCray v. United States, 195 U. S. 27. As to foreign commerce see Weber v. Freed, 239 U. S. 325, 329; Brolan v. United States, 236 U. S. 216, 217; Buttfield v. Stranahan, 192 U. S. 470. Fifty years ago a tax on state banks, the obvious purpose and actual effect of which was to drive them, or at least their circulation, out of existence, was sustained, although the result was one that Congress had no constitutional power to require. The court made short work of the argument as to the purpose of the act. "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers." Veazie Bank v. Fenno, 8 Wall. 533. So it well might have been argued that the corporation tax was intended under the guise of a revenue measure to secure a control not otherwise belonging to Congress, but the tax was sustained, and the objection so far as noticed was disposed of by citing McCray v. United States. Flint v. Stone Tracy Co., 220 U. S. 107. And to come to cases upon interstate commerce, notwithstanding United States v. E. C. Knight Co., 156 U. S. 1, the Sherman Act has been made an instrument for the breaking up of combinations in restraint of trade and monopolies, using the power to regulate commerce as a foothold, but not proceeding because that commerce was the end actually in mind. The objection that the control of the states over production was interfered with was urged again and again but always in vain. Standard Oil Co. v. United States, 221 U. S. 1, 68, 69. United States v. American Tobacco Co., 221 U. S. 106, 184. Hoke v. United States, 227 U. S. 308, 321, 322. See finally and especially Seven Cases of Eckman's Alterative v. United States, 239 U. S. 510, 514, 515.

The Pure Food and Drug Act which was sustained in Hipolite Egg Co. v. United States, 220 U. S. 45, with the intimation that "no trade can be carried on between the states to which it [the power of Congress to regulate commerce] does not extend," 57, applies not merely to articles that the changing opinion of the time condemn as intrinsically harmful but to others innocent in themselves, simply on the ground that the order for them was induced by a preliminary fraud. Weeks v. United States, 245 U. S. 618. It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil. I may add that in the cases on the so-called White Slave Act it was established that the means adopted by Congress as convenient to the exercise of its power might have the character of police regulations. Hoke v. United States, 227 U. S. 308, 323. Caminetti v. United States, 242 U. S. 470, 492. In Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311, 328, Leisy v. Hardin, 135 U. S. 100, 108, is quoted with seeming approval to the effect that "a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the state, unless placed there by congressional action." I see no reason for that proposition not applying here.

The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused—it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where in my opinion they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States.

But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink but not as against the product of ruined lives.

The act does not meddle with anything belonging to the states. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the states but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the states. Instead of being encountered by a prohibitive tariff at her boundaries the state encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. If, as has been the case within the memory of men still living, a state should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in Champion v. Ames. Yet in that case it would be said with quite as much force as in this that Congress was attempting to intermeddle with the state's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

MR. JUSTICE MCKENNA, MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE concur in this opinion.

DELAWARE, LACKAWANNA & WESTERN R. CO. v. UNITED STATES.

1913. Supreme Court of the United States. 231 U. S. 363.

Error to the District Court of the United States for the Western District of New York.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Delaware, Lackawanna & Western Railroad Company was indicted for hauling, over its lines, between Buffalo, New York, and Scranton, Pennsylvania, twenty carloads of hay, belonging to the Company, but not necessary for its use as a common carrier. This transportation was charged to be in violation of the Commodities Clause of the Hepburn Act, June 29, 1906, c. 3591, 34 Stat. 585, which makes it unlawful "for any railroad company to transport in interstate commerce any article * * * it may own * * * or in which it may have any interest * * * except such * * * as may be necessary * * * for its use in the conduct of its business as a common carrier."

On the trial it appeared that the defendant was not only chartered as a railroad, but had also been authorized to operate coal mines. The hay, referred to in the indictment, had been purchased for the use of animals employed in and about the mines at Scranton —all the coal taken therefrom being sold for use by the public, except the steam coal which was used as fuel for the company's locomotives.

The defendant was found guilty and sentenced on each of the twenty counts. It brought the case here, insisting that the Commodities Clause violated the Fifth Amendment; deprived the company of a right to contract, and prevented it from carrying its own property needed in a legitimate intrastate business, conducted under authority of a charter granted by the State of Pennsylvania, many years before the adoption of the Hepburn Bill.

1. This contention must be overruled on the authority of United States v. Delaware &c. Co., 213 U. S. 366, 416. It is true that the decision in that case related to shipments of coal from mine to market, while here the merchandise was transported from market to mine. But the statute relates to "all commodities, except lumber, owned by the company" and includes inbound as well as outbound shipments. Both classes of transportation are within the purview of the evil to be corrected and, therefore, subject to the power of Congress to regulate interstate commerce. The exercise of that power is, of course, limited by the provisions of the Fifth Amendment. (Monongahela Co. v. United States, 148 U. S. 312, 336; McCray v. United States, 195 U. S. 27; Union Bridge Co. v. United States, 204 U. S. 364), but the Commodities Clause does not take property nor does it arbitrarily deprive the company of a right of property. The statute deals with railroad companies as public carriers, and the fact that they may also be engaged in a private business does not compel Congress to legislate concerning them as carriers so as not to interfere with them as miners or merchants. If such carrier hauls for the public and also for its own private purposes, there is an opportunity to discriminate in favor of itself against other shippers in the rate charged, the facility furnished or the quality of the service rendered. The Commodities Clause was not an unreasonable and arbitrary prohibition against a railroad company transporting its own useful property, but a constitutional exercise of a governmental power intended to cure or prevent the evils that might result if, in hauling goods in or out, the company occupied the dual and inconsistent position of public carrier and private shipper.

It was suggested that the case is not within the statute because, as the company could buy, in Scranton, hay that had already been transported over its line, no possible harm could come to anyone if it bought the same hay at Buffalo and then hauled it to Scranton for use at the mine, but not for sale in competition with other dealers in stock food. But the courts are not concerned with the question as to whether, in a particular case, there had been any discrimination against shippers or harm to other dealers. The statute is general and applies not only to those particular instances in which the carrier did use its power to the prejudice of the shipper, but to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented. * * *

Judgment affirmed.

CLARK DISTILLING CO. v. WESTERN MARYLAND R. CO.[5]

1917. Supreme Court of the United States. 242 U. S. 311.

[Appeals from the District Court of the United States for the District of Maryland questioning the validity of the Webb-Kenyon Act (Act of Congress of March 1, 1913, 37 Stat. 699), stated in the opinion, and the validity of a statute of West Virginia which for-

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[5] This case was decided January 8, 1917. At that time Congress had not yet proposed the Eighteenth Amendment. The act of Congress proposing that Amendment was enacted December 18, 1917, and the Amendment was effectively ratified January 16, 1919.

In Leisy v. Hardin (1890) 135 U. S. 100, 34 L. ed. 128, ante, p. 1348, note 3, it was held that intoxicating liquor shipped into a state was not within the reach of state laws prohibiting sale until after the original package was broken or sold by the consignee, the opinion adding, "unless placed there by congressional action." The decisions in this case and in Bowman v. Chicago & N. W. R. Co., two years before, ante, p. 1344, led the advocates of prohibition to act upon the dictum just quoted. The result was the act of Congress of August 8, 1890, 26 Stat. 313, called the Wilson Act. It follows:

"Chap. 728.—An act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases.

"Be it enacted by the Senate and House Representatives of the United States of America in Congress assembled, That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

This act was held valid in In re Rahrer (1891) 140 U. S. 545, 35 L. ed. 572, on reasoning similar to that in Clark Distilling Co. v. Western Maryland R. Co. The Wilson Act was interpreted, however, in Rhodes v. Iowa (1898) 170 U. S. 412, 42 L. ed. 1088, quite literally to mean that the state laws could take effect upon liquor shipped in only after arrival and delivery to the consignee. Thus while the consignee might be prohibited from selling it, he was free to have it shipped in for his own consumption. The Wilson Act was sufficient to overcome the effect of Leisy v. Hardin but not of Bowman v. Chicago & N. W. R. Co. The next importbade any common carrier, for hire, and any other person, for hire or without hire, to carry or bring intoxicating liquor into the state.]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court. [After (1) interpreting the West Virginia statute as prohibiting receipt within the state, whether for personal use or otherwise, and (2) holding that it did not violate the Fourteenth Amendment by so doing, the opinion continues:]

This brings us to consider whether the Webb-Kenyon Law has so regulated interstate commerce as to give the state the power to do what it did in enacting the prohibition law and cause its provisions to be applicable to shipments of intoxicants in interstate commerce, thus saving that law from repugnancy to the Constitution of the United States, which is the third proposition for consideration.

3. *Assuming the constitutionality of the Webb-Kenyon Act, what is its true meaning and its operation upon the prohibitions contained in the West Virginia law?*

Omitting words irrelevant to the subject now under consideration, the title and text of the Webb-Kenyon Act are as follows:

"An Act Divesting intoxicating liquors of their interstate character in certain cases.

" * * * That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, * * * into any other State, Territory, or District of the United States, * * * which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, * * * is hereby prohibited."[6]

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ant step in the prohibition movement was the act of Congress sustained in Clark Distilling Co. v. Western Maryland R. Co.

These cases are not of merely historical significance. Thus while it was held in Powell v. Pennsylvania, ante, p. 666, that a state could prohibit the manufacture of oleomargarine and its sale in intrastate commerce, it was held in Schollenberger v. Pennsylvania (1898) 171 U. S. 1, 43 L. ed. 49, that the rule of Leisy v. Hardin applied to secure a consignee the privilege of selling within the state original packages of interstate shipped oleomargarine, and in Collins v. New Hampshire (1898) 171 U. S. 30, 43 L. ed. 60, that a state law requiring oleomargarine to be colored pink could not apply to such sales. See also Austin v. Tennessee (1900) 179 U. S. 343, 45 L. ed. 224 (cigarettes). Query, may legislation similar to the Wilson Act and the Webb Kenyon Act be applied to oleomargarine and tobacco? To other commodities? See U. S. C. A., Title 18, § 359 (a statute which applies the principle of the Wilson Act to game animals and game and song birds, alive or dead).

[6] It should be noted that in spite of the use of the word "prohibited" this statute contained no penal provision. Violation of it was not made a federal offense.—Ed.

As the state law forbade the shipment into or transportation of liquor in the state whether from inside or out, and all receipt and possession of liquor so transported without regard to the use to which the liquor was to be put, and as the Webb-Kenyon Act prohibited the transportation in interstate commerce of all liquor "intended * * * to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State," there would seem to be no room for doubt that the prohibitions of the state law were made applicable by the Webb-Kenyon Law. If that law was valid, therefore, the state law was not repugnant to the commerce clause. * * *

To correct the great evil which was asserted to arise from the right to ship liquor into a state through the channels of interstate commerce and there receive and sell the same in the original package in violation of state prohibitions, was indisputably the purpose which led to the enactment of the Wilson Law (Act of Congress of August 8, 1890, 26 Stat. 313) * * *. And this was recognized by the long line of decisions which upheld that law and pointed out that it permitted the state prohibitions to take away from interstate commerce shipments a right which they otherwise would have embraced, that is, the right to sell after receipt in the original package, any state law to the contrary notwithstanding. At the same time it was recognized, however, that as the right to receive liquor was not affected by the Wilson Act, such receipt and the possession following from it and the resulting right to use remained protected by the commerce clause even in a state where what is known as the dispensary system prevailed. Vance v. Vandercook Company, 170 U. S. 438. Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling * * *.

The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that act was within the power of Congress to adopt, there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution; and this brings us to the last question, which is:

4. *Did Congress have power to enact the Webb-Kenyon Law?*

We are not unmindful that opinions adverse to the power of Congress to enact the law were formed and expressed in other departments of the government. Opinion of the Attorney General, 30 Op. A. G. 88; Veto Message of the President, Cong. Rec., vol. 49, pt. 5, p. 4291. We are additionally conscious, therefore, of the responsibility of determining these issues and of their serious character.

It is not in the slightest degree disputed that if Congress had prohibited the shipment of all intoxicants in the channels of interstate commerce and therefore had prevented all movement between the several states, such action would have been lawful because within the power to regulate which the Constitution conferred. Lottery Case, 188 U. S. 321; Hoke v. United States, 227 U. S. 308. The issue, therefore, is not one of an absence of authority to accomplish in substance a more extended result than that brought about by the Webb-Kenyon Law, but of a want of power to reach the result accomplished because of the method resorted to for that purpose. This is certain since the sole claim is that the act was not within the power given to Congress to regulate because it submitted liquors to the control of the states by subjecting interstate commerce in such liquors to present and future state prohibitions, and hence in the nature of things was wanting in uniformity. Let us test the contentions by reason and authority.

The power conferred is to regulate, and the very terms of the grant would seem to repel the contention that only prohibition of movement in interstate commerce was embraced. And the cogency of this is manifest since if the doctrine were applied to those manifold and important subjects of interstate commerce as to which Congress from the beginning has regulated, not prohibited, the existence of government under the Constitution would be no longer possible.

The argument as to delegation to the states rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply. * * *

So far as uniformity is concerned, there is no question that the act uniformly applies to the conditions which call its provisions into play—that its provisions apply to all the states,—so that the question really is a complaint as to the want of uniform existence of things to which the act applies and not to an absence of uniformity in the act itself. But aside from this it is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it, that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States. In view of the conceded power on the part of Congress to prohibit the movement of intoxicants in interstate commerce, we cannot admit that because it did not exert its authority to the full limit, but simply regulated to the extent of permitting the prohibitions in one state to prevent the use of interstate commerce to ship liquor from another state, Congress exceeded its authority to regulate. We can see, therefore, no force in the argument relied upon tested from the point of view of reason, and we come to the question of authority.

It is settled, says the argument, that interstate commerce is divided into two great classes, one embracing subjects which do not exact uniformity and which, although subject to the regulation of Congress, are in the absence of such regulation subject to the control of the several states (Cooley v. Board of Wardens, 12 How. 299), and the other embracing subjects which do require uniformity and which in the absence of regulation by Congress remain free from all state control (Leisy v. Hardin, 135 U. S. 100). As to the first, it is said, Congress may, when regulating, to the extent it deems wise to do so permit state legislation enacted or to be enacted to govern, because to do so would only be to do that which would exist if nothing had been done by Congress. As to the second class, the argument is, that in adopting regulations Congress is wholly without power to provide for the application of state power to any degree whatever, because in the absence of the exertion by Congress of power to regulate, the subject-matter would have been free from state control, and because, besides, the recognition of state power under such circumstances would be to bring about a want of uniformity. But granting the accuracy of the two classifications which the proposition states, the limitation upon the power of Congress to regulate which is deduced from the classifications finds no support in the authority relied upon to sustain it. Let us see if this is not the case by examining the authority relied upon. What is that authority? The ruling in Leisy v. Hardin, supra. But that case, instead of supporting the contention, plainly refutes it for the following reason: Although Leisy v. Hardin declared in express terms that the movement of intoxicants in interstate commerce belonged to that class which was free from all interference by state control in the absence of regulation by Congress, it was at the same time in the most explicit terms declared that the power of Congress to regulate interstate commerce in intoxicants embraced the right to subject such movement to state prohibitions and that the freedom of intoxicants to move in interstate commerce and the protection over it from state control arose only from the absence of congressional regulation and would endure only until Congress had otherwise provided. * * *

And finally, after pointing out that the states had no power to interfere with the movement of goods in interstate commerce before they had been commingled with the property of the state, it was said that this limitation obtained "in the absence of congressional permission" to the state (p. 124). * * *

As we have already pointed out, the very regulation made by Congress in enacting the Wilson Law to minimize the evil resulting from violating prohibitions of state law by sending liquor through interstate commerce into a state and selling it in violation of such law was to divest such shipments of their interstate commerce character and to strip them of the right to be sold in the original package free from state authority which otherwise would have obtained. And that Congress had the right to enact this legislation making existing and future state prohibitions applicable, was the express result of the decided cases to which we have referred, beginning with In re Rahrer, 140 U. S. 545. As the power to regulate which was manifested in the Wilson Act and that which was exerted in enacting the Webb-Kenyon Law are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity. * * *

We can see no reason for saying that although Congress in view of the nature and character of intoxicants had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power. * * *

Before concluding we come to consider what we deem to be arguments of inconvenience which are relied upon, that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control and therefore destroys the Constitution. The want of force in the suggested inconvenience becomes patent by considering the principle which after all dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which under the constitutional guarantees such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest[7] and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace.

Affirmed.[8]

Mr. Justice McReynolds concurs in the result.

Mr. Justice Holmes and Mr. Justice Van Devanter dissent.

McDERMOTT v. STATE OF WISCONSIN.

1913. Supreme Court of the United States. 228 U. S. 115.

[McDermott was convicted in a Wisconsin court on a charge of violating a state statute in that he offered for sale a commodity in cans labeled "Karo Corn Syrup, 10% Cane Syrup, 90% Corn Syrup." The statute required in such case that cans containing such ingredients be labeled "Glucose flavored with Refiner's Syrup" without using any other name of a saccharine substance. The facts were that McDermott was a local retailer, that he had received 12 half gallon tin cans of the commodity from Chicago wholesalers in a wooden box, that he had removed the cans from the box and placed them on his shelves for sale. He contended in defense that the cans were labeled in accordance with the federal Pure Food and Drugs Act. (Act of June 30, 1906, 34 Stat. 768.) The state supreme court sustained the conviction and McDermott took this writ of error.]

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[7] "The powers possessed by government to deal with a subject are neither inordinately enlarged or greatly dwarfed because the power to regulate interstate commerce applies. This is illustrated by the difference between the much greater power of regulation which may be exerted as to liquor and that which may be exercised as to flour, dry-goods and other commodities. It is shown by the settled doctrine sustaining the right by regulation absolutely to prohibit lottery tickets and by the obvious consideration that such right to prohibit could not be applied to pig iron, steel rails, or most of the vast body of commodities." White, C. J., in Wilson v. New (1917) 243 U. S. 332, 346-347, 61 L. ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024.

"Like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, * * *. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation." Monongahela Navigation Co. v. United States (1893) 148 U. S. 312, 336, 37 L. ed. 463.

[8] The Webb-Kenyon Act enabled any state separately to go legally "bone-dry." See Samuels v. McCurdy, ante, p. 662. The next important step in the progress of prohibition was the act of Congress of March 3, 1917, quoted and applied in United States v. Simpson, ante, p. 1226. In what respect did it differ from the Webb-Kenyon Act? In what respects did the Eighteenth Amendment change the powers of the states and of the national government?

MR. JUSTICE DAY delivered the opinion of the court. * * *

It is insisted that the Federal Food and Drugs Act passed under the authority of the Constitution has taken possession of this field of regulation and that the state act is a wrongful interference with the exclusive power of Congress over interstate commerce, in which, it appears, the goods in question were shipped. * * *

That Congress has ample power in this connection is no longer open to question. That body has the right not only to pass laws which shall regulate legitimate commerce among the states and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them from the facilities and privileges thereof.

* * *

The Food and Drugs Act was passed by Congress, under its authority to exclude from interstate commerce impure and adulterated food and drugs and to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, * * *.

Section 2 of the act provides that "the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia * * * of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited"; * * *.

That the word "package" or its equivalent expression, as used by Congress in sections 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the act, clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. * * * Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming at the contents of the package as it shall reach the consumer, for whose protection the act was primarily passed, and it is the branding upon the package which contains the article intended for consumption itself which is the subject-matter of regulation. Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed. * * *

When delivered for shipment and when received through the channels of interstate commerce the cans in question bore brands or labels which were supposed to comply with the requirements of the act of Congress. * * * Whether the labels complied with the federal law was not for the state to determine. This was a matter provided for by the act of Congress and to be determined as therein indicated by proper proceedings in the federal courts.

The label upon the unsold article is in the one case the evidence of the shipper that he has complied with the act of Congress, while in the other, by its misleading and false character, it furnishes the proof upon which the federal authorities depend to reach and punish the shipper and to condemn the goods. If truly labeled within the meaning of the act his goods are immune from seizure by federal authority; if the label is false or misleading within the terms of the law the goods may be seized and condemned. In other words the label is the means of vindication or the basis of punishment in determining the character of the interstate shipment dealt with by Congress.

While in this situation, the goods being unsold, as a condition of their legitimate sale within the state, and also of their being in the possession of the importer for the purpose of sale and of being exposed and offered for sale by him, the Wisconsin statute provides that they shall bear the label required by the state law and none other (which represents a saccharine substance, as do the labels in these cases). In other words, it is essential to a legal exercise of possession of and traffic in such goods under the state law that labels which presumably meet with the requirements of the federal law, and for the determination of the correctness of which Congress has provided effectual means, shall be removed from the packages before the first sale by the importer. * * *

It is insisted, * * * that, since at the time when the state act undertook to regulate the branding of these goods, namely, when in the possession of the plaintiffs in error, and held upon their shelves for sale, the cans had been removed from the boxes in which they were shipped in interstate commerce, they had therefore passed beyond the jurisdiction of Congress, and their regulation was exclusively a matter for state legislation. This assertion is based upon the original-package doctrine as it is said to have been laid down in the former decisions of this court. * * *

Congress having made adulterated and misbranded articles contraband of interstate commerce, in the manner we have already pointed out, provides in § 10 of the act that such articles may be proceeded against and seized for confiscation and condemnation while being transported from one state, territory, district, or insular possession to another for sale, or, having been transported, remaining "unloaded, unsold, or in original unbroken packages," and the subsequent provisions of the section regulate the disposition of the articles seized. To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain "unloaded, unsold, or in original unbroken packages." The opportunity for inspection en route may be very inadequate. The real opportunity of government inspection may only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped and remain, as the act provides, "unsold." It is enough, by the terms of the act, if the articles are *unsold,* whether in original packages or not. Bearing in mind the authority of Congress to make effectual regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of § 10 are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose of the act.

The doctrine of original packages * * * was not intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end. The legislative means provided in the federal law for its own enforcement may not be thwarted by state legislation having a direct effect to impair the effectual exercise of such means.

For the reasons stated, the statute of Wisconsin, in forbidding all labels other than the one it prescribed, is invalid, * * *.

Reversed.

WEIGLE v. CURTICE BROTHERS CO.

1919. Supreme Court of the United States. 248 U. S. 285.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity brought by Curtice Brothers Company, a New York corporation, to restrain Weigle, the Dairy and Food Commissioner of Wisconsin, from enforcing certain laws of the state, especially Statutes of 1913, § 4601g. That section makes it unlawful to sell any article of food that contains benzoic acid or benzoates, with qualifications not material here. The plaintiff makes such articles from fruit, and adds benzoate of soda as a preservative. It puts them up in glass bottles and jars properly labelled under the Food and Drugs Act (June 30, 1906, c. 3915, 34 Stat. 768), packs the bottles and jars in wooden cases containing a number of the same, and ships the cases from its factory in New York to customers in Wisconsin among others. Of course the single bottles are sold in the retail trade, and their contents are served to guests in restaurants and hotels. The defendant disavowed any contention that the state laws affected or purported to affect sales by the importer in the unbroken wooden packages containing the bottles and the decree treated that subject as taken out of the case. But the bill went farther and setting up a decision, incorporated in a regulation under the Food and Drugs Act, that benzoate of soda is not injurious to health and that objection would not be raised to it under the act if each container should be plainly labelled, contended that under the Food and Drugs Act and the Commerce Clause of the Constitution, the Wisconsin law was invalid even as applied to domestic retail sales of single bottles or the contents of single bottles of the plaintiff's goods. The defendant stood on a motion to dismiss and the District Court made a decree following the prayer of the bill. The defendant appealed.

The argument in support of the decree contends in various forms that the sale of the individual bottles, when removed from the original package after entering the state, still is a part of commerce among the states, since the act of Congress as to misbranding applies to them. But the Food and Drugs Act does not change or purport to change the moment at which an object ceases to move in interstate commerce. It imposes an obligation to label the bottles severally, although contained in one original package, as of course it may. Seven Cases of Eckman's Alterative v. United States, 239 U. S. 510, 515, 516. It provides for seizure and condemnation of misbranded or adulterated articles that have been transported from one state to another, although the transit is at an end, while the articles remain unsold or in original unbroken packages, as again it may. There is no reason why a lien *ex delicto* should be lost by the end of the journey in which the wrong was done. The two things have no relation to each other. Hipolite Egg Co. v. United States, 220 U. S. 45, 57, 58. Finally, the duty to retain the label upon the single bottles does not disappear at once. For reasons stated in McDermott v. Wisconsin, 228 U. S. 115, if the state could require the label to be removed while the bottles remained in the importer's hands unsold, it could interfere with the means reasonably adopted by Congress to make its regulations obeyed. But all this has nothing to do with the question when interstate commerce is over and the articles carried in it have come under the general power of the state. The law upon that point has undergone no change.

The Food and Drugs Act indicates its intent to respect the recognized line of distinction between domestic and interstate commerce too clearly to need argument or an examination of its language. It naturally would, as the distinction is constitutional. The fact that a food or drug might be condemned by Congress if it passed from state to state, does not carry an immunity of foods or drugs, making the same passage, that it does not condemn. Neither the silence of Congress nor the decisions of officers of the United States have any authority beyond the domain established by the Constitution. Rast v. Van Deman & Lewis Co., 240 U. S. 342, 362. When objects of commerce get within the sphere of state legislation the state may exercise its independent judgment and prohibit what Congress did not see fit to forbid. When they get within that sphere is determined, as we have said, by the old long-established criteria. The Food and Drugs Act does not interfere with state regulation of selling at retail. Armour & Co. v. North Dakota, 240 U. S. 510, 517; McDermott v. Wisconsin, 228 U. S. 115, 131. Such regulation is not an attempt to supplement the action of Congress in interstate commerce but the exercise of an authority outside of that commerce that always has remained in the states.

Decree reversed.

Section 8.—Law Governing Tort Liability in Interstate Commerce.

PENNSYLVANIA RAILROAD CO. v. HUGHES.

1903. Supreme Court of the United States. 191 U. S. 477.

[Hughes delivered a horse to the New York Central Railroad for carriage on a through bill of lading over that road and the Pennsylvania Railroad from Albany, New York, to Cynwyd, Pennsylvania. The bill of lading, signed by him, stipulated that the shipment being at the lower of two available rates neither carrier should be liable for loss or damage resulting from negligence in excess of $100. The horse was injured by a collision occurring on the track of the second carrier in Pennsylvania. At the trial in a Pennsylvania court, Hughes obtained a verdict for $10,000 and judgment was given accordingly. The Supreme Court of Pennsylvania affirmed, and this writ of error was taken on the assignments of error discussed in the following opinion.]

Mr. Justice Day delivered the opinion of the court.

The right to review the judgment of the Supreme Court of Pennsylvania herein depends upon the proper assertion of a right or privilege under the federal Constitution or statutes which was denied to the plaintiff in error by the adverse holding of the state court.

Upon the trial in the Common Pleas Court, it was contended that the special contract above recited limited the recovery of the plaintiff to the sum of one hundred dollars. The court refused to so charge, but, holding that the policy and law of Pennsylvania, as declared by her courts of last resort, did not permit such limitations on the liability of common carriers, left to the jury to determine the value of the horse and the question of the negligence of the defendant.

In view of being carried to the Supreme Court of Pennsylvania, two errors were assigned to the refusal of the court to charge:

"1. That it was lawful in the State of New York for the carrier to limit its liability by a special contract for an injury resulting from its negligence; that said contract having been for a through consignment from Albany to Cynwyd, a place within this state, said contract must be considered in its entirety, and is incapable of divisibility; that said contract having stipulated for an agreed valuation of the stock shipped, the parties must be governed by its terms throughout the entire route, as said contract must be interpreted and enforced here by the law of the place where it was made, and within which state it is partly performed; and that consequently the plaintiff is not entitled to recover in excess of the valuation agreed upon by the parties at the time of shipment.

"2. That the plaintiff is not entitled to recover in excess of $100."

Neither of these assignments of error presents a federal question in such sense as to give this court jurisdiction to review the judgment of the state court under section 709 of the Revised Statutes of the United States. Nothing is better settled in federal jurisprudence than that the jurisdiction of this court in such cases depends upon the assertion of a right, title, privilege or immunity under the federal Constitution or laws set up and denied in the state courts. Beals v. Cone, 188 U. S. 184.

The first error assigned in the Common Pleas Court raised the question as to the law of the contract. It does not assert that any federal right was invaded or denied. It seems to have been conceded at the trial that the law of the State of New York where the contract was made permitted the making of a contract limiting the liability of the carrier to the agreed valuation in consideration of the lower freight rate for carriage, the shipper having the opportunity to have the larger liability for the value of the goods if the higher rate of freight for carriage was paid. This rule also prevails in the courts of the United States, Hart v. Railroad, 112 U. S. 331, wherein it was held that a contract fairly made and signed by the shipper, agreeing on a valuation of the property carried, with a rate of freight based on such valuation, on the condition that the carrier assume liability only to the extent of such agreed valuation, in case of loss by the negligence of the carrier, will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier is responsible and the freight received, and of protecting the carrier against extravagant valuations. But this is not a question of federal law wherein the decision of the highest federal tribunal is of conclusive authority. In Grogan v. Adams Express Co., 114 Pa. St. 523, the Supreme Court of Pennsylvania expressly declined to follow the rule laid down in Hart v. Railroad, adhering to its own declared doctrine denying the right of a common carrier to thus limit its liability for injuries resulting from negligence. The cases are numerous and conflicting, different rules prevailing in different states. The federal courts in cases of which they have jurisdiction will doubtless continue to follow the rule of the Hart case, but the highest court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the federal Supreme Court where some right, title, immunity or privilege, the creation of the federal power, has been asserted and denied. Bethell v. Demaret, 10 Wall. 537; Delmas v. Ins. Co., 14 Wall. 661; Ins. Co. v. Hendren, 92 U. S. 286; United States v. Thompson, 93 U. S. 587.

In the Supreme Court of Pennsylvania a further assignment of error was made as follows:

"III. The learned court below erred in entering judgment in conflict with the act of Congress of February 4, 1887, entitled 'An act to regulate commerce.' * * *"

Upon the authority of Missouri, Kansas &c. R. R. Co. v. Elliott, 184 U. S. 530, it may be admitted that the question of the decision of the state court being in contravention of the legislation of Congress to regulate interstate commerce, was sufficiently made, and the adverse decision to the party claiming the benefit of that act, gives rise to the right of review here. In refusing to limit the recovery to the valuation agreed upon, did the state court deny to the company a right or privilege secured by the interstate commerce law? It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon we fail to find any such provision therein. [Here the opinion enumerates the several regulations contained in the act of Congress.]

We look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and, until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?

It is well settled that the state may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic. * * *

The case of Chicago, Milwaukee &c. Ry. Co. v. Solan, 169 U. S. 133, is, in our opinion, virtually decisive of the question made upon this branch of the case. In that case cattle were loaded at Rock Valley, Iowa, to be shipped to Chicago. The contract, as here, was for interstate transportation. An injury happened to the drover in charge of the cattle in Iowa, due to the negligence of the transporting company. The shipper had signed a contract providing: "That the company shall in no event be liable to the person in charge of said stock for any injury to his person in any amount exceeding the sum of $500.00." The company averred and offered to prove that, in view of this limited liability, it had agreed to transport the cattle at a reduced rate. The statute of Iowa provided: "No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into." Iowa Code of 1873, sec. 1308. The trial court charged that the limitation contained in the contract was void, and a verdict of $1000.00 damages was returned. A judgment on the verdict was affirmed in the Supreme Court of Iowa. In delivering the opinion of this court, Mr. Justice Gray said (pp. 137, 138):

"A carrier exercising his calling within a particular state although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits. * * * The statute now in question, so far as it concerns liability for injuries happening within the State of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty, resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods."

It is true that this language was used of a statute of Iowa enacting a rule of obligation for common carriers in that state. But the principle recognized is that in the absence of Congressional legislation upon the subject, a state may require a common carrier, although in the execution of a contract for interstate carriage, to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties.

We can see no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the state courts. The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding. This requirement in the case just cited is held not to be an unlawful attempt to regulate interstate commerce in the absence of Congressional action providing a different measure of liability when contracts, such as the one now before us, are made in relation to interstate carriage. Its pertinence to the case under consideration renders further discussion unnecessary.

The judgment of the Supreme Court of Pennsylvania is

Affirmed.[1]

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[1] "The original Interstate Commerce Act of February 4, 1887, 24 Stat. 379, c. 104, was extensively amended by the act of June 29, 1906, 34 Stat. 584, c. 3591. We may pass by many of the changes and amendments made by the latter act as not decisive, and come at once to the far more important amendment made in § 20, an amendment bearing directly upon the carrier's liability or obligation under interstate contracts of shipment, and generally referred to as the Carmack amendment. * * *

"Prior to that amendment the rule of carrier's liability, for an interstate shipment of *property*, as enforced in both federal and state courts, was either that of the general common law as declared by this court and enforced in the federal courts throughout the United States, Hart v. Pennsylvania Railroad, 112 U. S. 331; or that determined by the supposed public policy of a particular state, Pennsylvania Railroad v. Hughes, 191 U. S. 477; or that prescribed by statute law of a particular state, Chicago &c. Railroad v. Solan, 169 U. S. 133.

"Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject. * * *

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational

KANSAS CITY SOUTHERN RY. CO. v. VAN ZANT.

1923. Supreme Court of the United States. 260 U. S. 459.

Certiorari to the Supreme Court of Missouri.

[This was an action brought in a Missouri court to recover damages for personal injury received by the plaintiff while riding on a free pass on the defendant's train in Missouri in course of an interstate journey which began in Kansas. The pass was lawfully issued under the statute quoted in the opinion. There was a stipulation on the pass that the person accepting and using it assumed all risk of accident and damage to person.]

MR. JUSTICE MCKENNA delivered the opinion of the court. * * *

The trial court took and expressed the view that the condition upon the pass was void under the laws and public policy of both states, and ruled that the condition upon it constituted no defense to the action and excluded it from the case. Declarations of law recognizing the relevancy and controlling effect of the condition were refused.

The court thereupon found for respondent (plaintiff) and fixed her damages at $8,000—that amount having been stipulated as representing her injury. Judgment was entered for that amount, and was affirmed by the Supreme Court of the state.

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doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it." Adams Express Co. v. Croninger (1913) 226 U. S. 491, 503, 57 L. ed. 314, 44 L. R. A. (N. S.) 257.

"Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and common law principles accepted and enforced by the federal courts." Southern Express Co. v. Byers (1916) 240 U. S. 612, 60 L. ed. 825, L. R. A. 1917A, 197. See also Chicago & N. W. R. Co. v. Whitnack Produce Co. (1922) 258 U. S. 369, 66 L. ed. 665; St. Louis, I. M. & S. R. Co. v. Starbird (1917) 243 U. S. 592, 61 L. ed. 917.

"The question as to the responsibility under the bill of lading is none the less a federal one because it must be resolved by the application of general principles of the common law." Hughes, J., for the court, in Southern R. Co. v. Prescott (1916) 240 U. S. 632, 60 L. ed. 836.

The principle of Pennsylvania R. Co. v. Hughes is still applicable to interstate carriers not included in the Interstate Commerce Act,—for examples, interstate city street cars, motor-busses, and carriers wholly by water, that is, those who do not operate in connection with railroads under a common control, management or arrangement for continuous carriage.—Ed.

INTERSTATE TELEGRAPH.—That Congress by the Act of June 18, 1910, c. 309, § 7, 36 Stat. 539, 544, amending the Interstate Commerce Act, U. S. C. A. Title 49, § 1 (5), has completely occupied the field of liability for negligence of telegraph companies in sending interstate messages and the prevention of discrimination therein, to the exclusion of regulation by state statutory or common law, see Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co. (1919) 251 U. S. 27, 64 L. ed. 118; Western Union Telegraph Co. v. Esteve Bros. & Co. (1921) 256 U. S. 566, 65 L. ed. 1094; Western Union Telegraph Co. v. Czizek (1924) 264 U. S. 281, 68 L. ed. 682; Western Union Telegraph Co. v. Priester (1928) 276 U. S. 252, 72 L. ed. 555; Western Union Telegraph Co. v. Speight, ante, p. 1229, holding that where federal law governs exclusively there is no liability when negligence causes mental suffering only, regardless of the law of the state to the contrary.

The Supreme Court discussed at some length the Hepburn Act, the extent of its regulation, and what it permitted to state powers or excluded from them, and said, adopting the language of a Supreme Court Commissioner of the state:

"Our conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability, and that therefore these matters remain the subject of regulation by the several states."

The comment concedes the supremacy of federal control, and leaves only the inquiry: Has control been exerted in the Hepburn Act?

The act was passed June 29, 1906, and was an amendment to the Interstate Commerce Act of 1887. It was, as the act it amended was, a regulation of carriers in interstate commerce, and it provided that no common carrier subject to its provisions "shall, after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families. * * *" And a carrier violating the act is subject to a penalty, and any person not of those excepted, who uses the pass, is also subject to a penalty.

The provision for passes, with its sanction in penalties, is a regulation of interstate commerce, to the completion of which the determination of the effect of the passes is necessary. We think, therefore, free passes in their entirety are taken charge of, not only their permission and use, but the limitations and conditions upon their use. Or to put it another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of responsibility the railroad incurs by their issue, and the extent of the right the person to whom issued acquires, are taken charge of. And that responsibility and those rights, this court has decided, the railroad company can control by conditions in the passes. Antecedently to the passage of the Hepburn Act, we decided that a passenger who accepts a free pass may exempt a carrier from responsibility for negligence, and no public policy is violated thereby. Northern Pacific Railway Co. v. Adams, 192 U. S. 440; Boering v. Chesapeake Beach Railway Co., 193 U. S. 442.

Those cases were considered and applied as giving validity to the stipulations of passes issued under the act in Charleston & Western Carolina Railway Co. v. Thompson, 234 U. S. 576, according thereby freedom of transportation to the possessor of a pass, and giving assurance to the railroad company that its gratuity will not be given the consequences of compensated right and its incident obligations, and be a means of exacting from the company indefinite damages. In this case the prayer was for $25,000—the recovery was for $8,000. Circumstances might have made it the larger sum—and this, it is the contention and decision, is the determination of state laws which could neither permit nor forbid the gift. We cannot assent. The pass proceeded from the federal act; it is controlled necessarily in its incidents and consequences by the federal act to the exclusion of state laws and state policies, and such is the effect of the cited cases.

Judgment reversed.

CHICAGO, R. I. & P. R. CO. v. MAUCHER.

1919. Supreme Court of the United States. 248 U. S. 359.

Mr. Justice Brandeis delivered the opinion of the court.

Barnum & Bailey, who owned rolling stock adapted to carrying their circus equipment and personnel, made, in 1913, a special contract with the Chicago, Rock Island & Pacific Railway Company concerning transportation on its lines. The railway agreed for a sum fixed, to give the right to use its tracks and locomotives fully manned and supplied, to haul the circus trains. Barnum & Bailey agreed, among other things, that the railway was not acting therein as a common carrier; that it should not be liable for any injury, though arising from negligence, either to their own person or property or to that of any of their employees; and that they would indemnify ~~the railway~~ against any such injury.

While the circus train was being moved in Nebraska, from Lincoln to Atlantic, Iowa, it was crashed into by one of the railway's regular passenger trains; and Maucher, an employee of the circus, was injured. He had, by his contract of employment, agreed to release all railroad companies from any claim for injuries suffered while travelling with the circus on their lines; but he brought, in a state court of Nebraska, an action against the railway for damages, alleging that he had been injured by its negligence. The railway defended on the ground that its contract with Barnum & Bailey, and thus with the plaintiff, operated to release it from all liability; that since the contract related to a movement in interstate commerce, its validity was to be determined by the federal law; and that by the federal law the contracts were valid, although undertaking to release the railway from liability; since it was not acting as common carrier. Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Brothers Construction Co., 228 U. S. 177. The trial court held that the liability was to be determined by the law of Nebraska; and entered judgment for plaintiff which was affirmed by the Supreme Court of the State. 100 Nebraska 237. The case came here on writ of error under § 237 of the Judicial Code.

The railway admits that prior to the enactment of the Carmack Amendment (Act of June 29, 1906, c. 3591, § 7, 34 Stat. 584, 595) Congress had not dealt with the right of carriers to limit by contract their liability for injuries occurring in interstate transportation, and that consequently the states were free to establish their own laws and policies and apply them to such contracts. Pennsylvania R. R. Co. v. Hughes, 191 U. S. 477. But it contends that this power of the states was superseded by the Carmack Amendment, since that amendment dealt with the power of carriers to contract in respect to such liability; Adams Express Co. v. Croninger, 226 U. S. 491; Boston & Maine Railroad v. Hooker, 233 U. S. 97; that it was the intention of Congress to deal with the whole subject; and that the rights of plaintiff in respect to personal injuries is governed by the federal law. But the Carmack Amendment deals only with the shipment of property. Its language is so clear as to leave no ground for the contention that Congress intended to deal with the transportation of persons. Furthermore plaintiff was not even a passenger on the railway. His claim rests not upon a contract of carriage, but upon the general right of a human being not to be injured by the negligence of another. Compare Southern Pacific Co. v. Schuyler, 227 U. S. 601, 613. The case presents no substantial federal question. The writ of error is

Dismissed.

SOUTHERN RAILWAY COMPANY v. RAILROAD COMMISSION OF INDIANA.

1915. Supreme Court of the United States. 236 U. S. 439.

Mr. Justice Lamar delivered the opinion of the court.

The Indiana statute requires railway companies to place secure grab-irons and hand-holds on the sides or ends of every railroad car, under a penalty of $100 fine to be recovered in a civil action.

In March, 1910, the Railroad Commission of the state brought such a suit against the Southern Railway Company, alleging that the company on February 24, 1910, had transported from Boonville, Indiana, to Milltown, Indiana, a car which did not have the required equipment. The defendant filed an answer in which it denied liability under the state law inasmuch as on February 24, 1910, the Federal Safety Appliance Act imposed penalties for failing to equip cars with hand-holds and also designated the court in which they might be recovered. The commission's demurrer to the answer was sustained. The defendant refusing to plead further, judgment was entered against the company. That judgment was affirmed by the state court and the case was brought here by writ of error.

The car alleged to have been without the required equipment, though transporting freight between points wholly within the State of Indiana, was moving on a railroad engaged in interstate commerce and the company was, therefore, subject to the provisions and penalties of the Safety Appliance Act. 27 Stat. 531, § 4. Southern Railway v. United States, 222 U. S. 20.

The defendant in error insists, however, that the railroad company was also liable for the penalty imposed by the Indiana statute. In support of this position numerous cases are cited which, like Cross v. North Carolina, 132 U. S. 131, hold that the same act may constitute a criminal offense against two sovereignties, and that punishment by one does not prevent punishment by the others. That doctrine is thoroughly established. But, upon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction. This concurrent jurisdiction may be either because the nature of the act is such that at the same time it produces effects respectively within the sphere of state and federal regulation and thus violates the laws of both; or, where there is this double effect in a matter of which one can exercise control but an authoritative declaration that the paramount jurisdiction of one shall not exclude that of the other. Compare, R. S., § 711; 37 Stat. 670.

But the principle that the offender may, for one act, be prosecuted in two jurisdictions has no application where one of the governments has exclusive jurisdiction of the subject-matter and therefore the exclusive power to punish. Such is the case here where Congress, in the exercise of its power to regulate interstate commerce, has legislated as to the appliances with which certain instrumentalities of that commerce must be furnished in order to secure the safety of employees. Until Congress entered that field the states could legislate as to equipment in such manner as to incidentally affect without burdening interstate commerce. But Congress could pass the Safety Appliance Act only because of the fact that the equipment of cars moving on interstate roads was a regulation of interstate commerce. Under the Constitution the nature of that power is such that when exercised it is exclusive, and ipso facto, supersedes existing state legislation on the same subject. Congress of course could have "circumscribed its regulations" so as to occupy a limited field. Savage v. Jones, 225 U. S. 501, 533; Atlantic Line v. Georgia, 234 U. S. 280, 293. But so far as it did legislate, the exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employees. The states thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties. For, as said in Prigg v. Commonwealth of Pennsylvania, 16 Pet. 539, 617: "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it * * * the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed."

Without, therefore, discussing the many cases sustaining the right of the states to legislate on subjects which, while not burdening, may yet incidentally affect interstate commerce, it is sufficient here to say that Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject. The principle is too well established to require argument. Its application may be seen in rulings in the closely analogous cases relating to state penalties for failing to furnish cars and to state penalties for retaining employés at work on cars beyond the time allowed by the Hours-of-Service Law.

In St. L., Iron Mt. & S. Ry. v. Hampton, 227 U. S. 267, it was held that the Arkansas statute imposing a penalty for failing to deliver cars had been superseded by the provisions of the Hepburn Act, although the provisions of the two statutes were not identical. In Northern Pacific Ry. v. Washington, 222 U. S. 371, it was held that congressional legislation as to hours-of-service so completely occupied the field as to prevent state legislation on that subject. In Erie R. R. v. New York, 233 U. S. 671, a like ruling was made in a case where the New York law punished a railroad company for allowing an employee to work more than eight hours when the federal statute punished the company for employing him for more than nine hours—even though it was argued that the state legislation was not in conflict with the federal act, but rather in aid of it. The same contention is made here inasmuch as the Indiana law requires hand-holds on sides *or* ends of cars, while the federal statutes requires hand-holds to be placed both on the sides *and* ends of cars.

The test, however, is not whether the state legislation is in conflict with the details of the federal law or supplements it, but whether the state had any jurisdiction of a subject over which Congress had exerted its exclusive control. The Safety Appliance Act having superseded the Indiana statute the judgment imposing the penalty must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.[2]

SHANKS v. DELAWARE, LACKAWANNA & WESTERN R. CO.

1916. Supreme Court of the United States. 239 U. S. 556.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

Shanks sued the railroad company for damages resulting from personal injuries suffered through its negligence while he was in its employ, and rested his right to recover upon the Employers' Liability Act of Congress. His injuries were received in New Jersey, and his action was brought in the Supreme Court of New York. He prevailed at the trial, but in the Appellate Division the judgment was reversed, with a direction that his complaint be dismissed without prejudice to any remedy he might have under the law of New Jersey, and this was affirmed by the Court of Appeals, the ground of the appellate rulings being that at the time of the injury he was not employed in interstate commerce. * * *

In so far as its words are material here, the Employers' Liability Act declares that "every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce"[3] if the injury results in

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[2] "When the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the states no more can supplement its requirements than they can annul them. * * * The question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the state must be answered by a judgment upon the particular case." Holmes, J., for the court in Pennsylvania R. Co. v. Public Service Comm. (1919) 250 U. S. 566, 569, 63 L. ed. 1142. For examples of such judgments see Missouri Pacific R. Co. v. Porter (1927) 273 U. S. 341, 71 L. ed. 672, and the cases cited at the end of the opinion, and Oregon-Washington R. & Nav. Co. v. Washington (1926) 270 U. S. 87, 70 L. ed. 482.

[3] U. S. C. A., Title 45, §§ 51-59. For a brief summary of this act and the grounds upon which the first statute on the subject was held invalid in the state areas see the discussion in El Paso & N. R. Co. v. Gutierrez, ante, p. 226, and the notes thereto.

The only employers within the act are common carriers by railroad engaged in interstate or foreign commerce, including interurban electric railways, Washington Ry. &c. Co. v. Scala (1917) 244 U. S. 630, 61 L. ed. 1360; not including express companies, Wells Fargo & Co. v. Taylor (1920) 254 U. S. 175, 186-188, 65 L. ed. 205, nor ordinary street railways, Stark v. Wilson (1923) 114 Kans. 459, 219 Pac. 507; Watts v. Ohio Valley Electric Co. (1916) 78 W. Va. 144, 88 S. E. 659; Peters v. Kansas City Rys. Co. (1920) 204 Mo. App. 197, 224 S. W. 25.

In In re Second Employers' Liability Cases (1912) 223 U. S. 1, 47-48, 56 L. ed. 327, 38 L. R. A. (N. S.) 44, sustaining the present act as an exercise by Congress of its power over commerce, Van Devanter, J., for the court said: "The duties of whole or in part from the negligence of the carrier or of any of its officers, agents, or employees. Thus it is essential to a right of recovery under the act not only that the carrier be engaged in interstate commerce at the time of the injury, but also that the person suffering the injury be then employed by the carrier in such commerce. And so it results where the carrier is also engaged in intrastate commerce, or in what is not commerce at all, that one who, while employed therein by the carrier, suffers injury through its negligence, or that of some of its officers, agents, or employees, must look for redress to the laws of the state wherein the injury occurs, save where it results from the violation of some federal statute, such as the Safety Appliance Acts.

The facts in the present case are these: The railroad company was engaged in both interstate and intrastate transportation, and was conducting an extensive machine shop for repairing parts of locomotives used in such transportation. While employed in this shop, Shanks was injured through the negligence of the company. Usually his work consisted in repairing certain parts of locomotives, but on the day of the injury he was engaged solely in taking down and putting into a new location an overhead countershaft—a heavy shop fixture—through which power was communicated to some of the machinery used in the repair work.

The question for decision is, Was Shanks at the time of the injury employed in interstate commerce within the meaning of the

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common carriers in respect of the safety of their employees, while both are engaged in commerce among the states, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power. [Citing cases.]

"As is well said in the brief prepared by the late Solicitor General: 'Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative direction, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act.'"

This statute expressly gives concurrent jurisdiction to state and federal courts in trial of actions to which it applies. U. S. C. A. Title 45, § 56. Must a state permit its courts to try such actions? See Mondou v. New York, N. H. & H. R. Co. (1912), 223 U. S. 1, 56 L. ed. 327, 38 L. R. A. (N. S.) 44; Chicago, M. & St. P. R. Co. v. McGinley (1921) 175 Wis. 565, 185 N. W. 218; Walton v. Pryor (1916) 276 Ill. 563, 115 N. E. 2, L. R. A. 1918E, 914.

Employers' Liability Act? What his employment was on other occasions is immaterial, for, as before indicated, the act refers to the service being rendered when the injury was suffered.

Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see Swift & Co. v. United States, 196 U. S. 375, 398), and that the true test of employment in such commerce in the sense intended is, Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?

Applying this test, we have held that the requisite employment in interstate commerce exists where a car repairer is replacing a drawbar in a car then in use in such commerce, Walsh v. New York, N. H. & H. R. Co., 223 U. S. 1; where a fireman is walking ahead of and piloting through several switches a locomotive which is to be attached to an interstate train and to assist in moving the same up a grade, Norfolk & Western Ry. v. Earnest, 229 U. S. 114; where a workman about to repair a bridge regularly used in interstate transportation is carrying from a tool car to the bridge a sack of bolts needed in his work, Pederson v. Del., Lack. & West. R. R., 229 U. S. 146; where a clerk is on his way through a railroad yard to meet an inbound interstate freight train and to mark the cars so the switching crew will know what to do with them when breaking up the train, St. Louis, San Francisco & Texas Ry. v. Seale, 229 U. S. 156; where a fireman, having prepared his engine for a trip in interstate commerce, and being about to start on his run, is walking across adjacent tracks on an errand consistent with his duties, North Carolina R. R. v. Zachary, 232 U. S. 248; and where a brakeman on a train carrying several cars of interstate and two of intrastate freight is assisting in securely placing the latter on a sidetrack at an intermediate station to the end that they may not run back on the main track and that the train may proceed on its journey with the interstate freight, New York Central R. R. v. Carr, 238 U. S. 260.

Without departing from this test, we also have held that the requisite employment in interstate commerce does not exist where a member of a switching crew, whose general work extends to both interstate and intrastate traffic, is engaged in hauling a train or drag of cars, all loaded with intrastate freight, from one part of a city to another, Ill. Cent. R. R. v. Behrens, 233 U. S. 473, and where an employee in a colliery operated by a railroad company is mining coal intended to be used in the company's locomotives moving in interstate commerce, Del., Lack. & West. R. R. v. Yurkonis, 238 U. S. 439. In neither instance could the service indicated be said to be interstate transportation or so closely related to it as to be practically a part of it.

Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the Yurkonis Case, was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the Employers' Liability Act.

Judgment affirmed.

RAYMOND v. CHICAGO, MILWAUKEE & ST. PAUL R. CO.

1917. Supreme Court of the United States. 243 U. S. 43.

Mr. Chief Justice White delivered the opinion of the court.

Raymond, the plaintiff in error, sued the Railway Company, a foreign corporation doing business in Washington, to recover damages resulting from injuries sustained by him while in its employ. The petition alleged that the defendant operated an interstate commerce railroad between Chicago and Seattle and that for the purpose of shortening its main line and making more efficient and expeditious its freight and passenger service, was engaged in cutting a tunnel through the mountain between Horrick's Spur and Rockdale in Washington. It was averred that plaintiff was employed by the defendant in the tunnel as a laborer and that while he was at work his pick struck a charge of dynamite which through the defendant's negligence had not been removed and that from the explosion which followed he has sustained serious injuries.

The defendant's answer contained a general denial and alleged that at the time and place of the accident the railroad and Raymond were not engaged in interstate commerce, since the tunnel was only partially bored and hence not in use as an instrumentality of interstate commerce. It was further alleged that the court was without jurisdiction to hear the cause because of the provisions of the Washington Workmen's Compensation Act (Chapter 74, Laws of 1911) with whose requirements the defendant had fully complied.

The reply of the plaintiff admitted the facts alleged in the answer but denied that they constituted defenses to the action.

The trial court entered a judgment for the defendant on the pleadings, and this writ of error is prosecuted to a judgment of the court below affirming such action. 233 Fed. Rep. 239.

Considering the suit as based upon the Federal Employers' Liability Act, it is certain under recent decisions of this court, whatever doubt may have existed in the minds of some at the time the judgment below was rendered, that under the facts as alleged Raymond and the Railway Company were not engaged in interstate commerce at the time the injuries were suffered, and consequently no cause of action was alleged under the act. Delaware, Lackawanna & Western R. R. Co. v. Yurkonis, 238 U. S. 439; Chicago, Burlington & Quincy R. R. Co. v. Harrington, 241 U. S. 177; Minneapolis & St. Louis R. R. Co. v. Nash, 242 U. S. 619.

It is also certain that if the petition be treated as alleging a cause of action under the common law, the court below was without authority to afford relief, as that result could only be attained under the local law in accordance with the provisions of the Washington Workmen's Compensation Act, which has this day been decided to be not repugnant to the Constitution of the United States. Mountain Timber Company v. Washington, 243 U. S. 219. And this result is controlling even although it be conceded that the railroad company was in a general sense engaged in interstate commerce, since it has been also this day decided that that fact does not prevent the operation of a state workmen's compensation act. New York Central R. R. Co. v. White, 243 U. S. 188.

Affirmed.

PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY v. SMITH.

1919. Supreme Court of the United States. 250 U. S. 101.

MR. JUSTICE PITNEY delivered the opinion of the court.

Respondent brought his action in a state court of Maryland under the provisions of the Federal Employers' Liability Act of April 22, 1908, as amended April 5, 1910 (c. 149, 35 Stat. 65; c. 143, 36 Stat. 291), to recover damages for personal injuries sustained by him upon one of petitioner's lines of railroad in the State of Maryland over which petitioner was engaged in transporting interstate as well as intrastate commerce.

Plaintiff was employed by defendant in connection with a gang of bridge carpenters, who were employed by defendant in the repair of the bridges and bridge abutments upon said line of railway. The gang, including plaintiff, worked over the entire line, and were moved from point to point as the repair work required in what was called a "camp car," furnished and moved by defendant, in which they ate, slept, and lived. Plaintiff's principal duties were to take care of this car, keep it clean, attend to the beds, and prepare and cook the meals for himself and the other members of the gang. On December 23, 1915, the bridge carpenters were engaged in repairing a bridge abutment on defendant's line near Easton, Maryland, and the camp car was on defendant's side-track at Easton; and while plaintiff was in the car, engaged in cooking a meal for the bridge carpenters and himself, the engineer of one of defendant's trains, without warning, ran the engine upon the side-track and against a car to which the camp car was coupled with such force that plaintiff received injuries, to recover for which his action is brought.

A judgment in plaintiff's favor was affirmed by the Maryland Court of Appeals (132 Maryland, 345), and the case comes here on a writ of certiorari.

The only question we have to consider is whether plaintiff at the time he was injured was engaged in interstate commerce within the meaning of the statute. Petitioner, citing Illinois Central R. R. Co. v. Behrens, 233 U. S. 473, 478, and Erie R. R. Co. v. Welsh, 242 U. S. 303, 306, as conclusive to the effect that the true test is the nature of the work being done by the employee at the time of the injury, and that what he had been doing before and expected to do afterwards is of no consequence, argues that since plaintiff at the time of the injury and for some weeks prior thereto was and had been working as mess cook and camp cleaner or attendant for a gang of bridge carpenters who were quartered "for their own convenience" in a camp car belonging to petitioner, which was not being moved in interstate commerce, but was located and standing on a switch track in the neighborhood of the bridge upon which the carpenters then were and for some weeks prior thereto had been and for some time afterwards were working; and since plaintiff at the moment of the injury was engaged in cooking food which was the property of himself and the carpenters, he was not at the time engaged in interstate commerce.

As thus stated, the relation of plaintiff's work to the interstate commerce of his employer would seem to be rather remote. But upon a closer examination of the facts the contrary will appear. Taking it to be settled by the decision of this court in Pedersen v. Delaware, Lackawanna & Western R. R. Co., 229 U. S. 146, 152, that the repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it, it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it. The next question is, what was plaintiff's relation to the work of the bridge carpenters? It may be freely conceded that if he had been acting as cook and camp cleaner or attendant merely for the personal convenience of the bridge carpenters, and without regard to the conduct of their work, he could not properly have been deemed to be in any sense a participant in their work. But the fact was otherwise. He was employed in a camp car which belonged to the railroad company, and was moved about from place to place along its line according to the exigencies of the work of the bridge carpenters, no doubt with the object and certainty with the necessary effect of forwarding their work, by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had. The circumstance that the risks of personal injury to which plaintiff was subjected were similar to those that attended the work of train employees generally and of the bridge workers themselves when off duty, while not without significance, is of little moment. The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act.

Judgment affirmed.[4]

Section 9.—Maritime Authority in the United States.

THE BELFAST.

1868. Supréme Court of the United States. 7 Wall. 624.

Error to the Supreme Court of Alabama.

The case was thus: The Constitution ordains that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." And the ninth Section of the Judiciary Act of 1789, provides that the District Courts of the United States:

"Shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * *saving to suitors*

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[4] Numerous cases applying the federal Employers' Liability Act are collected in 2 Roberts, Federal Liabilities of Carriers (1929), pp. 1341-1514.

in all cases the right of common law remedy, where the common law is competent to give it."

In this state of federal law, fundamental and statutory, the State of Alabama, by enactments, entitled "PROCEEDINGS IN ADMIRALTY," provided that there should be a lien on all vessels for work and materials done or furnished, and for all debts contracted by the master, owner or consignee, and for the wages of the officers, crew, &c., in preference to other debts due from the owners thereof. By the terms of the code, the lien is to be asserted by filing a complaint in any county in which the vessel may be found, stating the amount and nature of the claim, and praying a seizure of the vessel. Thereupon the clerk is to issue a writ commanding the sheriff to seize the vessel, her tackle, apparel and furniture. At any time before judgment, the master, owner or other persons may release the vessel by entering into bond in double the amount of the claim, stipulating to pay the amount of the judgment. Any number of persons may unite in the same complaint, and if more than one complaint be filed the court must consolidate them, and render but one judgment against the vessel, which is to be considered several as to each complainant. If a stipulation be entered into, the stipulators are defendants. If none, the court must render a judgment ex parte condemning the boat, tackle, &c., to be sold in satisfaction of the claim; and the affidavit of complainant is made presumptive evidence of the justice of the demand.

Finally, the code provides that, "unless where otherwise provided in this chapter, the proceedings to enforce the lien shall be the same as in the *courts of admiralty* of the United States, *but either party may have any question of fact decided by a jury, upon an issue* made up under direction of the court."

By the act of 7th October, 1864, "to amend the *admiralty laws* of the State, "these provisions are extended to the contract of *affreightment.*

Under this statute, Boone & Co. filed their libel, March 30, 1866, in the City Court of Mobile, claiming $5800 for the loss of certain bales of cotton, shipped to them from Vienna, *in the State of Alabama,* to Mobile, *in the same state,* and prayed *"process in admiralty"* for the seizure of the steamboat Belfast.

In the same court a libel was also filed by J. & S. Steers, claiming compensation for other bales, shipped by them from Columbus, *Mississippi,* to Mobile, in *Alabama,* already mentioned. And a libel by Watson & Co. claiming it for cotton shipped by them, from and to the same points.

All the navigation which was the subject of the case, was upon the Tombigbee River, navigable water of the United States.

Under these several libels, the sheriff, by virtue of writs of seizure, took the steamer into possession, and posted his monitions, and the causes, under the statute, were consolidated and heard together.

The answer, applicable to the three cases alike, set forth that the steamer was duly enrolled and licensed, in pursuance of laws of the United States, and that on the 15th January, 1866, she was regularly cleared at Mobile, Alabama, for Columbus, Mississippi, and that on her downward trip the cotton claimed was lost, and therefore, that the City Court had *no jurisdiction.*

A decree was rendered on 28th July, for the three libellants. [From an affirmance by the Supreme Court of Alabama this writ of error was taken.] * * *

MR. JUSTICE CLIFFORD delivered the opinion of the court. * * *

Theory of the respondents is, that the respective libels were libels in rem to enforce a maritime lien in favor of the shippers of the cotton, under contracts of affreightment for the transportation of goods and merchandise from one port to another upon navigable waters, and that the state courts have no jurisdiction to employ such a process to enforce such a lien in any case; that the jurisdiction to enforce a maritime lien by a proceeding in rem is exclusively vested in the federal courts by the Constitution of the United States and the laws of Congress. But the libellants controvert that proposition, and insist that the state courts have concurrent jurisdiction in these cases under that clause in the ninth Section of the Judiciary Act, which saves "to suitors in all cases the right of a common law remedy where the common law is competent to give it." 1 Stat. at Large, 77.

They also contend, if their first proposition is not sustained, that inasmuch as the three cases were heard together, under an agreement that they should be tried upon the same issues, and that the libel filed by W. C. Boon & Company, as stated in the bill of exceptions, was selected as the case to be tried in the court where the suits were commenced, the rights of the parties in the other two cases must abide the decision of this court in that case.

Assuming that to be so, then they contend that the state court had jurisdiction in the first case, because the contract of affreightment was for the transportation of goods and merchandise between ports and places in the same state. Impliedly, the argument admits that the rule is otherwise where the contract is for the transportation of goods and merchandise between ports and places in *different* states; but the proposition is, that where the contract is between citizens of the same state, for the transportation of goods and merchandise from one port to another in the same state, the case is not one within the jurisdiction of the admiralty courts of the United States, unless it becomes necessary, in the course of the voyage, to carry the goods or merchandise into or through some *other* state or foreign dominion. * * *

Principal subjects of admiralty jurisdiction are maritime contracts and maritime torts, including captures jure belli, and seizures on water for municipal and revenue forfeitures.

(1) Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty.

(2) Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts.

Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon locality.[1] Mistakes need not be made if these rules are observed; but contracts to be performed on waters not navigable are not maritime any more than those made to be performed on land. Nor are torts cognizable in the admiralty unless committed on waters within the admiralty and maritime jurisdiction, as defined by law. * * *

Exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction was conferred upon the District Courts by the ninth Section of the Judiciary Act. * * *

Remedies for marine torts, it is conceded, may be sought in the admiralty courts under that provision, although committed within the body of a county,[2] but it is denied that redress can be obtained in the admiralty for the breach of a contract of affreightment in a case where the port of shipment and the port of destination are in the same State. * * *

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[1] "It must be taken to be the settled law of this court that while the civil jurisdiction of the admiralty in matters of tort depends upon locality—whether the act was committed upon navigable waters—in matter of contract it depends upon the subject-matter—the nature and character of the contract; and that the English rule, which conceded jurisdiction, with a few exceptions, only to contracts made and to be executed upon the navigable waters, is inadmissible, the true criterion being the nature of the contract, as to whether it have reference to maritime service or maritime transactions. People's Ferry Co. v. Beers, 20 How. 393, 401; Philadelphia, Wilmington & Baltimore R. R. Co. v. Philadelphia & Steam Towboat Co., 23 How. 209, 215; Insurance Co. v. Dunham, 11 Wall. 1, 26; The Eclipse, 135 U. S. 599, 608." Pitney, J., for the court in North Pacific S. S. Co. v. Hall Brothers M. R. & S. Co. (1919) 249 U. S. 119, 125, 63 L. ed. 510.

The locality test as to maritime torts is illustrated by the decisions that the following are not maritime torts: (1) A stevedore standing over navigable water on a platform projecting from and fastened only to a wharf which rested upon land was hit by a sling swinging from a ship that he was helping to unload and fell into the water where later he was found dead, Smith & Son v. Taylor (1928) 276 U. S. 179, 72 L. ed. 520; (2) injury to a wharf by fire spreading from a ship, The Plymouth (1865) 3 Wall. 20, 18 L. ed. 125; (3) injury to a grain elevator by a ship ramming it, Johnson v. Chicago &c. Elevator Co. (1886) 119 U. S. 388, 30 L. ed. 447; injury to a bridge pier by a ship colliding with it, Martin v. West (1911) 222 U. S. 191, 56 L. ed. 159, 36 L. R. A. (N. S.) 592. See The Blackheath (1904) 195 U. S. 361, 49 L. ed. 236, and note in 75 U. of P. L. Rev 655-660, for an exception to the exclusiveness of the locality test.

It has been doubted by high authority whether every harm that is a tort at common law is necessarily a maritime tort when it occurs on a ship at sea, thus slander by one passenger of another; or whether assault by an ocean swimmer upon another is a maritime tort. Henry Billings Brown, Admiralty Jurisdiction of Torts (1909) 9 Col. L. Rev. 1, 8; 1 Benedict, Admiralty (1925) § 127.

[2] In the struggle between the common-law courts and the admiralty court, in England, the admiralty court's jurisdiction was excluded: (1) in cases arising with respect to waters not affected by tide, (2) in cases arising with respect to waters which though arms of the sea and affected by the tide were within the body of a county or as was commonly said, waters where a man might discern from shore to shore. In The Thomas Jefferson (1825) 10 Wheat. 428, 6 L. ed. 358, limitation (1) was assumed to be applicable to the admiralty courts of the United States, and it was held that a case involving conduct on or with respect to the Missouri River was not within the admiralty jurisdiction of the federal courts.

Direct proposition of the respondents in the case of The Commerce, 1 Black 578, was, that the case before the court, which was a collision on the Hudson River, was not a case cognizable in the admiralty, because it did not appear that either of the vessels was engaged in foreign commerce, or in commerce among the several states; but the court held that judicial power in all cases of admiralty and maritime jurisdiction was conferred by the Constitution, and that in cases of tort the question of jurisdiction was wholly unaffected by the considerations suggested in that proposition; and we reaffirm the rule there laid down, that locality is the true test of admiralty cognizance in all cases of marine torts; that if it appears, as in cases of collision, depredations upon property, illegal dispossession of ships, or seizures for the violation of the revenue laws, that the wrongful act was committed on navigable waters, within the admiralty and maritime jurisdiction of the United States, then the case is one properly cognizable in the admiralty. 2 Story on the Constitution, § 1669. * * *

In Waring v. Clarke (1846) 5 How. 441, 12 L. ed. 226, the Supreme Court started upon a change of view by rejecting limitation (2).

In the leading case of The Genesee Chief v. Fitzhugh (1851) 12 How. 443, 13 L. ed. 1058, a case arising with respect to the Great Lakes was held to be within the jurisdiction. After referring to the extensive navigation that had sprung up on our inland waters, Taney, C. J., for the court said:

"In England, undoubtedly the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tide water. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide. * * *

"At the time the constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen states the far greater part of the navigable waters are tide waters. And in the states which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide water to the head of navigation. And, indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. * * * "It is evident that a definition that would at this day limit public rivers in this country to tide water rivers, is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States."

See also Jackson v. The Magnolia (1857) 20 How. 296, 15 L. ed. 909, and The Hine v. Trevor (1866) 4 Wall. 555, 18 L. ed. 451, overruling The Thomas Jefferson, and holding that cases arising from conduct on or with respect to rivers as far up as they are navigable is within the jurisdiction if similar conduct on water affected by tide would be. The result is usually expressed by saying that the admiralty jurisdiction extends to all public navigable waters, though it is obvious that the court's jurisdiction extends to *cases* which arise from *some* types of conduct on or with respect to such waters.

The question has been mooted whether a navigable lake wholly within a single state, having no navigable outlet to another state is "within the jurisdiction" in the above sense. Ex parte Boyer (1883) 109 U. S. 629, 632, 27 L. ed. 1056; The

Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants. The Genesee Chief, 12 Howard, 452. * * *

Unable to deny that the admiralty has jurisdiction over marine torts, though the voyage is between ports and places in the same state, the advocates of the more restricted jurisdictions over maritime contracts set up a distinction, and contend that the admiralty jurisdiction over such contracts is limited by the power granted to Congress to regulate commerce. Reference may be made to the case of Maguire v. Card, 21 Howard, 249, as one where the distinction was adopted; but the decisive answer to that case, and the one preceding it in the same volume, will be found in the later cases already referred to, and in the case of The Mary Washington [Fed. Cas. No. 9229] where the opinion was given by the present Chief Justice. All three of the cases, therefore, as well as the case of W. C. Boon & Company as the other two, are cases within the admiralty and maritime jurisdiction of the federal courts.

Suppose that to be so, then, it is contended by the libellants, in the second place, that all three of the original actions were well brought in the state court as a court of concurrent jurisdiction with the District Courts of the United States in admiralty, and that the particular remedy, given by the statute of the state, and adopted in

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Robert W. Parsons (1903) 191 U. S. 17, 28, 48 L. ed. 73. That it should be answered in the negative, see John Barker Waite, Admiralty Jurisdiction and State Waters (1913) 11 Mich. L. Rev. 580.

The expression "navigable waters of the United States" is not used in the Constitution nor in those acts of Congress which confer admiralty jurisdiction on the District Courts. Of course the admiralty jurisdiction extends to other waters—the high seas and also to some extent to causes arising in foreign territorial waters. Panama R. Co. v. Napier Shipping Co. (1897) 166 U. S. 280, 41 L. ed. 1004; The Kongsli (1918) 252 Fed. 267. The expression is found in acts of Congress for the regulation of commerce, as in the statute held valid in The Daniel Ball, ante, p. 1220. The act there involved required steam vessels operating on the "navigable waters of the United States" to have federal licenses, involving federal inspection, under penalty of forfeiture of $500 by the owner, for which the vessel also should be liable and might be proceeded against summarily by libel in the United States District Court. It was held that the Grand River, in Michigan, upon which the Daniel Ball was plying was *within the statute.* The court said:

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water." The Daniel Ball, 10 Wall. 557, 563, 19 L. ed. 999.

these cases, is within the true intent and meaning of the saving clause in the ninth Section of the Judiciary Act.

Wherever a maritime lien arises the injured party may pursue his remedy, whether for a breach of a maritime contract or for a marine tort, by a suit in rem, or by a suit in personam, at his election. Attention will be called to three classes of cases only as examples to illustrate that proposition; but many more might be given to the same effect.

Shippers have a lien by the maritime law upon the vessel employed in the transportation of their goods and merchandise from one port to another, as a security for the fulfillment of the contract of the carrier, that he will safely keep, duly transport, and rightly deliver the goods and merchandise shipped on board, as stipulated in the bill of lading or other contract of shipment.

Owners of vessels damaged by collision, occasioned without fault on their part, and wholly through the fault of those in charge of the colliding vessel, also have a maritime lien on the vessel in fault as a security for such damages as may be awarded to them in the admiralty for the injury thereby caused to their vessel, and they may proceed in rem to enforce their claim for the damages, or they may waive the lien and bring their suit in personam against the master or owners of the vessel.

Material-men, also, who furnish materials or supplies for a vessel in a foreign port, or in a port other than a port of the state where the vessel belongs, have a maritime lien on the vessel as a security for the payment of the price of all such materials and supplies. They have such a lien because, upon the principles of the maritime law, such materials and supplies are presumed to be furnished on the credit of the vessel, and consequently they are entitled to proceed in rem in the admiralty court to enforce the lien, but they are not compelled to do so, as they may waive the lien and bring their suit in personam against the master or owners, as they are also liable as well as the vessel.

None of these principles are controverted, but the libellants contend that the state courts have concurrent jurisdiction to afford the parties the same remedies in all such cases. No warrant for that proposition, however, is found in the ninth Section of the Judiciary Act, nor in any other part of that fundamental regulation of our judicial system. On the contrary, the exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction is, by the very terms of that Section, conferred upon the District Courts of the United States, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." Nothing is said about a concurrent jurisdiction in a state court or in any other court, and it is quite clear that in all cases where the parties are citizens of different states, the injured party may pursue the common law remedy here described and saved, in the Circuit Court[3] of the district as well as in the state courts.

Original cognizance is exclusive in the District Courts, except that the suitor may, if he sees fit, elect to pursue a common law remedy in the state courts or in the Circuit Court, as before explained, in all cases where such a remedy is applicable. Common law remedies are not applicable to enforce a maritime lien by a proceeding in rem, and consequently the original jurisdiction to enforce such a lien by that mode of proceeding is exclusive in the District Courts. The Moses Taylor, 4 Wallace, 411.

State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a state court to enforce such a lien by a suit or proceeding in rem, as practised in the admiralty courts. Observe the language of the saving clause under consideration. It is to suitors, and not to the state courts, nor to the Circuit Courts of the United States. Examined carefully it is evident that Congress intended by that provision to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed, a party under that provision may proceed in rem in the admiralty, or he may bring a suit in personam in the same jurisdiction, or he may elect not to go into admiralty at all, and may resort to his common law remedy in the state courts or in the Circuit Court of the United States, if he can make proper parties to give that court jurisdiction of his case.

Undoubtedly most common law remedies in cases of contract and tort, as given in common law courts, and suits in personam in the admiralty courts, bear a strong resemblance to each other, and it is not, perhaps, inaccurate to regard the two jurisdictions in that behalf as concurrent, but there is no form of action at common law which, when compared with the proceeding in rem in the admiralty, can be regarded as a concurrent remedy.

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[3] At the time the above opinion was written, two "inferior" federal courts sat in each District, one called the Circuit Court, the other the District Court. The latter had jurisdiction in admiralty, crimes, bankruptcy and some special minor types of cases. The Circuit Court, while it had concurrent jurisdiction with the District Court in criminal cases, was the court of general jurisdiction in civil actions, both in law and equity, that is, general in a sense—keeping in mind the limits of the federal judicial power. The Circuit Court also had jurisdiction of appeals from the District Court, including appeals in admiralty cases. What is significant here is that the Circuit Court had no original jurisdiction in admiralty cases.

Now that the Circuit Courts are abolished and all the original jurisdiction of the federal courts (except that of the Supreme Court) is consolidated in the District Courts, a District Court is a many-sided court. It has its law "side," its equity "side," its admiralty "side," etc. The present Circuit Courts of Appeal were established in 1891. The old Circuit Courts were abolished in 1912. For the early organization, see B. R. Curtis, Jurisdiction of the United States Courts, 1st ed. (1880).

Consignees or shippers may proceed in the admiralty in rem against the vessel to enforce their maritime lien, or they may waive that lien and still proceed in the admiralty in personam against the owners of the vessel to recover damages for the non-fulfillment of the contract, or they may elect to bring a common action against the owners to recover damages, as in other cases for the breach of a contract to be executed on land.

Proceedings in a suit at common law on a contract of affreightment are precisely the same as in suits on contracts not regarded as maritime, wholly irrespective of the fact that the injured party might have sought redress in the admiralty. When properly brought, the suit is against the owners of the vessel, and in states where where there are attachment laws the plaintiff may attach any property not exempted from execution, belonging to the defendants.

Liability of the owners of the vessel under the contract being the foundation of the suit, nothing can finally be held under the attachment except the interest of the owners in the vessel, because the vessel is held under the attachment as the property of the defendants, and not as the offending thing, as in the case of a proceeding in rem to enforce a maritime lien. Attachment in such suits may be of the property of nonresidents or of defendants absent from the state, as in suits on contracts not maritime, and the same rules apply in respect to the service of process and notice to the defendants.

Applying these rules to the cases before the court, it is obvious that the jurisdiction exercised by the state court was of the precise character which is exclusive in the District Courts of the United States sitting in admiralty. Authority does not exist in the state courts to hear and determine a suit in rem in admiralty to enforce a maritime lien.

Such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts it is competent for the states, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement.

Contracts for shipbuilding are held not to be maritime contracts, and, of course, they fall within the same category, but in all cases where a maritime lien arises, the original jurisdiction to enforce the same by a proceeding in rem is exclusive in the District Courts of the United States, as provided in the ninth Section of the Judiciary Act.

Respective decrees reversed, and the several causes remanded, with instructions to dismiss the respective libels.

THE LOTTAWANNA.

1874. Supreme Court of the United States. 21 Wall. 558.

Appeal in admiralty from the Circuit Court for the District of Louisiana.

In the year 1819 this court, in The General Smith, 4 Wheaton, 443, decided (as the profession has generally understood), that in respect to repairs or necessaries furnished to a ship in the port or state to which she belongs, no lien is implied unless it is recognized by the municipal law of the state; declaring the rule herein to be different from that where the repairs or necessaries are furnished to a foreign ship; in which case it was admitted that the maritime law of the United States gives the party a lien on the ship itself for his security.

In view of this decision most or all of the states enacted laws giving a lien for the protection of material-men in such cases.

In the year 1833, in the case of The Planter (Peyroux v. Howard), 7 Peters, 324, the converse of the rule in The General Smith was laid down, and process against a vessel in her home port was used and supported, the state law giving a lien in the case. * * * [In 1844 the Supreme Court promulgated a rule of practice in admiralty based on the decisions in The General Smith and The Planter. In 1859 the court adopted a substitute rule excluding proceedings in rem for supplies, repairs or other necessaries in case of domestic ships.]

In this state of things, William Doyle and another filed a libel in the District Court of the United States for the District of Louisiana, above mentioned, on the 10th day of June, 1871, against the steamer Lottawana, of New Orleans, for mariners' wages. The vessel being seized, libels of intervention were afterwards filed by various parties, some for mariners' wages, some for salvage services, some for supplies, materials, and repairs furnished in the port of New Orleans, for the use of the steamer. On the 20th day of June, 1871, Catharine Rodd, administratrix, together with several commercial firms of the city of New Orleans, filed a libel of intervention by which they set up a mortgage on the vessel, given to them by the owner, on the 20th of May, 1871, and duly recorded in the custom-house on the 22d of May, to secure the payment of various promissory notes of the same date, given to said libellants by the said owner, and amounting to more than $14,000.

The steamer, up to the 16th of May, had been engaged in the river trade on the Mississippi and Red Rivers, between New Orleans and Jefferson, in Texas, and was laid up for repairs at New Orleans on that day. Most of the claims for wages and supplies arose before the date of the mortgage, although some arose afterwards. The steamer was sold for $7500, and, after deducting expenses of sale, costs, salvage and wages of mariners (which were admitted to have preference), there remained a surplus of $4644.42, which the District Court, by a decree rendered February 26th, 1872, and signed on the 1st of March following, decreed to be paid pro rata to the mortgage creditors, to the exclusion of the claims for repairs and supplies. [While this case was pending on appeal in the Circuit Court, the Supreme Court again modified the rule, restoring in effect the rule of 1844.]

In this state of things, the above mentioned decree of the District Court was reversed by the Circuit Court, on appeal, and the surplus was decreed to be paid pro rata to the claimants for repairs and supplies, to the exclusion of the mortgage creditors;[4] the amount not being sufficient to pay either class of creditors in full. From the latter decree an appeal was taken to this court.

The principal question presented by the appeal, therefore, was whether the furnishing to a vessel on her credit, at her home port, needful repairs and supplies created a maritime lien. If it did, such lien would take precedence of a mortgage given for the payment of money generally, and the decree must be affirmed. If it did not, the decree was to be reversed, unless the appellees could sustain themselves on some other ground. [The claimants for supplies and repairs claimed a maritime lien under "the general" maritime law, for though the Code of Louisiana gave a lien for supplies it declared it to be good against third persons only if recorded, which the claims in this case were not.]

MR. JUSTICE BRADLEY delivered the opinion of the court.

The ground on which we are asked to overrule the judgment in the case of The General Smith is, that by the general maritime law, those who furnish necessary materials, repairs, and supplies to a vessel, upon her credit, have a lien on such a vessel therefor, as well when furnished in her home port as when furnished in a foreign port, and that the courts of admiralty are bound to give effect to that lien.

The proposition assumes that the general maritime law governs this case, and is binding on the courts of the United States.

But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several states of this Union also presents an analogous case. It is the basis of all the state laws; but is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with, or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed—as in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence and do not affect other nations. * * *

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[4] "The maritime lien is a secret one. It may operate to the prejudice of prior mortgagees or of purchasers without notice." Brandeis, J., in Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co. (1920) 254 U. S. 1, 12, 65 L. ed. 97. An act of Congress now provides for making and recording mortgages on vessels, giving them priority over some but not all maritime liens. See 1 Benedict, Admiralty (1925) §§ 77, 78.

The proposition, therefore, that by the general maritime law a lien is given in cases of the kind now under consideration, does not advance the argument a single step, unless it be shown to be in accordance with the maritime law as accepted and received in the United States. It certainly has not been the maritime law of England for more than two centuries past; and whether it is the maritime law of this country depends upon questions which are not answered by simply turning to the ordinary European treatises on maritime law, or the codes or ordinances of any particular country.

That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase "admiralty and maritime jurisdiction" is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of "cases in law and equity," or of "suits at common law," without defining those terms, assuming them to be known and understood.

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.

The question is discussed with great felicity and judgment by Chief Justice Taney, delivering the opinion of the court in the case of The St. Lawrence, 1 Black, 526, 527, where he says: "Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the Constitution to the federal government in general terms, and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided to them; the extent of the jurisdiction conferred depending very much upon the character of the government in which they were created; and this circumstance, with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States. This difficulty was increased by the complex character of our government, where separate and distinct specified powers of sovereignty are exercised by the United States and a state independently of each other within the same territorial limits. And the reports of the decisions of the court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries; but certainly no state law can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the federal government."

Guided by these sound principles, this court has felt itself at liberty to recognize the admiralty jurisdiction as extending to localities and subjects which, by the jealousy of the common law, were prohibited to it in England, but which fairly belong to it on every ground of reason when applied to the peculiar circumstances of this country, with its extended territories, its inland seas, and its navigable rivers, especially as the narrow restrictions of the English law had never prevailed on this side of the Atlantic, even in colonial times.

The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.

To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian, and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages, and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and Constitution are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed.

But we must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law, and that of commercial regulations are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrolment, license and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime. And with regard to the question now under consideration, namely, the rights of material-men in reference to supplies and repairs furnished to a vessel in her home port, there does not seem to be any great reason to doubt that Congress might adopt a uniform rule for the whole country, though, of course, this will be a matter for consideration should the question ever be directly present for adjudication. * * *

Be this, however, as it may, and whether the power of Congress is or is not sufficient to amend the law on this subject (if amendment is desirable), this court is bound to declare the law as it now stands. And according to the maritime law as accepted and received in this country, we feel bound to declare that no such lien exists as is claimed by the appellees in this case. The adjudications in this court before referred to, which it is unnecessary to review, are conclusive on the subject; and we see no sufficient ground for disturbing them.

This disposes of the principal question in the case.

But it is alleged by the appellees that by the law of Louisiana they have a privilege for their claims, giving them a lien on the vessel and her proceeds; and that the court was bound to enforce this lien in their behalf, though not strictly a maritime lien.

On examining the record, however, it appears that the appellees never caused their lien (if they had one) to be recorded according to the requirements of the state law. * * *

Had the lien been perfected, and had the rule [of 1859] not stood in the way, the principles that have heretofore governed the practice of the District Courts exercising admiralty jurisdiction, and which have been repeatedly sanctioned by this court, would undoubtedly have authorized the material-men to file a libel against the vessel or its proceeds. The General Smith, 4 Wheaton, 438; Peyroux v. Howard, 7 Peters 324; The Orleans v. Phoebus, 11 Id. 175; The St. Lawrence, 1 Black, 522. It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of material-men furnishing necessaries to a vessel in her home port may be regulated in each state by state legislation. State laws, it is true, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts so as to enable them to proceed in rem for the enforcement of liens created by such state laws, for it is exclusively conferred upon the District Courts of the United States. They can only authorize the enforcement thereof by common-law remedies, or such remedies as are equivalent thereto. But the District Courts of the United States having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by the state laws.[5] The practice may be somewhat anomalous, but it has existed from the origin of the government, and, perhaps, was originally superinduced by the fact that prior to the adoption of the Constitution, liens of this sort created by state laws had been enforced by the state courts of admiralty; and as those courts were immediately succeeded by the District Courts of the United States, and in several instances the judge of the state court was transferred to the District Court, it was natural, in the infancy of federal legislation on commercial subjects, for the latter courts to entertain jurisdiction over the same classes of cases, in every respect as the state courts had done, without due regard to the new relations which the states had assumed towards the maritime law and admiralty jurisdiction. * * *

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[5] So held in The Glide (1897) 167 U. S. 606, 42 L. ed. 296.

But, whatever may have been the origin of the practice, and whether or not it was based on the soundest principles, it became firmly settled, and it is now too late to question its validity.

It is true that the inconveniences arising from the often intricate and conflicting state laws creating such liens, induced this court in December Term, 1858, to abrogate that portion of the twelfth admiralty rule of 1844 which allowed proceedings in rem against domestic ships for repairs and supplies furnished in the home port, and to allow proceedings in personam only in such cases. But we have now restored the rule of 1844, or, rather, we have made it general in its terms, giving to material-men in all cases their option to proceed either in rem or in personam. Of course this modification of the rule cannot avail where no lien exists; but where one does exist, no matter by what law, it removes all obstacles to a proceeding in rem, if credit is given to the vessel.

It would undoubtedly be far more satisfactory to have a uniform law regulating such liens,[6] but until such a law be adopted (supposing Congress to have the power) the authority of the states to legislate on the subject seems to be conceded by the uniform course of decisions.

Decree reversed.[7]

[CLIFFORD and FIELD, JJ., dissented in an opinion by the former.]

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[6] This was not done until the act of Congress of June 23, 1910, c. 373, 36 Stat. 604, slightly amended and incorporated in the Jones Act of June 5, 1920, c. 250, 41 Stat. 988; U. S. C., Title 46, § 971, the purpose of which was "to substitute a single federal statute for the state statutes in so far as they confer liens for repairs, supplies and other necessaries." Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co. (1920) 254 U. S. 1, 11, 65 L. ed. 97.

[7] Also, formerly, other rights in rem or in personam, in admiralty, were recognized as dependent upon state law for their origin, thus:

"Indeed, with respect to injuries that result in death, it already is settled that although the general maritime law, like the common law, afforded no civil remedy for death by wrongful act (The Harrisburg, 119 U. S. 199; The Alaska, 130 U. S. 201, 209), yet a right of action created by [state] statute is enforceable in a state court although the tort was committed upon navigable water (Steamboat Co. v. Chase, 16 Wall. 522, 533; Sherlock v. Alling, 93 U. S. 99, 104), and the liability arising out of a state statute in such a case will be recognized and enforced in the admiralty (The Hamilton, 207 U. S. 398), although not by proceeding in rem unless the statute expressly creates a lien (The Corsair, 145 U. S. 335, 347)."

In re Garnett (1891) 141 U. S. 1, 35 L. ed. 631, sustaining an act of Congress which limited the liability of the owner of an American vessel for any loss or injury occurring without his privity to the value of the ship and freight money earned on the voyage,[8] the court, by Bradley, J., said: "It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several states, in order to find authority to pass the law in question. The act of Congress which limits the liability of shipowners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends. The subject has frequently been up for consideration by this court for many years past, and but one view has been expressed. It was gone over so fully, however, in the late case of Butler v. Boston Steamship Co., 130 U. S. 527, that we cannot do better than to quote a single passage from the opinion of the court in that case. We there said:

" 'The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of

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Pitney J., in Southern Pacific Co. v. Jensen (1917) 244 U. S. 205, 247, 61 L. ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900.

"A maritime lien is said by writers upon maritime law to be the foundation of every proceeding in rem in the Admiralty. In much the larger class of cases, the lien is given by the general admiralty law, but in other instances, such for example as insurance, pilotage, wharfage, and materials furnished in the home port of the vessel, the lien is given, if at all, by the local law. As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases, we are bound to inquire whether the local law gives a lien upon the offending thing. If it merely gives a right of action in personam for a cause of action of a maritime nature, the District Court may administer the law by proceedings in personam, as was done with a claim for half pilotage dues under the law of New York, in the case of Ex parte McNiel, 13 Wall. 236, but unless a lien be given by the local law, there is no lien to enforce by proceedings in rem in the court of Admiralty." Brown, J., in The Corsair (1892) 145 U. S. 335, 347, 36 L. ed. 727.

A state cannot, however, create as against a foreign vessel (one whose home port is in another state or country) a maritime lien unknown to the general maritime law as "received" by the federal courts. The Roanoke (1903) 189 U. S. 185, 195, 47 L. ed. 770, where Brown, J., for the court, said:

"The injustice of permitting such claims to be set up is plainly apparent. The master is the agent of the vessel and its owner in more than the ordinary sense. During the voyage he is in fact the alter ego of his principal. He is intrusted with an uncontrolled authority to provide for the crew, and for the preservation and repair of the ship. He engages the cargoes, receives the freight, hires and pays his crew, and is intrusted, perhaps for years, with the command and disposition of the vessel. With full authority to bind the vessel, his position is such that it is almost impossible for him to acquaint himself with the laws of each individual state he may visit, and he has a right to suppose that the general maritime law applies to him and his ship, wherever she may go, unhampered by laws which are mainly intended for local application, or for domestic vessels."

[8] "The purpose of the act of Congress was 'to encourage investment by exempting the investor from loss in excess of the fund he is willing to risk in the enterprise.' 26 F. (2d) 24." Holmes, J., in Flink v. Paladini (1929) 279 U. S. 59, 73 L. ed. 613.

this country, and therefore it is coextensive, in its operation, with the whole territorial domain of that law. Norwich Co. v. Wright, 13 Wall. 104, 127; The Lottawanna, 21 Wall. 558, 577; The Scotland, 105 U. S. 24, 29, 31; Providence & New York Steamship Co. v. Hill Manufacturing Co., 109 U. S. 578, 593. In The Lottawanna we said: "It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed." p. 577. * * *

"'In The Scotland this language was used: "But it is enough to say that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of Congress, we have announced that we propose to administer justice in maritime cases." p. 31. Again, in the same case (p. 29), we said: "But, while the rule adopted by Congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. As explained in The Lottawanna, the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the maritime law had never been adopted in this country until it was enacted by statute. Therefore, whilst it is now a part of our maritime law, it is, nevertheless, statute law." * * *

"'These quotations are believed to express the general, if not unanimous, views of the members of this court for nearly twenty years past; and they leave us in no doubt that, while the general maritime law, with slight modifications, is accepted as law in this country, it is subject to such amendments as Congress may see fit to adopt. One of the modifications of the maritime law, as received here, was a rejection of the law of limited liability. We have rectified that. Congress has restored that article to our maritime code. We cannot doubt its power to do this. As the Constitution extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction," and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the state legislatures. It is true, we have held, that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national. Chief Justice Taney, in The St. Lawrence, 1 Black, 522, 526, 527; The Lottawanna, 21 Wall. 558, 575, 576. But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as Congress may from time to time have adopted. It being clear, then, that the law of limited liability of ship-owners is a part of our maritime code, the extent of its territorial operation (as before intimated) cannot be doubtful. It is necessarily coextensive with that of the general admiralty and maritime jurisdiction, and that by the settled law of this country extends wherever public navigation extends,—on the sea and the great inland lakes, and the navigable waters connecting therewith. Waring v. Clarke, 5 How. 441; The Genesee Chief v. Fitzhugh, 12 How. 443; Jackson v. The Magnolia, 20 How. 296; The Commerce, 1 Black, 574.' pp. 575-577.

WORKMAN v. NEW YORK CITY.

1900. Supreme Court of the United States. 179 U. S. 552.

[Workman, owner of the British barkentine, Linda Park, filed a libel in personam in a District Court of the United States to recover from New York City damages caused by a fire-boat belonging to the city, which while engaged in putting out a fire on the shore of East River negligently collided with the Linda Park. The Circuit Court of Appeals reversed a decree against the city on the ground that under the law of New York a municipality is not liable for torts committed by its employees while performing governmental functions. The Supreme Court allowed this review by certiorari.]

Mr. Justice White delivered the opinion of the court. * * *

In examining the first question, that is, whether the local law of New York must prevail, though in conflict with the maritime law, it must be borne in mind that the issue is not—as was the case in Detroit v. Osborne (1890) 135 U. S. 492—whether the local law governs as to a controversy arising in the courts of common law or of equity of the United States, but, does the local law, if in conflict with the maritime law, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (Art. III, Sec. 2) upon the courts of the United States.

The proposition, then, which we must first consider may be thus stated: Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts, and when the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular state or the course of decisions therein. * * *

If it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing today and another thing tomorrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. * * *

The disappearance of all symmetry in the maritime law * * * which would thus arise, would, however, not be the only evil springing from the application of the principle relied on, since the maritime law which would survive would have imbedded in it a denial of justice. * * * It cannot be doubted that the greater part, if not the whole, of the maritime commerce of the country is either initiated or terminated in ports where municipal corporations exist. All the vessels, whether domestic or foreign, in which this vast commerce is carried on, under the rule referred to, could be subjected to injury and wrong without power to obtain redress, since every municipality would be hedged about with the attributes of supreme sovereignty * * *

The evil consequences growing from thus implanting in the maritime law the doctrine that wrong can be done with impunity were very aptly pointed out in Mersey Docks and Harbour Board, Trustees, v. Gibbs (1866) L. R. 1, H. L. 122. In that case it was sought to hold the dock trustees liable for damage occasioned to a ship and cargo in striking a mud bank while attempting to enter a dock. The trustees asserted an exemption on the ground that they did not collect tolls for their own profit, but merely as trustees for the benefit of the public. Lord Chancellor Cranworth said: "It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed." * * *

Potential, however, as may be these arguments, predicated on the inherent injustice of the doctrine contended for, and the serious inconvenience which must result from an attempt to apply it, we are not thereby relieved from considering the question in a more fundamental aspect. In doing so, it becomes manifest that the decisions of this court overthrow the assumption that the local law or decisions of a state can deprive of all rights to relief, in a case where redress is afforded by the maritime law, and is sought to be availed of in a cause of action maritime in its nature and depending in a court of admiralty of the United States.

[Here the opinion in The Lottawanna, ante, is quoted from, ending:]

"One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

* * *

True, it is well settled that in certain cases where a lien is given by a state statute, the admiralty courts will enforce rights so conferred when not in absolute conflict with the admiralty law. The Lottawanna (1874) 21 Wall. 558. Moreover, it has been decided that although at the time of the adoption of the Constitution, in courts of admiralty as in courts of common law, a cause of action for a personal injury abated by the death of the injured party, nevertheless, when, by a state statute, a right of recovery in such a case was conferred, the admiralty courts would recognize and administer the appropriate relief. The Albert Dumois (1900) 177 U. S. 257-259, and cases cited. But such cases afford no foundation for the proposition that state laws or decisions can deprive an individual of a right of recovery for a maritime wrong which, under the general principles of the admiralty law, he undoubtedly possessed, and can destroy the symmetry and efficiency of that law by engrafting therein a principle which violates the imperative command of such law that admiralty courts must administer redress for every maritime wrong in every case where they have jurisdictional power over the person by whom the wrong has been committed. The cases in question, on the contrary, but illustrate the alacrity with which admiralty courts adopt statutes granting the right to relief where otherwise it could not be administered by a maritime court, and they hence do not support the contention that there is a want of power in admiralty courts to give redress in every case within their jurisdiction where the duty to do so is imposed by the maritime law. * * *

It being then settled that the local decisions of one or more states cannot, as a matter of authority, abrogate the maritime law, we are brought to consider whether, under the maritime law, the city of New York was liable for the injury inflicted by the fire-boat. * * *

[The court held that under the maritime law the city was liable, GRAY, BREWER, SHIRAS and PECKHAM, JJ., dissenting on this last point.]

SOUTHERN PACIFIC CO. v. JENSEN.

1917. Supreme Court of the United States. 244 U. S. 205.

[Jensen was employed by the Southern Pacific Company in unloading one of its ships at a pier in New York City. He was driving a truck loaded with lumber from the ship over a gangway to the pier. The truck jammed against the guide pieces on the gangway. He reversed the truck and in backing into the ship his head struck the top of the port and he was killed. His dependents filed claims before the Workmen's Compensation Commission of New York State and awards were made. The Southern Pacific Company attacked these awards as unconstitutional, in the Appellate Division of the Supreme Court of New York which affirmed them, and on appeal the New York Court of Appeals also affirmed. Now on writ of error.]

MR. JUSTICE MCREYNOLDS delivered the opinion of the court. * * *

Article III, § 2, of the Constitution, extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction"; and Article I, § 8, confers upon the Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof." Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. Butler v. Boston & Savannah Steamship Co., 130 U. S. 527; In re Garnett, 141 U. S. 1, 14. And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction. The Lottawanna, 21 Wall. 558; Butler v. Boston & Savannah Steamship Co., 130 U. S. 527, 557; Workman v. New York City, 179 U. S. 552.

In The Lottawanna, Mr. Justice Bradley, speaking for the court, said: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' * * * One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

By § 9, Judiciary Act of 1789, 1 Stat. 76, 77, the district courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." And this grant has been continued. Judicial Code, §§ 24 and 256.

In view of these constitutional provisions and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute, The Lottawanna, 21 Wall. 558, 579, 580; The J. E. Rumbell, 148 U. S. 1; pilotage fees fixed, Cooley v. Board of Wardens, 12 How. 299; Ex parte McNiel, 13 Wall. 236, 242; and the right given to recover in death cases, The Hamilton, 207 U. S. 398; La Bourgogne, 210 U. S. 95, 138. See The City of Norwalk, 55 Fed. 98, 106. Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings in rem according to the course in admiralty, The Moses Taylor, 4 Wall. 411; Steamboat Co. v. Chase, 16 Wall. 522, 534; The Glide, 167 U. S. 606; nor create liens for materials used in repairing a foreign ship, The Roanoke, 189 U. S. 185. See Workman v. New York City, 179 U. S. 552. And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from The Lottawanna.

A similar rule in respect to interstate commerce, deduced from the grant to Congress of power to regulate it, is now firmly established. "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." Bowman v. Chicago & Northwestern Ry. Co., 125 U. S. 465, 507, 508. * * * And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the states to interpose where maritime matters are involved.

The work of a stevedore, in which the deceased was engaged, is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 59, 60.

If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien, condemned in The Roanoke. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid.

Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the federal District Courts, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction. The Hine v. Trevor, 4 Wall. 555, 571, 572; The Belfast, 7 Wall. 624; Steamboat Co. v. Chase, 16 Wall. 522, 531, 533; The Glide, 167 U. S. 606, 623. And finally, this remedy is not consistent with the policy of Congress to encourage investments in ships, manifested in the acts of 1851 and 1884 (Rev. Stats., §§ 4283-4285; § 18, Act of June 26, 1884, 23 Stat. 57, c. 121), which declare a limitation upon the liability of their owners. Richardson v. Harmon, 222 U. S. 96, 104.

Judgment reversed.

MR. JUSTICE HOLMES, dissenting. * * *

There is no doubt that the saving to suitors of the right of a common-law remedy leaves open the common-law jurisdiction of the state courts, and leaves some power of legislation, at least, to the states. For the latter I need do no more than refer to state pilotage statutes, and to liens created by state laws in aid of maritime contracts. Nearer to the point, it is decided that a statutory remedy for causing death may be enforced by the state courts, although the death was due to a collision upon the high seas. Steamboat Co. v. Chase, 16 Wall. 522; Sherlock v. Alling, 93 U. S. 99, 104; Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 646. Minnesota Rate Cases, 230 U. S. 352, 409. The misgivings of Mr. Justice Bradley were adverted to in The Hamilton, 207 U. S. 398, and held at least insufficient to prevent the admiralty from recognizing such a state-created right in a proper case, if indeed they went to any such extent. La Bourgogne, 210 U. S. 95, 138.

The statute having been upheld in other respects, New York Central R. R. Co. v. White, 243 U. S. 188, I should have thought these authorities conclusive. The liability created by the New York act ends in a money judgment, and the mode in which the amount is ascertained, or is to be paid, being one that the state constitutionally might adopt, cannot matter to the question before us if any liability can be imposed that was not known to the maritime law. And as such a liability can be imposed where it was unknown not only to the maritime but to the common law, I can see no difference between one otherwise constitutionally created for death caused by accident and one for death due to fault. Neither can the statutes limiting the liability of owners affect the case. Those statutes extend to nonmaritime torts, which, of course, are the creation of state law. Richardson v. Harmon, 222 U. S. 96, 104. They are paramount to but not inconsistent with the new cause of action. However, as my opinion stands on grounds that equally would support a judgment for a maritime tort not ending in death, with which admiralty courts have begun to deal, I will state the reasons that satisfy my mind. * * *

Taking it as established that a state has constitutional power to pass laws giving rights and imposing liabilities for acts done upon the high seas when there were no such rights or liabilities before, what is there to hinder its doing so in the case of a maritime tort? Not the existence of an inconsistent law emanating from a superior source, that is, from the United States. There is no such law. The maritime law is not a corpus juris—it is a very limited body of customs and ordinances of the sea. The nearest to anything of the sort in question was the rule that a seaman was entitled to recover the expenses necessary for his cure when the master's negligence caused his hurt. The maritime law gave him no more. The Osceola, 189 U. S. 158, 175. One may affirm with the sanction of that case that it is an innovation to allow suits in the admiralty by seamen to recover damages for personal injuries caused by the negligence of the master, and to apply the common-law principles of tort.[9]

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[9] In Quebec Steamship Co. v. Merchant (1890) 133 U. S. 375, 33 L. ed. 656, an action by a seaman (a stewardess) for personal injuries alleged to be due to negligence, occurring two miles off the shore in the West Indies, was brought in a New York court and was removed to the Circuit Court of the United States and heard as a law action. The Supreme Court sustained a judgment for the defendant company on the ground that the negligence causing the injury was that of a fellow servant. The case was frequently followed in the federal courts, and has been often cited in non-maritime cases as an exposition of the fellow-

Now, however, common-law principles have been applied to sustain a libel by a stevedore in personam against the master for personal injuries suffered while loading a ship. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, and The Osceola recognizes that in some cases, at least, seamen may have similar relief. From what source do these new rights come? The earliest case relies upon "the analogies of the municipal law," The Edith Godden, 23 Fed. 43, 46,—sufficient evidence of the obvious pattern, but inadequate for the specific origin. I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge, exercising the limited jurisdiction of admiralty, say, I think well of the common-law rules of master and servant, and propose to introduce them here en bloc. Certainly he could not in that way enlarge the exclusive jurisdiction of the district courts and cut down the power of the states. If admiralty adopts common-law rules without an act of Congress, it cannot extend the maritime law as understood by the Constitution. It must take the rights of the parties from a different authority, just as it does when it enforces a lien created by a state. The only authority available is the common law or statutes of a state. For from the often-repeated statement that there is no common law of the United States, Wheaton v. Peters, 8 Pet. 591, 658; Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92, 101, and from the principles recognized in Atlantic Transport Co. v. Imbrovek having been unknown to the maritime law, the natural inference is that, in the silence of Congress, this court has believed the very limited law of the sea to be supplemented here as in England by the common law, and that here that means, by the common law of the state. Sherlock v. Alling, 93 U. S. 99, 104; Taylor v. Carryl, 20 How. 583, 598. So far as I know, the state courts have made this assumption without criticism or attempt at revision from the beginning to this day; e. g., Wilson v. MacKenzie, 7 Hill (N. Y.), 95; Gabrielson v. Waydell, 135 N. Y. 1, 11; Kalleck v. Deering, 161 Mass. 469. See Ogle v. Barnes, 8 T. R. 188; Nicholson v. Mounsey, 15 East, 384. Even where the admiralty has unquestioned jurisdiction the common law may have concurrent authority and the state courts concurrent power. Schoonmaker v. Gilmore, 102 U. S. 118. The invalidity of state attempts to create a remedy for maritime contracts or torts, parallel to that in the admiralty, that was established in such cases as The Moses Taylor, 4 Wall. 411, and The Hine v. Trevor, 4 Wall. 555, is immaterial to the present point.

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servant doctrine of the common law. See the annotations in Rose's Notes. But see Austin Tappan Wright, Uniformity in the Maritime Law of the United States (1925) 73 U. of P. L. Rev. 123, 223, at p. 246.

The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact. It always is the law of some state, and if the district courts adopt the common law of torts, as they have shown a tendency to do, they thereby assume that a law not of maritime origin, and deriving its authority in that territory only from some particular state of this Union, also governs maritime torts in that territory,—and if the common law, the statute law has at least equal force, as the discussion in The Osceola assumes. On the other hand, the refusal of the district courts to give remedies coextensive with the common law would prove no more than that they regarded their jurisdiction as limited by the ancient lines,—not that they doubted that the common law might and would be enforced in the courts of the states as it always has been. This court has recognized that in some cases different principles of liability would be applied as the suit should happen to be brought in a common law or admiralty court. Compare The Max Morris, 137 U. S. 1, with Belden v. Chase, 150 U. S. 674, 691. But hitherto it has not been doubted authoritatively, so far as I know, that even when the admiralty had a rule of its own to which it adhered, as in Workman v. New York City, 179 U. S. 552, the state law, common or statute, would prevail in the courts of the state. Happily such conflicts are few. * * *

As to the specter of a lack of uniformity, I content myself with referring to The Hamilton, 207 U. S. 398, 406. The difficulty really is not so great as in the case of interstate carriers by land, which, "in the absence of federal statute providing a different rule, are answerable according to the law of the state for nonfeasance or misfeasance within its limits." The Minnesota Rate Cases, 230 U. S. 352, 408, and cases cited. * * *

MR. JUSTICE PITNEY, dissenting. * * * [After quoting Const. Art. III, Sec. 2, and the saving clause of the Judiciary Act of 1789:]

From the language quoted from the Constitution, read in the light of the general purpose of that instrument and the contemporaneous construction found in the Judiciary Act, with regard also to the mischiefs that called for the establishment of a national judiciary, and from what I believe to be the unbroken current of decisions in this court from that day until the present, I draw the following conclusions: (1) That the framers of the Constitution intended *to establish jurisdiction*,—the power to hear and determine controversies of the various classes specified,—and *not to prescribe particular codes or systems of law* for the decision of those controversies; (2) that the civil jurisdiction in admiralty was not intended to be exclusive of the courts of common law, at least not until Congress should deem it proper so to enact; (3) that by the law of England, and by the practice of the colonial governments, the courts of common law, of equity, and of admiralty, were controlled in their decisions by separate, and, in a sense, independent systems of substantive law, and the constitutional grant of judicial power in "all cases in law and equity," and in "all cases of admiralty and maritime jurisdiction," was no more intended (in the absence of legislation by Congress) to make the rules of maritime law binding upon the federal courts of common law when exercising their concurrent jurisdiction, than to make the rules of the common law binding upon the courts of admiralty; (4) that, if not binding upon the federal courts, it results, a fortiori, that the rules of maritime law were not intended to be made binding upon the courts of the states; (5) that it is not necessary, in order to give full effect to the grant of admiralty and maritime jurisdiction, to imply that the rules of decision prevailing in admiralty must be binding upon common-law courts exercising concurrent jurisdiction in civil causes of maritime origin, and to give such a construction to the Constitution is to render unconstitutional the saving clause in § 9 of the Judiciary Act, and also to trench upon the proper powers of the states by interfering with their control over their water-borne internal commerce; and (6) that, in the absence of legislation by Congress abrogating the saving clause, the states are at liberty to administer their own laws in their own courts when exercising a jurisdiction concurrent with that of admiralty, and at liberty to change those laws by statute.

That the language of § 2 of Art. III of the Constitution speaks only of establishing jurisdiction, and does not prescribe the mode in which or the substantive law by which the exercise of that jurisdiction is to be governed, seems to me entirely plain; and upon this point I need only refer to the language itself, which I have quoted.

* * *

What I contend is that the Constitution does not, proprio vigore, impose the maritime law upon the states except to the extent that the admiralty jurisdiction was exclusive of the courts of common law before the Constitution; that is to say, in the prize jurisdiction, and the peculiar maritime process in rem; and that as to civil actions in personam having a maritime origin, the courts of the states are left free, except as Congress, by legislation passed within its legitimate sphere of action, may control them; and that Congress, so far from enacting legislation of this character, has from the beginning left the state courts at liberty to apply their own systems of law in those cases where, prior to the Constitution, they had concurrent jurisdiction with the admiralty, for the saving clause in the Judiciary Act necessarily has this effect. * * *[10]

[BRANDEIS and CLARKE, JJ., concurred with both of the dissenting opinions.]

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[10] For discussions of the Jensen case, its forerunners and the aftermath, see E. Merrick Dodd, Jr., The New Doctrine of the Supremacy of Admiralty over

CHELENTIS v. LUCKENBACH STEAMSHIP CO.

1918. Supreme Court of the United States. 247 U. S. 372.

Certiorari to the Circuit Court of Appeals for the Second Circuit.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

In December, 1915, petitioner was employed by respondent, a Delaware corporation, as fireman on board the steamship "J. L. Luckenbach" which it then operated and controlled. While at sea, twenty-four hours out from New York, the port of destination, petitioner undertook to perform certain duties on deck during a heavy wind; a wave came aboard, knocked him down and broke his leg. He received due care immediately; when the vessel arrived at destination he was taken to the marine hospital where he remained for three months; during that time it became necessary to amputate his leg. After discharge from the hospital, claiming that his injuries resulted from the negligence and an improvident order of a superior officer, he instituted a common law action in Supreme Court, New York County, demanding full indemnity for damage sustained. The cause was removed to the United States District Court because of diverse citizenship. Counsel did not question seaworthiness of ship or her appliances and announced that no claim was made for maintenance, cure, or wages. At conclusion of plaintiff's evidence the court directed verdict for respondent and judgment thereon was affirmed by the Circuit Court of Appeals. 243 Fed. Rep. 536. * * *

In The Osceola, 189 U. S. 158, 175, a libel in rem to recover damages for personal injuries to a seaman while on board and alleged to have resulted from the master's negligence, speaking through Mr. Justice Brown we held:

"1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

"2. That the vessel and her owner are both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. Scarff v. Metcalf, 107 N. Y. 211.[11]

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the Common Law (1921) 21 Col. L. Rev. 647; Austin Tappan Wright, Uniformity in the Maritime Law of the United States (1925) 73 U. of P. L. Rev. 123, 223; John Gorham Palfrey, The Common Law Courts and the Law of the Sea (1923) 36 Harv. L. Rev. 777; Frederic Cunningham, Is Every County Court in the United States a Court of Admiralty? (1919) 53 Am. L. Rev. 749; William J. Conlin, Ten Years of the Jensen Case (1928) 76 U. of P. L. Rev. 926.

[11] A seaman may bring suit in a state court against the owner of the ship to recover for injury received on board the ship while in navigable waters beyond the territorial limits of the state ("Alaskan waters," the suit being in the State of Washington) where the injury results from unseaworthiness or lack of or im-

"3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

"4. That the seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

The work about which petitioner was engaged is maritime in its nature; his employment was a maritime contract; the injuries received were likewise maritime and the parties' rights and liabilities were matters clearly within the admiralty jurisdiction. Atlantic Transportation Co. v. Imbrovek, 234 U. S. 52, 59, 60. And unless in some way there was imposed upon the owners a liability different from that prescribed by maritime law, petitioner could properly demand only wages, maintenance and cure. Under the doctrine approved in Southern Pacific Co. v. Jensen, no state has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

Two acts of Congress are relied upon, and it is said that under each petitioner has the right to recover full indemnity according to the common law. They are: (1) Section 9, Judiciary Act of 1789, 1 Stat. 76, 77, whereby District Courts of the United States were given exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it" (Judicial Code, §§ 24, 256); and (2) section 20 of Act to Promote the Welfare of American Seamen, approved March 4, 1915,

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proper condition of appliances. The action is for compensatory damages. These may be fixed by the jury, if the state law provides a jury. The substantive law of the case is this rule of the maritime law which imposes liability independent of negligence of defendant, and it is error to instruct that common law rules of negligence are applicable. Carlisle Packing Co. v. Sandanger (1922) 259 U. S. 255, 66 L. ed. 927 (the conditions creating liability being a can marked "coal oil" filled with gasoline, and an absence of life preservers).

Compare Robins Dry Dock &c. Co. v. Dahl (1925) 266 U. S. 449, 69 L. ed. 372: Action in a New York state court brought by an employee (not a seaman) against his employer for an injury due to the falling of a scaffold on which he was working, on a ship afloat in navigable water at Brooklyn, the employer having contracted to repair the ship. The substantive law applicable to the case was said to be "the general maritime" law, which was assumed to be a rule of liability for negligence, and the state decision for plaintiff was reversed because the trial court instructed the jury to take into consideration a New York statute which tended to make the defendant liable because of the unsafeness of the scaffold irrespective of negligence.

c. 153, 38 Stat. 1164, 1185, which provides—"That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."

The precise effect of the quoted clause of the original Judiciary Act has not been delimited by this court and different views have been entertained concerning it. In Southern Pacific Co. v. Jensen we definitely ruled that it gave no authority to the several states to enact legislation which would work "material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations." In The Moses Taylor, 4 Wall. 411, 431, we said: "That clause only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding in rem, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law." And in Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 644, 648: "Some of the cases already cited recognize the distinction between a common law action and a common law remedy. Thus in The Moses Taylor, * * * it is said of the saving clause of the Judiciary Act: 'It is not a remedy in the common law courts which is saved, but a common law remedy.'" "If the suit be in personam against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute * * * of a common law remedy. The suit in this case being one in equity to enforce a common law remedy, the state courts were correct in assuming jurisdiction."

The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouvier's Law Dictionary. Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea.

Section 20 of the Seamen's Act declares "seamen having command shall not be held to be fellow-servants with those under their authority," and full effect must be given this whenever the relationship between such parties becomes important. But the maritime law imposes upon a shipowner liability to a member of the crew injured at sea by reason of another member's negligence without regard to their relationship; it was of no consequence therefore to petitioner whether or not the alleged negligent order came from a fellow servant; the statute is irrelevant. The language of the section discloses no intention to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore.

Affirmed.

[Holmes, J., concurred in the result. Pitney, Brandeis and Clarke, JJ., dissented.]

KNICKERBOCKER ICE CO. v. STEWART.

1920. Supreme Court of the United States. 253 U. S. 149.

Error to the Appellate Division of the Supreme Court of New York.

Mr. Justice McReynolds delivered the opinion of the court.

While employed by Knickerbocker Ice Company as bargeman and doing work of a maritime nature, William M. Stewart fell into the Hudson River and drowned—August 3, 1918. His widow, defendant in error, claimed under the Workmen's Compensation Law of New York; the Industrial Commission granted an award against the Company for her and the minor children; and both Appellate Division and the Court of Appeals approved it. 226 N. Y. 302. The latter concluded that the reasons which constrained us to hold the Compensation Law inapplicable to an employee engaged in maritime work—Southern Pacific Co. v. Jensen, 244 U. S. 205—had been extinguished by "An Act To amend sections twenty-four and two hundred and fifty-six of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to claimants the rights and remedies under the workmen's compensation law of any State," approved October 6, 1917, c. 97, 40 Stat. 395.

The provision of § 9, Judiciary Act, 1789 (c. 20, 1 Stat. 76), granting to United States District Courts, "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * *, saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it," was carried into the Revised Statutes—§§ 563 and 711—and thence into the Judicial Code—clause 3, §§ 24 and 256. The saving clause remained unchanged until the statute of October 6, 1917, added *"and to claimants the rights and remedies under the workmen's compensation law of any State."*

[Here Southern Pacific Co. v. Jensen, ante, and Chelentis v. Luckenbach Steamship Co., ante, are summarized:]

In Union Fish Co. v. Erickson, 248 U. S. 308, an admiralty cause, a master sought to recover damages for breach of an oral contract with the owner of a vessel for services to be performed principally upon the sea. The latter claimed invalidity of the contract under a statute of California, where made, because not in writing and not to be performed within a year. We ruled: "The Circuit Court of Appeals correctly held that this contract was maritime in its nature and an action in admiralty thereon for its breach could not be defeated by the statute of California relied upon by the petitioner." "In entering into this contract the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made." See also The Blackheath, 195 U. S. 361, 365.

As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Since the beginning, federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago. "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. * * * One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states." The Lottawanna, 21 Wall. 558, 574, 575. The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true it is quite impossible to account for a multitude of adjudications by the admiralty courts. See Workman v. New York City, 179 U. S. 552, 557, et seq.

The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten. Also, it should be noted that federal laws are constantly applied in state courts—unless inhibited their duty so requires. Constitution, Article VI, clause 2; Second Employers' Liability Cases, 223 U. S. 1, 55. Consequently mere reservation of partially concurrent cognizance to such courts by an act of Congress conferring an otherwise exclusive jurisdiction upon national courts, could not create substantive rights or obligations or indicate assent to their creation by the states. * * *

[By the act in question] Congress undertook to permit application of Workmen's Compensation Laws of the several states to injuries within the admiralty and maritime jurisdiction; and to save such statutes from the objections pointed out by Southern Pacific Co. v. Jensen. It sought to authorize and sanction action by the states in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work.

And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the federal government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do so as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant. See Sudden & Christenson v. Industrial Accident Commission, 188 Pac. Rep. 803.

Congress cannot transfer its legislative power to the states—by nature this is non-delegable. In re Rahrer, 140 U. S. 545, 560; Field v. Clark, 143 U. S. 649, 692; Buttfield v. Stranahan, 192 U. S. 470, 496; Butte City Water Co. v. Baker, 196 U. S. 119, 126; Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 214.

[Here the opinion distinguishes Clark Distilling Co. v. Western Md. Ry. Co., ante, p. 1368.]

Here, we are concerned with a wholly different constitutional provision—one which, for the purpose of securing harmony and uniformity, prescribes a set of rules, empowers Congress to legislate to that end, and prohibits material interference by the states. Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent.

In The Hamilton, 207 U. S. 398, an admiralty proceeding, effect was given, as against a ship registered in Delaware, to a statute of that state which permitted recovery by an ordinary action for fatal injuries, and the power of a state to supplement the maritime law to that extent was recognized. But here the state enactment prescribes exclusive rights and liabilities, undertakes to secure their observance by heavy penalties and onerous conditions, and provides novel remedies incapable of enforcement by an admiralty court. * * * The doctrine of The Hamilton may not be extended to such a situation.

Reversed and remanded.[12]

[Holmes, Pitney, Brandeis and Clarke, JJ., dissented in an opinion by Holmes, J.]

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[12] After the above decision Congress by Act of June 10, 1922, c. 216, 42 Stat. 634, made a different addition to the saving clause: "And to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive * * * Provided, That the jurisdiction of the district courts shall not extend to causes arising out of injuries to or death of persons other than the master or members of the crew, for which compensation is provided by the workmen's compensation law of any State, District, Territory, or possession of the United States." This act also was held invalid, the court, by McReynolds, J., saying: "Except as to the master and members of the crew, the Act of 1922 must be read as undertaking to permit application of the workmen's compensation laws of the several states to injuries within the admiralty and maritime jurisdiction substantially as provided by the Act of 1917. The exception of master and crew is wholly insufficient to meet the objections to such enactments heretofore often pointed out. Manifestly, the proviso which denies jurisdiction to district courts of the United States over causes arising out of the injuries specified was intended to supplement the provision covering rights and remedies under state compensation

WESTERN FUEL COMPANY v. GARCIA, ADMINISTRATOR OF SOUZA.

1921. Supreme Court of the United States. 257 U. S. 233.

Certificate from and Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The Circuit Court of Appeals certified certain questions for instruction and thereafter we directed that the cause be sent here for determination as if upon appeal. Judicial Code, § 239.

Manuel Souza, a citizen and resident of California, was instantly killed, August 5, 1916, while employed as a stevedore by the petitioner and at work in the hold of the "Tancred," a Norwegian vessel under charter to it, then anchored in San Francisco Bay and discharging her cargo. The libel alleged that the injury was caused by coal negligently permitted to fall from a steel hoisting bucket.

Relying upon the California Workmen's Compensation Act of 1913, the Industrial Accident Commission granted an award in favor of the widow and children which the Supreme Court of the state annulled August 6, 1917—a year and a day subsequent to the death.

Shortly thereafter—August 21st—the widow and children began an admiralty suit in personam against the petitioner in the United States District Court, Northern District of California, wherein they alleged that the accident resulted from its negligence and prayed for damages. Later, respondent, having been appointed administrator, filed an amended libel with like allegations and prayer; and upon this the cause was ultimately tried. Petitioner denied liability and relied upon § 340, sub-section 3, California Code of Civil Procedure, which requires that an action for damages consequent upon death caused by wrongful act, or negligence shall be brought within one year.

The District Court held in favor of the administrator and awarded substantial damages; the Circuit Court of Appeals has sent up the whole cause under our direction.

It is established doctrine that no suit to recover damages for the death of a human being caused by negligence, may be maintained

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laws. As that provision is ineffective, so is the proviso. To hold otherwise would bring about an unfortunate condition wholly outside the legislative intent. * * *

"Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several states. The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress. Knickerbocker Ice Co. v. Stewart." Washington v. W. C. Dawson Co. (1924) 264 U. S. 219, 223, 227, 68 L. ed. 646.

in the admiralty courts of the United States under the general maritime law. At the common law no civil action lies for an injury resulting from death. The maritime law as generally accepted by maritime nations leaves the matter untouched and in practice each of them has applied the same rule for the sea which it maintains on land. The Harrisburg, 119 U. S. 204, 213; The Alaska, 130 U. S. 201, 209; La Bourgogne, 210 U. S. 95, 138, 139.

How far this rule of non-liability adopted and enforced by our admiralty courts in the absence of an applicable statute may be modified, changed or supplemented by state legislation has been the subject of consideration here but no complete solution of the question has been announced.

In Cooley v. Board of Wardens, 12 How. 299, and Ex Parte McNiel, 13 Wall. 236, the power of a state to legislate concerning subjects maritime in their nature was under discussion; and it was pointed out that as to certain local matters a state statute may grant rights which will be enforced in an admiralty court.

In American Steamboat Co. v. Chase, 16 Wall. 531, 532, the decedent was killed on navigable waters within Rhode Island. Relying upon the death statute of that state, his administrator sued and recovered in one of its courts. This court affirmed the judgment. Whether an admiralty court could have entertained a proceeding based upon the statute was mooted but not determined.

Sherlock v. Alling, 93 U. S. 99, arose out of a collision between steamboats on the Ohio River within the limits of Indiana, whose statute gave a right of action for death caused by wrongful act, and a recovery in the state court was affirmed here. The defense rested primarily upon the erroneous theory that the statute encroached upon the commercial powers of Congress. There was no discussion of the point now directly presented. In Butler v. Boston & Savannah S. S. Co., 130 U. S. 557, 558, the point was raised but left without expression of opinion.

The Hamilton, 207 U. S. 398, 405, an admiralty proceeding for limitation of liability, affirmed the validity of claims for damages resulting from death at sea based upon the statute of Delaware where the vessel's owner had been incorporated.

The inferior federal courts on the admiralty side have enforced rights of action based upon death statutes holding they had jurisdiction as the claims grew out of torts on navigable waters and were maritime in their nature. The City of Norwalk, 55 Fed. 98, and the cases cited. See also Hughes on Admiralty, 2nd ed., pp. 228, 230, et seq.

In Southern Pacific Co. v. Jensen, 244 U. S. 205; Chelentis v. Luckenbach S. S. Co., 247 U. S. 372; Union Fish Co. v. Erickson, 248 U. S. 308, and Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, we have recently discussed the theory under which the general maritime law became a part of our national law, and pointed out the inability of the states to change its general features so as to defeat uniformity—but the power of a state to make some modifications or supplements was affirmed. And we further held that rights and liabilities in respect of torts upon the sea ordinarily depend upon the rules accepted and applied in admiralty courts which are controlling wherever suit may be instituted. Under this view, American Steamboat Co. v. Chase, and Sherlock v. Alling, support the right to recovery under a local statute in an admiralty court for death occurring on navigable waters within the state when caused by tort there committed.

As the logical result of prior decisions we think it follows that, where death upon such waters results from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such a right is given. The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. Southern Pacific Co. v. Jensen, supra.

The California Code of Civil Procedure, § 340, prescribes one year as the period within which an action for death caused by wrongful action or negligence shall be brought. It is admitted that under the circumstances here presented suit against petitioner, if instituted in a court of that state, would have been barred, and we are of opinion that the same limitation must be enforced in respect of the admiralty proceeding. It was so decided in The Harrisburg, 119 U. S. 213, 214, a proceeding in rem begun in the United States District Court, Eastern District of Pennsylvania. * * * Through Mr. Chief Justice Waite, this court said: "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all." * * *

"An Act Relating to the maintenance of actions for death on the high seas and other navigable waters," approved March 30, 1920, c. 111, 41 Stat. 537, gives a right of action for damages resulting from death caused by wrongful act, neglect or default occurring on the high seas beyond one marine league from the shore. It expressly directs, "That the provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this Act. Nor shall this Act apply to the Great Lakes or to any waters within the territorial limits of any state, or to any navigable waters in the Panama Canal Zone."

In the present cause the District Court rightly assumed jurisdiction of the proceedings, but erred in holding the right of action was not barred under the state statute of limitation. Accordingly, its judgment must be reversed and the cause remanded there with instructions to dismiss the libel.

Reversed.[13]

PANAMA RAILROAD COMPANY v. JOHNSON.

1924. Supreme Court of the United States. 264 U. S. 375.

Mr. Justice Van Devanter delivered the opinion of the court.

This was an action by a seaman against his employer, the owner of the ship on which he was serving, to recover damages for personal injuries suffered at sea while he was ascending a ladder from the deck to the bridge in the course of his employment,—the complaint charging that the injuries resulted from negligence of the employer in providing an inadequate ladder and negligence of the ship's officers in permitting a canvas dodger to be stretched and insecurely fastened across the top of the ladder and in ordering the seaman to go up the ladder. The employer was a New York corporation. The ship was a domestic merchant vessel which at the time of the injuries was returning from an Ecuadorian port. The action was brought on the common-law side of a District Court of the United States, and the right of recovery was based expressly on § 20 of the Act of March 4, 1915, c. 153, 38 Stat. 1185, as amended by § 33 of the Act of June 5, 1920, c. 250, 41 Stat. 1007, which reads as follows:

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[13] Great Lakes Dredge & Dock Co. v. Kierejewski (1923) 261 U. S. 479, 67 L. ed. 756 (with correction in 266 U. S., prefix p. II) was an action at law (not a suit in admiralty) brought in a United States District Court on diversity of citizenship of the parties for a maritime tort resulting in death, the deceased being a boiler-maker engaged in repairing a scow moored in navigable waters in New York State. It was held that the state wrongful death statute applied,—"the rules of the maritime law supplemented by the local death statute applied and fixed the rights and liabilities of the parties."

The deaths in both Western Fuel Co. v. Garcia, and Great Lakes Dredge & Dock Co. v. Kierejewski occurred before the adoption of the Merchant Marine Act (Jones Act) of June 5, 1920, quoted and discussed in the next case above, Panama R. Co. v. Johnson. As to wrongful death of "seamen" (and in terms it applies only to seamen) this act is held to supercede all state laws. Lindgren v. United States (1930) 281 U. S. 38. In this case the question was raised as to how far the wrongful death provisions of the Merchant Marine Act supercedes also, so far as "seamen" are concerned, the Wrongful Death on the High Seas Act, quoted at the close of the opinion in the Garcia case above. The court declined to answer the question because the seaman in Lindgren v. United States was not killed on the high seas, but in state territorial waters. For a discussion as to what categories of persons the Wrongful Death on the High Seas Act applies, see Calvert Magruder and Marshall Grout, Wrongful Death within the Admiralty Jurisdiction (1926) 35 Yale L. J. 395.

"Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The defendant unsuccessfully demurred to the complaint and then answered. The issues were tried to the court and a jury; a verdict for the plaintiff was returned, and a judgment was entered thereon, which the Circuit Court of Appeals affirmed. 289 Fed. 964. The defendant prosecutes this writ of error. * * *

The case arose under a law of the United States and involved the requisite amount, if any was requisite; so there can be no doubt that the case was within the general jurisdiction conferred on the District Courts by § 24 of the Judicial Code. * * *

The defendant objects that the statute whereon the plaintiff based his right of action is in conflict with § 2 of Article III of the Constitution, which extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction." Before coming to the particular grounds on the objection, it will be helpful to refer briefly to the purpose and scope of the constitutional provision as reflected in prior decisions.

As there could be no cases of "admiralty and maritime jurisdiction" in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in Colonial times and during the Confederation and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control because of its intimate relation to navigation and to interstate and foreign commerce. In pursuance of that purpose the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. Commentators took that view; Congress acted on it, and the courts, including this court, gave effect to it. Practically therefore the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded or as being only the law of the several states, but as having become the law of the United States,—subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion. But there are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provision require that the enactments,—when not relating to matters whose existence or influence is confined to a more restricted field, as in Cooley v. Board of Wardens, 12 How. 299, 319,—shall be coextensive with and operate uniformly in the whole of the United States. Waring v. Clarke, 5 How. 441, 457; The Lottawanna, 21 Wall. 558, 574, 577; Butler v. Boston & Savannah S. S. Co., 130 U. S. 527, 556, 557; In re Garnett, 141 U. S. 1, 12; Southern Pacific Co. v. Jensen, 244 U. S. 205, 215; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 164; Washington v. Dawson & Co., 264 U. S. 219; 2 Story Const., 5th ed., §§ 1663, 1664, 1672.

In this connection it is well to recall that the Constitution, by § 1 of Article III, declares that the judicial power of the United States shall be vested in one Supreme Court "and in such inferior courts as the Congress may from time to time ordain and establish," and, by § 8 of Article I, empowers the Congress to make all laws which shall be necessary and proper for carrying into execution the several powers vested in the government of the United States. Mention should also be made of the enactment by the first Congress, now embodied in §§ 24 and 256 of the Judicial Code, whereby the District Courts are given exclusive original jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

The particular grounds on which a conflict with § 2 of Article III is asserted are that the statute enables a seaman asserting a cause of action essentially maritime to withdraw it from the reach of the maritime law and the admiralty jurisdiction, and to have it determined according to the principles of a different system applicable to a distinct and irrelevant field, and also disregards the restriction in respect of uniformity. For reasons which will be stated we think neither ground can be sustained.

The statute is concerned with the relative rights and obligations of seamen and their employers arising out of personal injuries sustained by the former in the course of their employment. Without question this is a matter which falls within the recognized sphere of the maritime law, and in respect of which the maritime rules have differed materially from those of the common law applicable to injuries sustained by employees in nonmaritime service. But, as Congress is empowered by the constitutional provision to alter, qualify or supplement the maritime rules, there is no reason why it may not bring them into relative conformity to the common-law rules or some modification of the latter, if the change be countrywide and uniform in operation. Not only so, but the constitutional provision interposes no obstacle to permitting rights founded on the maritime law or an admissible modification of it to be enforced as such through appropriate actions on the common-law side of the courts,—that is to say, through proceedings in personam according to the course of the common law. Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 384; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 159. This was permissible before the Constitution, and it is still permissible. Judicial Code, §§ 24 and 256; Waring v. Clarke, 5 How. 441, 460; New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344, 390; Leon v. Galceran, 11 Wall. 185, 188, 191; Schoonmaker v. Gilmore, 102 U. S. 118; Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 646; Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 259; Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109.

Rightly understood the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified, and not between that law and some nonmaritime system.

The source from which the new rules are drawn contributes nothing to their force in the field to which they are translated. * * *

But it is insisted that, even if the statute brings those rules into that law, it is still invalid in that it restricts the enforcement of rights founded on them to actions at law, and thereby encroaches on the admiralty jurisdiction intended by the Constitution. It must be conceded that the construction thus sought to be put on the statute finds support in some of its words, and also that if it be so construed a grave question will arise respecting its constitutional validity. * * *

The course of legislation * * * always has been to recognize the admiralty jurisdiction as open to the adjudication of all maritime cases as a matter of course, and to permit a resort to common-law remedies through appropriate proceedings in personam as a matter of admissible grace. It therefore is reasonable to believe that, had Congress intended by this statute to withdraw rights of action founded on the new rules from the admiralty jurisdiction and to make them cognizable only on the common-law side of the courts, it would have expressed that intention in terms befitting such a pronounced departure,—that is to say, in terms unmistakably manifesting a purpose to make the resort to common-law remedies compulsory, and not merely permissible. But this was not done. On the contrary, the terms of the statute in this regard are not imperative but permissive. It says "may maintain" an action at law "with the right of trial by jury," the import of which is that the injured seaman is permitted, but not required, to proceed on the common law side of the court with a trial by jury as an incident. The words "in such action" in the succeeding clause are all that are troublesome. But we do not regard them as meaning that the seaman may have the benefit of the new rules if he sues on the law side of the court, but not if he sues on the admiralty side. Such a distinction would be so unreasonable that we are unwilling to attribute to Congress a purpose to make it. A more reasonable view, consistent with the spirit and purpose of the statute as a whole, is that the words are used in the sense of "an action to recover damages for such injuries," the emphasis being on the object of the suit rather than the jurisdiction in which it is brought. So we think the reference is to all actions brought to recover compensatory damages under the new rules as distinguished from the allowances covered by the old rules, usually consisting of wages and the expense of maintenance and cure. See The Osceola, 189 U. S. 158; The Iroquois, 194 U. S. 240; Chelentis v. Luckenbach S. S. Co., 247 U. S. 372. In this view the statute leaves the injured seaman free under the general law—§§ 24 (par. 3) and 256 (par. 3) of the Judicial Code—to assert his right of action under the new rules on the admiralty side of the court. On that side the issues will be tried by the court,[14] but if he sues on the common-law side there will be a right of trial by jury. So construed, the statute does not encroach on the admiralty jurisdiction intended by the Constitution, but permits that jurisdiction to be invoked and exercised as it has been from the beginning. * * *

Judgment affirmed.[15]

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[14] On the strange disappearance of an early provision by Congress for jury trial in some cases in admiralty, see Henry Billings Brown, Jurisdiction of the Admiralty in Cases of Tort (1909) 9 Col. L. Rev. 1, 2-4.

[15] State courts have concurrent jurisdiction with federal courts to enforce the rights given seamen by the Jones Act, the act of June 5, 1920, supra. Engel v. Davenport (1926) 271 U. S. 33, 70 L. ed. 813; Panama R. Co. v. Vasquez (1925)

SULTAN RAILWAY & TIMBER CO. v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON.

1928. Supreme Court of the United States. 277 U. S. 135.

Error to the Supreme Court of Washington.

Mr. Justice Van Devanter delivered the opinion of the court.

These suits present the same questions, were heard together and may be disposed of in one opinion, as they were below.

They were brought to restrain the enforcement of an order, legislative in character, made by a state bureau—the objection to the order being that it is repugnant to the Constitution and laws of the United States in that it impinges on the admiralty and maritime jurisdiction of the United States. The order was upheld by the trial court and by the Supreme Court of the state, 141 Washington 172. The cases are here on writs of error sued out under § 237(a) of the Judicial Code.

The order is a statute of the state within the meaning of that section, and therefore our jurisdiction is invoked in the right mode. John P. King Manufacturing Co. v. Augusta, 277 U. S. 100, and cases there cited.

The order requires each of the plaintiffs from time to time to report the number of men employed by it in the work about to be described; together with the wages paid to them, and to pay into the state's workmen's compensation fund, out of which injured employees are compensated, premiums or assessments based on such wages.

The plaintiff in one suit is conducting logging operations, a part of which consists in putting sawlogs into booms, after they have been thrown into a navigable river, so that they conveniently may

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271 U. S. 557, 70 L. ed. 1085. And a suit based on these rights may be by libel in personam in an admiralty court. Baltimore S. S. Co. v. Phillips (1927) 274 U. S. 316, 71 L. ed. 1069; but not by libel in rem, Plamals v. The Pinar Del Rio (1928) 277 U. S. 151, 72 L. ed. 827. For cases interpreting these new rights see annotation of U. S. C. A. Title 46, § 688. For a brief summary of the rights of railroad employees engaged in interstate commerce made applicable to seamen by this act see ante, p. 230, footnote.

What maritime workers are "seamen"? It has been held that a stevedore injured while engaged in stowing cargo in the hold of a ship is a "seaman" and may recover under this Act from his employer which was not the ship but a company engaged in stevedoring, the injury being caused by negligence of another employee of the same employer. International Stevedoring Co. v. Haverty (1926) 272 U. S. 50, 71 L. ed. 157. "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew." An injury received by a stevedore *in such circumstances* is a maritime tort to which state workmen's compensation acts cannot be applied. Northern Coal &c. Co. v. Strand (1928) 278 U. S. 142, 73 L. ed. 232. See also Messel v. Foundation Co. (1927) 274 U. S. 427, 71 L. ed. 1135 (another type of workman receiving injury while aboard a ship).

be towed elsewhere for sale. The men are employed in the booming work. The plaintiff in the other suit conducts a saw mill on the bank of a navigable river. Logs are towed in booms to a point adjacent to the mill and then anchored. The booms afterwards are taken apart and the logs are guided to a conveyor extending into the river and then drawn into the mill for sawing. The men are employed in taking apart the booms and guiding the logs to the conveyor. In both instances the place of work is on navigable water—in one it is done before actual transportation begins and in the other after the transportation is completed.

It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity. Grant Smith-Porter Co. v. Rohde, 257 U. S. 469; Millers' Indemnity Underwriters v. Braud, 270 U. S. 59; Alaska Packers Association v. Industrial Accident Commission, 276 U. S. 467.

We think the order in question as applied to the situations disclosed comes within that rule.

Judgments affirmed.

LONDON GUARANTEE & ACCIDENT CO. v. INDUSTRIAL ACCIDENT COMMISSION.

1929. Supreme Court of the United States. 279 U. S. 109.

Appeal from a judgment of the Supreme Court of California which affirmed an award made by the state Industrial Accident Commission.

Mr. Chief Justice Taft delivered the opinion of the court.

This proceeding was begun by a petition to the Industrial Accident Commission of California to obtain an award for the death of John James Uttley Brooke, an unmarried minor nineteen years of age, who was drowned in Santa Monica Bay on April 8, 1926, while in the service of the Morris Pleasure Fishing, Inc. The appellant was the insurance carrier of the employer, and the question presented in this appeal is whether the case * * * might be brought within the purview of the Workmen's Compensation Act of California. * * *

The facts as shown before the Commission and as stated by the District Court of Appeal were as follows:

"The Morris Pleasure Fishing, Inc., is a corporation which carries on the business of maintaining and operating from Santa

Monica Bay a small fleet of fishing vessels for the accommodation of the public seeking recreation in deep-sea fishing. In the fishing seasons its practice has been to have excursions daily from Santa Monica Bay to the ocean fishing grounds, a distance of three to five miles, with fixed charges both for half-day and full-day trips. For use in this business the company has several vessels, ranging from four to fourteen tons registry, equipped with gas engines and capable of cruising a distance of 500 miles. The business has been confined entirely to the maintenance of these pleasure-fishing vessels and the transportation of patrons to and fro by water, except that excursionists have also been supplied with bait. As one of the necessary incidents of its business the company employs seamen to navigate its vessels; and before and at the time of the accident which occasioned Brooke's death, he was in the company's employ as an apprentice navigator and seaman. In that capacity he made daily trips as required with the company's vessels, and at times was substituted as 'spare skipper' for one of the regular skippers. On April 8, 1926, one of the company's fishing vessels called 'W. K.,' of about seven tons registry, was moored, with no one aboard, in Santa Monica Bay about three-quarters of a mile to a mile from the pier. A storm having arisen, the vessel broke from her moorings early in the afternoon and began to drift toward the shore. In an effort to save the vessel from destruction, Captain Morris, as Brooke's superior officer, had Brooke and another employe, named Gregory, put off from the pier with the captain himself, in a boat about eighteen feet long, with the purpose in mind of boarding the 'W. K.' and returning her to her anchorage. But as they neared the drifting vessel, their boat was capsized by a heavy wave and all three were drowned."

[Several cases beginning with Southern Pacific Co. v. Jensen, ante, p. 1416, are here summarized.]

Other cases, however, are cited to sustain the state jurisdiction in this case. The first and chief one is Grant Smith-Porter Company v. Rohde, 257 U. S. 469.[16] * * *

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[16] Grant-Smith-Porter Ship Co. v. Rohde (1922) 257 U. S. 469, 66 L. ed. 321, 25 A. L. R. 1008: Libel in personam in admiralty to recover damages for an injury suffered by Rohde. The respondent was a shipbuilding company engaged in building a ship. At the time of the injury the ship, having been launched, was lying in the Willamette River at Portland, Oregon, a navigable water, tied to a dock which was a part of the shipbuilding plant. The ship was not completed and Rohde was a carpenter engaged at the time of injury in carpentry work in the interior of the ship, essential to its completion. The Oregon Workmen's Compensation Act in terms applied to shipbuilders and their employees but was optional in the sense that it applied of its own force only if neither employer nor employee by notice rejected its application. No notice was given. The statute also provided that compensation under the act was the sole relief available to employees to whom the act was applicable. In holding that Rohde could not recover in admiralty, the court, by Reynolds, J., said:

"The contract for constructing 'The Ahala' was non-maritime, and although the incompleted structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment, nor his activities at the time had

In Miller's Indemnity Underwriters v. Braud, 270 U. S. 59, the plaintiff's intestate was employed as a diver by a ship building company. He submerged himself from a floating barge anchored in a navigable river 35 feet from the bank, in order to saw off some timbers of an abandoned set of ways once used for launching ships which had become an obstruction to navigation. He died from suffocation for lack of air supply during his work. His representative was allowed to recover from the employer's insurer under the Texas Workmen's Compensation Law. The facts disclosed a possible maritime tort to which the general admiralty jurisdiction might extend, except that the state compensation law prescribed an exclusive remedy. The state statute was allowed to have effect. It was thought that enforcing such a state statute would not tend to destroy the characteristic features of maritime law.

In Alaska Packers' Association v. Industrial Accident Commission, 276 U. S. 467, a person engaged by a fishing and canning company as a seaman, also as a fisherman, and then for general work in and about a cannery, was injured after the fishing season was over while standing upon the shore and endeavoring to push a stranded fishing boat into navigable waters for the purpose of floating it to a nearby dock, where it was to be lifted out and stored for the winter. It was held that the injury, even if within admiralty jurisdiction, was of such a local character as to be cognizable under a state compensation law,—a ruling which would not injure the characteristic features or uniformity of the admiralty law.

[Sultan Railway & Timber Co. v. Department of Labor of the State of Washington, ante, was here summarized.]

Nothing in these cases could apply to the case before us. They may be said to be of an amphibious character. They have an admiralty feature about them in the locality where they occurred, although even this is doubtful with respect to the Alaska case. But the contract in the Rohde case was non-maritime, the ship was

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any direct relation to navigation or commerce. Thames Towboat Co. v. The Schooner 'Francis McDonald', 254 U. S. 242. The injury was suffered within a state whose positive enactment prescribed an exclusive remedy therefor. And as both parties had accepted and proceeded under the statute by making payments to the Industrial Accident Fund it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law. * * * Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential. * * *

"Construing the first question [certified by the Circuit Court of Appeals] as meaning to inquire whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state, we answer, yes.

"Assuming that the second question presents the inquiry whether in the circumstances stated the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist, we also answer, yes." Cf. Northern Coal &c. Co. v. Strand (1928) 278 U. S. 142, 73 L. ed. 232.

incomplete, and being completed under a non-maritime contract; both parties had made a non-maritime contract with reference to their liabilities and not in contemplation of the admiralty law. The Braud case was one of a maritime tort. But it had no characteristic feature of the general maritime law except locality, and it was very like, in its relation to the state law, to the Rohde case. The employment was not maritime, and the transaction and the circumstances thus seemed to have but one characteristic that was maritime. This was true of the Sultan Company case. * * *

We have thus examined all the cases in this court since Southern Pacific Co. v. Jensen, with respect to the efforts to apply the workmen's compensation acts in admiralty, [to maritime torts] and we have found nothing in them that would justify an award in the present case.

Here it is without dispute that the deceased was a sailor, that his employment and relation to the owner of the vessel were maritime. It is without dispute that the vessel, in the navigation of which he was employed, was registered as a vessel engaged in the navigable waters of the United States, in the business of transporting people for hire. He was a skipper engaged in assisting the navigation of these registered vessels from their mooring place in Santa Monica Bay to the place where the deep sea fishing was to be carried on, a distance of from three to five miles or more, all in navigable waters. The vessels were capable of navigation for 500 miles. There was no feature of the business and employment that was not purely maritime. To hold that a seaman, engaged and injured in an employment purely of admiralty cognizance, could be required to change the nature or conditions of his recovery under a state compensation law, would certainly be prejudicial to the characteristic features of the general maritime law.

Objection is made that the deceased here lost his life by drowning when he was not on a vessel in the navigation of which he had been employed as a seaman. This is immaterial. He was lost in navigable waters. He was engaged in attempting to moor and to draw into a safe place the vessel with relation to which he was employed. It is clearly established that the jurisdiction of the admiralty over a maritime tort does not depend upon the wrong having been committed on board a vessel, but rather upon its having been committed upon the high seas or other navigable waters. The Plymouth, 3 Wall. 20; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 59, 60.

Another objection to the admiralty jurisdiction here is that the vessel was not engaged in interstate or foreign commerce. It was employed only to run from shore to Santa Monica Bay, five or ten miles to the deep sea fishing place, and then return, and all within the jurisdiction of California. This argument is a complete misconception of what the admiralty jurisdiction is under the Constitution of the United States. Its jurisdiction is not limited to transportation of goods and passengers from one state to another, or from the United States to a foreign country, but depends upon the jurisdiction conferred in Article 3, Section 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction.

Mr. Justice Clifford, in The Belfast, 7 Wall. 624, 640, said:

"Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it can not be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants." Citing The Genesee Chief, 12 How. 452. See also In re Garnett, 141 U. S. 1, 15; Ex parte Boyer, 109 U. S. 629, 632; The Propeller Commerce, 1 Black 574, 578.

Another objection which is pressed on us is that § 256 of the Judicial Code does not exclude the jurisdiction under the California Compensation Act, because the object of the trips was for pleasure and not for commerce. This is a misconception. Commerce is not prevented because the object of it is to serve the pleasure of passengers. The business was that of earning money by transporting people on the navigable waters of the United States, and, strictly speaking, it is just as much a part of commerce and of the admiralty jurisdiction as if these vessels were carrying cargoes of merchandise. Gibbons v. Ogden, 9 Wheat. 1, 215 et seq. The conclusion sought to be drawn by counsel for the Commission from the Rohde and other cases is that workmen's compensation acts will apply unless their application would interfere with the uniformity of the general maritime law in interstate and foreign commerce, and there is neither here. But this omits one of the grounds for making an exception—that it shall not be prejudicial to the characteristic features of the maritime law. That is just what it would be here, for here we have a transaction on the navigable waters of the United States which in every respect covers all the characteristic features of maritime law and has no other features but those. To apply to such a case a state compensation law would certainly be prejudicial to those features. We must hold, therefore, that it was a violation of the exclusive maritime jurisdiction conferred by the Constitution to apply in this case the California Compensation Act.

The judgment of the Supreme Court of California is

Reversed.[17]

MR. JUSTICE BRANDEIS dissents.

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[17] Red Cross Line v. Atlantic Fruit Co. (1924) 264 U. S. 109, 68 L. ed. 582: A New York statute authorized courts of that state to decree specific enforcement of agreements to arbitrate. Prior to the statute such agreements were held, in New York and usually elsewhere, to be not specifically enforceable, though they were recognized as valid and damages could be recovered for refusal to

arbitrate as agreed. Specific enforcement was unknown to courts of admiralty. The question was, was this statute applicable to maritime contracts, herein an agreement in the chartering of a ship that any dispute arising therefrom should be submitted to arbitration? Held, yes. The court, by Brandeis, J., said:

"In admiralty, also, agreements to submit controversies to arbitration are valid. * * * For breach of an executory agreement a libel for damages will lie. * * * The agreement whether executory or executed, can not be enforced in admiralty by specific performance; merely because that court lacks the power to grant equitable relief. * * * The reluctance of the admiralty court to lend full aid goes, however, merely to the remedy. * * * By reason of the saving clause, state courts have jurisdiction in personam, concurrent with the admiralty courts, of all causes of action maritime in their nature arising under charter parties. * * * The 'right of a common law remedy', so saved to suitors, does not, as has been held * * * include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 644, et seq.; Rounds v. Cloverport Foundry & Machine Co., 237 U. S. 303. A state may not provide a remedy in rem for any cause of action within the admiralty jurisdiction. The Hine v. Trevor, 4 Wall. 555; The Glide, 167 U. S. 606. But otherwise, the state, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit. New York, therefore, had the power to confer upon its courts the authority to compel parties within its jurisdiction to specifically perform an agreement for arbitration, which is valid by the general maritime law, as well as by the law of the state, which is contained in a contract made in New York and which, by its terms, is to be performed there."

March 4, 1927, Congress enacted a "Longshoremen's and Harbor Workers' Compensation Act," 44 Stat. 1424. It follows in general the system of the various state workmen's compensation acts. It embraces employers "whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.)" It expressly excludes from its provisions "a master or member of a crew of any vessel" and "any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." The act is to be administered by the United States Employees (government employees) Compensation Commission and local deputy commissioners appointed by that commission. To be within the act disability or death must result from injury occurring on "the navigable waters of the United States (including any dry dock.)" For annotations See U. S. C. A. Title 33, ch. 18, §§ 901 ff.

CHAPTER XI.

CORPORATIONS, DOMESTIC AND FOREIGN.

Section 1.—Suits in Federal Courts.

THE BANK OF THE UNITED STATES v. DEVEAUX ET AL.

1809. Supreme Court of the United States. 5 Cranch, 61.

Error to the Circuit Court for the district of Georgia. The petition stated the action to be brought by The President, Directors and Company, of the Bank of the United States, which said bank was established under an act of Congress entitled "An Act to incorporate the subscribers to the Bank of the United States," passed Feb. 5, 1791 and averred that the petitioners were citizens of the State of Pennsylvania and that Deveaux and Robertson, the defendants, were citizens of Georgia. The defendants pleaded that the petitioners having averred themselves to be a corporation the court had no jurisdiction to entertain a suit by them in that capacity. To this plea there was a demurrer and the circuit court gave judgment thereon for the defendants.

Binney, for the plaintiffs in error.—In the year 1805, the state of Georgia passed a law to tax the Branch Bank of the United States, at Savannah. The bank having refused to pay the tax, the state officers entered their office of discount and deposit, and took and carried away $2000, for which the bank of the United States brought their action of trespass in the Circuit Court of the United States for the district of Georgia. The plea to the jurisdiction does not deny that the plaintiffs were citizens of the state of Pennsylvania, but relies upon the fact that the plaintiffs sue as a body corporate. * * *

The spirit of the federal Constitution and laws demands, that the citizenship of the members should be noticed, as well to affect the question of jurisdiction, as for other purposes. * * *

What is a corporation aggregate? It is a collection of many individuals, united into one body, under a special name, having perpetual succession under an artificial form, and vested, by the policy of the law, with the capacity of acting in several respects as an individual. 1 Kyd on Corp. 13. To say that it is an "ens civile, a jus habendi et agendi, an ens rationis, a mere metaphysical being, and that it rests only in consideration and intendment of law," are terms calculated to mislead the understanding.

A corporation is composed of natural persons; it is a visible, tangible body; and although the whole collectively have faculties in law which the individuals have not, yet it does not follow, that the whole body may not be seen, examined, sifted and contemplated, as any other body of individuals having collectively a particular faculty. 11 Co. 98 b. The individuals hold their rights as members, in their natural, and not in a politic capacity. A corporation is a mere collection of men having collectively certain faculties. * * *

A corporation as a "faculty" has no "local habitation," though it has a "name." If it is an ens rationis only, it cannot be said to reside anywhere; and it certainly occupies nothing; yet habitancy, residence and occupation may be predicated of a corporation aggregate. The residence and inhabitancy of the particular members have been taken into consideration, and have been deemed to impart these characters to the corporation. * * *

The rule seems to be, not that the individuals confer their private privileges upon the body corporate, but that as often as justice or convenience require that the corporation should be considered as composed of natural persons, the individuals are disclosed, and their character becomes the subject of legal contemplation. * * * It is unimportant by what name citizens are by the laws of their own state permitted to sue they are still citizens, and entitled to that substantial justice, and the benefit of those independent tribunals, which were intended to be secured by the federal Constitution. The Constitution does not speak of the name on record—of the nominal party; it speaks of "controversies" "between citizens of different states." The question is not, what names appear upon the record, but between whom is the controversy? who are the real litigants? * * * Besides, if the bank cannot sue, they cannot be sued in the federal courts; nor any other corporation. The consequence is, that if a citizen of Georgia would sue the Bank of the United States, at Philadelphia, he must go into the state courts. If he would sue the corporation of Philadelphia, he must sue in the state court; nay, even in the county court of Philadelphia itself.

But it is not more a question of jurisdiction than of right. If you cannot inquire who are the members of a corporation, whenever a right depends upon the question of citizenship, that right cannot be enjoyed by a corporation.

If citizenship of the members cannot give jurisdiction, neither can their alienage. A corporation composed of aliens cannot sue in the federal courts. Neither the East India Company, the Bank of England, nor even a sole corporation, such as the Chamberlain of London, can sue in those courts; for in his corporate capacity, he is not an alien. An alien cannot sue a domestic corporation, unless in the state courts. Although you permit an obscure alien to sue a citizen in the federal courts, yet you deny that privilege to a corporation consisting of a great number of aliens. * * *

P. B. Key, contra. * * * A corporation aggregate is an artificial, invisible body, existing only in contemplation of law. It has no analogy to a natural person. It has no organ but its seal. It cannot sue, or be sued, for any personal injury; it cannot be outlawed; it is not subject to an attachment of contempt; it never dies. It cannot be a citizen of any state, because it cannot owe allegiance; it cannot commit treason nor felony; it can have no residence, because it is an artificial, invisible, intangible body. It cannot appear in person, but must appear by attorney. For all these reasons, it cannot come within the description of those who are entitled to sue in the circuit courts of the United States. Neither residence nor inhabitancy is sufficient to give jurisdiction; it must be a citizen, possessing political rights, and owing allegiance to some state. * * *

If the averment in the declaration relate to the body politic, it is repugnant. If to the individual members, it is immaterial. No issue could have been taken upon it; it does not name a single individual member of the corporation. If they had named every individual, it would have appeared that some of them were citizens of Georgia. If the defendant had pleaded that A. B., one of the members, was a citizen of Georgia, it would have been a bad plea, because immaterial and argumentative. * * *

This cause being argued in connection with the cases of The Hope Insurance Company of Providence v. Boardman et al. [printed next in this case-book] and The Maryland Insurance Company v. Wood, in the latter of which Mr. Harper was counsel for the defendant in error, he was permitted to reply. * * *

Harper, in reply.—The point of jurisdiction gives rise to two questions. 1. As to the form of the averment. 2. As to the effect of the incorporation, on the original character of the members.

I. In the case of the Maryland Insurance Company against Wood, the averment is, "The Maryland Insurance Company, citizens of the State of Maryland." This does not mean that the corporation, as such, is a citizen of Maryland, but that the individuals who compose it are citizens. It is the same thing in substance as to say, "The Maryland Insurance Company, a corporate body composed of persons who are citizens of Maryland."

It is objected, that such an averment cannot be true; but it is surely possible that all the members of a corporate body may be citizens of one state; and with regard to insurance companies, it is almost always true. But if not true, the contrary may be shown.

It is also objected that the averment is defective because it does not name the individuals who are affirmed to be citizens. But it may be answered that they need not be named because they have authority to join in the suit in their corporate name and therefore in that name may make the averment. There is no uncertainty because it is averred that they are all citizens [of Maryland]. * * *

If the fact be not as averred, it may be pleaded, and the plea may state that A, B and C are members of the corporation, and are citizens of another state.

II. As to the effect of the incorporation. The question is not, whether a corporation can be a citizen in its corporate capacity; but whether by becoming members of the corporation the individuals who compose it lose in their corporate affairs those privileges which as individuals they possessed before. * * *

The construction contended for would restrict the privilege of suing; and would take away one of its most important properties. One great object in allowing citizens of different states to sue in the federal courts was to obtain a uniformity of decision in cases of a commercial nature. The most numerous and important class of those cases, and the class in which it is most important to have uniform rules and principles is that of insurance cases. They are almost wholly confined to corporations, though most frequently, in fact, between citizens of different states. * * *

Marshall, Ch. J., delivered the opinion of the court. * * * The jurisdiction of this court being limited, so far as respects the character of the parties in this particular case, "to controversies between citizens of different states," both parties must be citizens, to come within the description. That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty and not as a company of individuals who in transacting their joint concerns may use a legal name, they must be excluded from the courts of the Union.

The duties of this court to exercise jurisdiction where it is conferred and not to usurp it where it is not conferred are of equal obligation. The constitution, therefore, and the law are to be expounded without a leaning the one way or the other according to those general principles which usually govern in the construction of fundamental or other laws.

A constitution from its nature deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.

The judicial department was introduced into the American Constitution, under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be that the tribunals of the states will administer justice as impartially as those of the nation to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states. Aliens or citizens of different states are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals.

Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an individual, without feeling a doubt respecting its jurisdiction. Those decisions are not cited as authority; for they were made without considering this particular point; but they have much weight, as they show that this point neither occurred to the bar or the bench; and that the common understanding of intelligent men is in favor of the right of incorporated aliens, or citizens of a different state from the defendant, to sue in the national courts.

* * *

If a corporation may sue in the courts of the Union, the court is of opinion that the averment in this case is sufficient. Being authorized to sue in their corporate name, they could make the averment, and it must apply to the plaintiffs as individuals, because it could not be true as applied to the corporation.

Judgment reversed; plea in abatement overruled, and cause remanded.

Judge Livingston, having an interest in the question, gave no opinion.

HOPE INSURANCE COMPANY OF PROVIDENCE v. BOARDMAN ET AL.

1809. Supreme Court of the United States. 5 Cranch, 57.

Error to the Circuit Court for the district of Rhode Island, in an action upon a policy of insurance. The only question decided in this court was that relative to the jurisdiction of the courts of the United States.

The parties were described in the declaration as follows: "William Henderson Boardman and Pascal Paoli Pope, both of Boston, in the district of Massachusetts, merchants and citizens of the state of Massachusetts, complain of the Hope Insurance Company of Providence, a company legally incorporated by the legislature of the state of Rhode Island and Providence Plantations, and established at Providence in said district. * * *

Ingersoll, for the plaintiffs in error, contended that * * * a corporation aggregate cannot be a citizen of any state; and here is no averment of citizenship of the individuals who compose the corporation. * * *

Adams, contra. * * * The term citizen could not with propriety be applied to a corporation aggregate. It could only be a citizen, by intendment of law. It is only a moral person; but it may be a citizen quoad hoc, i. e., in the sense in which the term citizen is used in that part of the Constitution which speaks of the jurisdiction of the judicial power of the United States. The term is indeterminate in its signification. It has different meaning in different parts of the Constitution. * * *

To say that all the individual members of a body corporate must be citizens of a certain description, destroys the idea of a body politic. It is the body politic, the moral person, that sues; and not the individuals who compose the corporation. Its powers, its duties and capacities are different from those of the individuals of whom it is composed. It can neither derive benefit from the privileges, nor suffer injuries by the incapacities, of any of those individuals. Thus, the infancy of any or even of all the members of a body corporate does not affect the validity of its acts. * * * A majority of the members of the Bank of the United States are aliens.

The objection goes to exclude all corporations aggregate from the federal courts. For if a corporation cannot be a citizen, it cannot be an alien. And as the individual members are constantly changing, by the transfer of stock, it is impossible to ascertain at any precise moment who are the individuals who constitute the corporate body; and it would at any time be in the power of a corporation defendant to evade the jurisdiction of the court by taking in a new member who should be of the same state with the plaintiff.

* * *

THE COURT, having in the case of The Bank of the United States v. Deveaux decided that the right of a corporation to litigate in the courts of the United States depended upon the character (as to citizenship) of the members which compose the body corporate, and that a body corporate, as such, cannot be a citizen within the meaning of the Constitution reversed the judgment for want of jurisdiction in the court below.

Judgment reversed.

NOTE.

In Strawbridge et al. v. Curtiss et al. (1806) 3 Cranch (U. S.), 267, 2 L. ed. 435, where some of the plaintiffs were citizens of Massachusetts and the defendants were citizens, some of Massachusetts and one of Vermont, it was held that the Circuit Court did not have jurisdiction. The grant of jurisdiction by Congress to these inferior courts of the United States read, "where an alien is a party; or the suit is between a citizen of a state where the suit is brought, and a citizen of another state" and this was construed to mean that where there are two or more persons on either side of a suit the citizenship and residence of each essential plaintiff and of each essential defendant must be such that that particular Circuit Court would have jurisdiction in suits by each plaintiff separately against every one of the defendants separately. (Query, whether consistently with the Constitution Congress might not have made it wider?) Strawbridge v. Curtiss has been followed in construing all similar and analogous provisions ever since. See Smith v. Lyon (1890) 133 U. S. 315, 318, 33 L. ed. 635; Camp v. Gress (1919) 250 U. S. 308, 312, 63 L. ed. 997. This ruling as to natural persons was combined with the rule of Bank of the United States v. Deveaux in Commercial and Railroad Bank of Vicksburg v. Slocomb (1840) 14 Pet. 60, 10 L. ed. 354 and it was held that where two of the several shareholders of the defendant corporation were citizens of the same state as the plaintiff, the Circuit Court did not have jurisdiction whatever might be the citizenship of the other shareholders.

Four years later in a suit by a railroad company chartered by the State of South Carolina against a citizen of New York in the United States Circuit Court for South Carolina further complications were presented. Among these was the fact that two of the railroad company's shareholders were corporations each of which had some shareholders who were citizens of New York. Also two shareholders were citizens of North Carolina, that is, not all the shareholders were citizens of the state where the suit was brought. (See the statute quoted above.) The court commented adversely upon both Strawbridge v. Curtiss and Bank of the United States v. Deveaux, saying that inferences had been drawn from them that ought not to be followed, that they had never been satisfactory to the bar, nor the latter to the bench, that in the present case jurisdiction could be sustained by modifying the rules of those cases to this extent as to corporations, viz., that only *some* of the shareholders need have the requisite citizenship. "But," the court continued, "there is a broader ground upon which * * * we altogether rest our present judgment * * *. It is that a corporation created by and doing business in a particular state is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person. * * * When the corporation exercises its powers in the state which chartered it that is its residence, and such an averment is sufficient to give the circuit courts jurisdiction." Louisville, Cincinnati and Charleston Railroad Co. v. Letson (1844) 2 How. 497, 11 L. ed. 353. The further evolution of the present day doctrine is recounted by Justice Shiras in the following case. Consider the cases abstracted therein as well as the case itself.

ST. LOUIS AND SAN FRANCISCO RY. CO. v. JAMES.

1896. Supreme Court of the United States. 161 U. S. 545.

[Answering a question, sufficiently stated in the opinion, certified to it by the United States Circuit Court of Appeals for the Eighth Circuit.]

Mr. Justice Shiras delivered the opinion of the court.

Etta James, as a citizen of the State of Missouri, and having a cause of action against the St. Louis and San Francisco Railway Company, a corporation of the State of Missouri, could, of course, sue the latter in the courts of that state, but equally, of course, could not sue such state corporation in the Circuit Court of the United States for the District of Missouri. Can she, as such citizen of the State of Missouri, lawfully assert her cause of action in the Circuit Court of the United States for the District of Arkansas against the St. Louis and San Francisco Railway Company by showing that the latter had availed itself of the rights and privileges conferred by the State of Arkansas on railroad corporations of other states coming within her borders and complying with the terms and conditions of her statutes?

Before addressing ourselves directly to this question, it must be conceded that the plaintiff's cause of action, though arising in Missouri, is transitory in its nature, and that the St. Louis and San Francisco Railway Company, though denying the plaintiff's right to sue it in the Circuit Court of Arkansas, waives its statutory privilege of being sued only in the district in which it has its habitat.

It must be regarded, to begin with, as finally settled, by repeated decisions of this court, that, for the purpose of jurisdiction in the federal courts, a state corporation is deemed to be indisputably composed of citizens of such state. It is equally true that, without objection so far from the federal authority, whether legislative or judicial, it has become customary for a state, adjacent to the state creating a railroad corporation, to legislatively grant authority to such foreign corporation to enter its territory with its road—to make running arrangements with its own railroads—to buy or lease them or to consolidate with the companies owning them. Sometimes, as in the present case, such foreign corporation is declared, upon its acceptance of prescribed terms and conditions, to become a domestic corporation of such adjacent state, and to be endowed with all the rights and privileges enjoyed by similar corporations created by such state.

We have already said that the rule that state corporations are undisputably composed of citizens of the states creating them is finally settled. But, in view of the question now before us, it may be well to briefly review some of the cases.

In the case of Bank of the United States v. Deveaux, 5 Cranch, 61, 78, 88, where an action had been brought against citizens of the State of Georgia in the Circuit Court of the United States for the District of Georgia, by a petition of "the president, directors, and company of the Bank of the United States," wherein it was alleged that the petitioners were citizens of the State of Pennsylvania, it was held that a corporation aggregate, composed of citizens of one state, may sue a citizen of another state in the Circuit Court of the United States, and Chief Justice Marshall, in giving the opinion of the court, said: "Substantially and essentially, the parties in such a case, where the members of the corporation are aliens or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals."

Before leaving this case it should be noted that the United States Bank was not a corporation of the State of Pennsylvania, but of the United States. The decision, therefore, was to the effect that where it appeared that a corporation plaintiff, regardless of its origin, was composed of aliens or of citizens of a different state from the defendant, the plaintiff, though suing in its corporate name, could make the averment that the individuals who composed the corporation were such aliens or citizens of a different state, and such averment, if not traversed, would sustain the jurisdiction. The principle of the case makes the individual corporators the real parties to the suit.

[Here the case of Louisville, Cincinnati and Charleston Railroad Company v. Letson, is briefly abstracted.]

Marshall v. Baltimore & Ohio Railroad [1853] 16 How. 314, 329, was a case tried in the Circuit Court of the United States for the District of Maryland, wherein the plaintiff alleged that he was a citizen of the State of Virginia, and that the Baltimore and Ohio Railroad Company, the defendant, was a body corporate by an act of the general assembly of Maryland, and it was suggested, when the case came into this court, that such an averment was insufficient to show jurisdiction in the courts of the United States over the suits, and it was denied that the decision in Louisville Railroad Company v. Letson, 2 How. 497, sanctioned it, or, if some of the doctrines there advanced seemed to do so, it was said that they were extrajudicial, and, therefore, not authoritative. Several judges dissented, but the court, speaking through Mr. Justice Grier, held that "if the declaration set forth facts from which the citizenship of the parties may be presumed or legally inferred, it is sufficient. The presumption arising from the habitat of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, the allegation that 'the defendants are a body corporate by the act of the general assembly of Maryland,' is a sufficient averment that the real defendants are citizens of that state."

In Covington Drawbridge Co. v. Shepherd [1857] 20 How. 227, 233, Chief Justice Taney, speaking for the court, said: "The question as to the jurisdiction of the courts of the United States in cases where a corporation is a party, was argued and considered in this court, for the first time, in the cases of the Hope Insurance Company v. Boardman, and of the Bank of the United States v. Deveaux, 5 Cranch, 57 and 61. These two cases were argued at the same term, and were, as appears by the report, decided at the same time: And in the last-mentioned case the court held that in a suit by or against a corporation, in its corporate name, this court might look beyond the mere legal being which the charter created, and regard it as a suit brought by or against the individual persons who composed the corporation; and an averment that they were citizens of a particular state (if such was the fact) would be sufficient to give jurisdiction to a court of the United States, although the suit was in the corporate name, and the individual corporators were not named in the suit or the averment.

"But in the case of the Louisville Railroad Company v. Letson the court overruled as much of this opinion as authorized a corporation to plead in abatement that one or more of the corporators, plaintiff or defendants, were citizens of a different state from the one described, and held that the members of the corporate body must be presumed to be citizens of the state in which the corporation was domiciled, and that both parties were estopped from denying it. And that inasmuch as the corporators were not parties to the suit in their individual characters, but merely as members and component parts of the body or legal entity which the charter created, the members who composed it ought to be presumed, so far as its contracts and liabilities are concerned, to reside where the domicil of the body was fixed by law, and where alone they could act as one person; and to the same extent, and for the same purposes, be also regarded as citizens of the state from which this legal being derived its existence and its faculties and powers."[1]

The previous cases were reviewed in Ohio & Mississippi Railroad v. Wheeler [1861] 1 Black, 286, 297. That was the case of an action brought in the Circuit Court of the United States for the District of Indiana against Wheeler, a citizen of that state, to recover the amount due on his subscription to stock of the Ohio and Mississippi Railroad Company. The declaration described the plaintiffs as "the president and directors of the Ohio and Mississippi Railroad Company, a corporation created by the laws of the States of Indiana and Ohio, and having its principal place of business in Cincinnati, in the State of Ohio, a citizen of the State of Ohio." The defendant pleaded to the jurisdiction by alleging that the plaintiff company, although a corporation of the State of Ohio in the first instance, had been incorporated by an act of assembly of the State of Indiana, and thus had become a body corporate of the same state whereof he was a citizen.

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[1] Taney, C. J., also said, "In the case of Lafayette Insurance Co. v. French [(1855) 18 How. 404, 15 L. ed. 451] the declaration stated that the corporation itself was a citizen of Indiana. Now, no one, we presume, ever supposed that the artificial being created by an act of incorporation could be a citizen of a state in the sense in which that word is used in the Constitution of the United States, and the averment was rejected because the matter averred was simply impossible."

The question thus raised was on a certificate of a division of opinion between the judges of the Circuit Court, brought to this court, and was answered as follows: "This suit in the corporate name is, in contemplation of law, the suit of the individual persons who compose it, and must, therefore, be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of the last mentioned state. Such an action cannot be maintained in a court of the United States, where jurisdiction of the case depends altogether on the citizenship of the parties. And, in such a suit, it can make no difference whether the plaintiffs sue in their own proper names, or by the corporate name and style by which they are described. The averments in the declaration would seem to imply that the plaintiffs claim to have been created a corporate body, and to have been endued with the capacities and faculties it possesses by the cooperating legislation of the two states, and to be one and the same legal being in both states. If this were the case it would not affect the question of jurisdiction in this suit. But such a corporation can have no legal existence upon the principles of the common law or under the decision of this court in the case of the Bank of Augusta v. Earle. It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of those states as one corporate body, exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state, except by the law of the state. And neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the state or sovereignty which brings it into life and endues it with its faculties and powers. The president and directors of the Ohio and Mississippi Railroad Company are, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a Circuit Court of the United States. * * *

And we shall certify to the Circuit Court that it has no jurisdiction of the case on the facts presented by the pleadings."

Memphis & Charleston Railroad v. Alabama, 107 U. S. 581, 585, was where an action had been brought by the State of Alabama, for the use of a county of that state, in a court of that state, against a railroad corporation whose road passed through that state and county, to recover the amount of a county tax assessed upon its property; and the cause was removed into the Circuit Court of the United States for the Northern District of Alabama; and upon motion the cause was remanded to the state court upon the ground that the defendant, although incorporated in Tennessee also, was a corporation of the state of Alabama. On error the judgment of the court below was affirmed, and this court, per Mr. Justice Gray, said: "The defendant, being a corporation of the State of Alabama, has no existence in this state as a legal entity or person, except under and by force of its incorporation by this state; and although also incorporated in the State of Tennessee must, as to all its doings within the State of Alabama, be considered a citizen of the State of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States." * * * [Here the court referred to Railway Company v. Whitton, 13 Wall. 270; Pennsylvania Co. v. St. Louis &c. Railroad, 118 U. S. 290, 295, and Nashua Railroad v. Lowell Railroad, 136 U. S. 356.] * * *[2]

To fully reconcile all the expressions used in these cases would be no easy task, but we think the following propositions may be fairly deduced from them: There is an indisputable legal presumption that a state corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the state which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the federal courts in "controversies between citizens of different States."

It is competent for a railroad corporation organized under the laws of one state, when authorized so to do by the consent of the state which created it, to accept authority from another state to extend its railroad into such state and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second state. Such legislation on the part of two or more states is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between states.

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[2] A collection of persons by their voluntary action obtained incorporation both in states M and C. A citizen of state M sued the corporation in the United States district court for state M, averring that the corporation was a corporation of state C. On a plea to the jurisdiction the corporation showed that it was also incorporated under the laws of state M. Held, that the court did not have jurisdiction. Goodwin v. New York, &c., R. Co. (1903) 124 Fed. 358. But the plaintiff might have sued in the United States district court for the state of C. Lake Shore & M. S. Ry. Co. v. Eder (1909) 174 Fed. 944. Other variations of the problem may be assumed. If the suit were brought in the courts of either state could the corporation remove to a federal court on the ground that it was a corporation of the other state? See Patch v. Wabash Railroad Co. (1907) 207 U. S. 277, 52 L. ed. 204, 12 Ann. Cas. 518. If the corporation were plaintiff what variations might be assumed and with what result? Many cases are collected in the two opinions just cited. See in general, Joseph H. Beale, Jr. (1904) 4 Col. L. Rev. 391-408.

Such corporations may be treated by each of the states whose legislative grants they accept as domestic corporations.

The presumption that a corporation is composed of citizens of the state which created it accompanies such corporation when it does business in another state, and it may sue or be sued in the federal courts in such other state as a citizen of the state of its original creation.

We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one state, indisputably taken, for the purpose of federal jurisdiction, to be composed of citizens of such state, is authorized by the law of another state to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second state, in such a sense as to confer jurisdiction on the federal courts at the suit of a citizen of the state of its original creation.

We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that state corporations were composed of citizens of the state which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it.[3]

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[3] An averment that a corporation is a "citizen and a resident" of a state named is insufficient. Wells v. Russellville Anthracite Coal Mining Co. (1913) 206 Fed. 528; Winkler v. Chicago & E. I. R. Co. (1901) 108 Fed. 305.

A common and sufficient averment is that the party is a corporation duly organized and existing under the laws of the State of .... Sun Printing and Publishing Assn. v. Edwards (1904) 194 U. S. 377, 48 L. ed. 1027. As to the virtue of the word "existing" see Magna Oil & Refining Co. v. White Star Refining Co. (1922) 280 Fed. 52, 62-63. For an instructive instance of insufficiency see Thomas v. Board of Trustees of the Ohio State University (1904) 195 U. S. 207, 49 L. ed. 160.

Application of the fiction stopped short of one absurdity. Doctor v. Harrington (1904) 196 U. S. 579, 49 L. ed. 606, presented for decision the case of a shareholder who was a citizen of the United States residing in New Jersey bringing suit in a federal court against his own corporation which was organized under the laws of New York. To give the corporation standing as a party, New York citizenship had to be imputed to *all* the shareholders and the corporation regarded as representing the shareholders. It was contended that consistency required the court to regard the plaintiff for the purpose of the suit as having only this imputed New York citizenship, with the result that there would be no

It should be observed that, in the present case, the corporation defendant was not incorporated as such by the State of Arkansas. The legislation of that state was professedly dealing with the railroad corporations of other states. The constitution of Arkansas provides that "foreign corporations may be authorized to do business in this state under such limitations and restrictions as may be prescribed by law," but "they shall not have power to condemn or appropriate private property."

Section 5 of the act of March 16, 1881, as shown in the preliminary statement, provides that "any railroad company incorporated by or under the laws of any other state, and having a line of railroad built, or partly built, to or near any boundary of this state, and desiring to continue its line of railroad into or through this state, or any branch thereof, may, for the purpose of acquiring the right to build its line of railroad, lease or purchase the property, rights, privileges, lands, tenements, immunities and franchises of any railroad company organized under the laws of this state, which said lease or purchase shall carry with it the right of eminent domain held and acquired by said company at the time of lease or sale, and thereafter hold, use, maintain, build, construct, own and operate the said railroad so leased or purchased as fully and to the same extent as the company organized under the laws of this state might or could have done; and the rights and powers of such company, and its corporate name, may be held and used by such foreign railroad company as will best subserve its purpose and the building of said line of railroad. * * * In all other matters said foreign railroad company shall be subject to all the provisions of all acts in relation to railroads, the liabilities and forfeitures thereby imposed, and may sue and be sued in the same manner as other railroad corporations, and subject to the same service of process, and shall keep an office or offices in said state as required by the constitution of this state."

It was under the provisions of this section that the St. Louis and San Francisco Railway Company, in 1882, purchased from corporations of Arkansas, the railroad already built by them extending from the southern boundary of Missouri to Fort Smith in Arkansas. These Arkansas corporations have since maintained their separate organizations as corporations of that state, but do not operate railroads. It is, therefore, obvious that such purchase by the Missouri corporation of the railroad and franchises of the Arkansas companies did not convert it into an Arkansas corporation. The terms of the statute show that it merely granted rights and powers to an existing foreign corporation, which was to continue to exist as such, subject only to certain conditions—among others that of

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diversity of citizenship between plaintiff and defendant, but the court dropped the fiction at that point and regarded him as having the New Jersey citizenship that the facts and the constitution conferred upon him.

keeping an office in the state, so as to be subject to process of the Arkansas courts.

It is true that by the subsequent act of 1889, by the proviso to the second section, it was provided that every railroad corporation of any other state, which had theretofore leased or purchased any railroad in Arkansas, should, within sixty days from the passage of the act, file a certified copy of its articles of incorporation or charter with the secretary of state, and shall thereupon become a corporation of Arkansas, anything in its articles of incorporation or charter to the contrary notwithstanding; and it appears that the defendant company did accordingly file a copy of its articles of incorporation with the secretary of state. But whatever may be the effect of such legislation, in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we cannot concede that it availed to create an Arkansas corporation out of a foreign corporation in such a sense as to make it a citizen of Arkansas within the meaning of the federal Constitution so as to subject it as such to a suit by a citizen of the state of its origin. In order to bring such an artificial body as a corporation within the spirit and letter of that Constitution as construed by the decisions of this court, it would be necessary to create it out of natural persons, whose citizenship of the state creating it would be imputed to the corporation itself. But it is not pretended in the present case that natural persons, resident in and citizens of Arkansas, were by the legislation in question created a corporation, and that therefore the citizenship of the individual corporators is imputable to the corporation.

It is further contended, on behalf of the defendant in error, the plaintiff below, that, as the plaintiff described herself as a citizen of Missouri, and the defendant company as a citizen of Arkansas, and as the cause of action, though arising in Missouri, was transitory in its nature, jurisdiction was thus formally conferred upon the Circuit Court of the United States for the district of Arkansas, and that the only question left for inquiry was whether the defendant company, alleged to be a citizen of Arkansas, was legally responsible for the conduct of the Missouri company of the same name, and such responsibility is supposed to be found in the fact that the railroad running through both states was under the common management of both companies.

But even if it be admitted that a common management of a railroad running through two states, and participation in its earnings and losses, by two companies, might make both responsible, jointly and severally, for a tortious cause of action, and that such cause of action might be maintained in the courts of either state, the question of the jurisdiction of the federal court still remains. The defendant was not content to leave that question to be decided by the plaintiff's allegations, but pleaded that it was in law a corporation of the State of Missouri, and that, therefore, an action could not be maintained against it, in the federal court, by a citizen of that state. In other words, the defendant company claimed that, while it had voluntarily subjected itself to the laws of Arkansas, as interpreted and enforced by the courts of that state, it still remained a corporation of the State of Missouri, disabled from suing or being sued by a citizen of that state in a federal court, and that such disability was not and could not be removed by state legislation.

The result of these views is that we answer the * * * question * * * in the negative.[4]

Mr. Justice Harlan dissented.

SEABOARD RICE MILLING CO. v. CHICAGO, R. I. & P. RY. CO.

1926. Supreme Court of the United States. 270 U. S. 363.

Error to a judgment of the District Court dismissing an action for want of jurisdiction over the defendant.

Mr. Justice Sanford delivered the opinion of the court.

This is an action at law brought by the Milling Company against the Railway Company, in the District Court for the Eastern District of Missouri, to recover the sum of $3,035.73 for damages alleged to have been sustained through the negligence of the Railway Company, the initial carrier, and its connecting carriers, in the interstate transportation of rice shipped from Arkansas to New York. The Railway Company, appearing specially, filed a plea to the jurisdiction, on the ground that neither it nor the Milling Company was a resident or inhabitant of the district. This plea was sustained, without opinion, and the suit was dismissed for want of jurisdiction. This direct writ of error was allowed and the jurisdictional question certified, in February, 1925, under § 238 of the Judicial Code.

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[4] If a corporation originally incorporated under the laws of state A has by compulsory legislation of state B the status of a state B corporation imposed upon it, it is still a corporation of state A only,—as to jurisdiction of federal courts and a suit by a citizen of state B may be maintained against it even in the federal court for the district of state B. Missouri Pacific Ry. Co. v. Castle (1912) 224 U. S. 541, 546, 56 L. ed. 875; and if sued in a court of state B by a citizen of state B it has the privilege of removal to the federal court for that district, which is given "non-resident" defendants who are citizens of other states. Southern Ry. Co. v. Allison (1903) 190 U. S. 326, 47 L. ed. 1078. Further, on the distinction between an incorporation in two or more states that is "substantially simultaneous and free" and the case "where a corporation originally created in one state afterwards becomes compulsorily a corporation of another state," see Patch v. Wabash Railroad Company (1907) 207 U. S. 277, 52 L. ed. 204, 12 Ann. Cas. 518. Other cases are collected in (1922) 18 A. L. R. 135-139.

The Railway Company has interposed a motion to affirm the judgment, upon the ground that the question upon which the decision depends is so unsubstantial as not to need further argument. Hodges v. Snyder, 261 U. S. 600, 601. This motion must be granted.

The declaration and the testimony heard upon the plea show that the Milling Company is a corporation organized under the laws of Texas; and that the Railway Company is a corporation organized under the laws of Illinois and Iowa, having its principal office in Chicago, but maintaining a branch office and operating a branch line within the eastern district of Missouri.

Section 51 of the Judicial Code, (U. S. C., Title 28, § 112) which deals with the venue of suits originally begun in the District Courts —reenacting in part a similar provision in the Judiciary Act of 1888—provides, subject to certain exceptions not material here, that "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." That is to say, the suit must be brought within the district of which the defendant is an inhabitant, unless the general federal jurisdiction is founded upon diversity of citizenship alone, in which case it must be brought either in that district or in the district in which the plaintiff resides.

While this provision does not limit the general jurisdiction of the District Courts, it confers a personal privilege on the defendant, which he may assert, or may waive, at his election, if sued in some other district. Lee v. Chesapeake Railway, 260 U. S. 653, 655; and cases cited. If this privilege is seasonably asserted, the suit must be dismissed for want of jurisdiction over the person of the defendant. Macon Grocery Co. v. Atlantic Coast Line, 215 U. S. 501, 510; and cases cited.

It is immaterial whether the general federal jurisdiction in the present suit is founded upon diversity of citizenship alone, or whether the suit is also one arising under the laws of the United States, since neither the Milling Company nor the Railway Company is a resident of the Eastern District of Missouri; a corporation being, within the meaning of the jurisdictional statutes, a resident of the state in which it is incorporated, and not a resident or inhabitant of any other state, although it may be engaged in business within such other state. Re Keasbey & Mattison Co., 160 U. S. 221, 229; Macon Grocery Co. v. Atlantic Coast Line, supra, 509; and cases cited.

The Milling Company contends, however, that since it might have brought the suit originally in a state court of concurrent jurisdiction within the Eastern District of Missouri, in which the Railway Company is transacting business, and the Railway Company, under the decisions in General Investment Co. v. Lake Shore Railway, 260 U. S. 261, and Lee v. Chesapeake Railway, supra, might then have removed it to the District Court, this necessarily involves the conclusion that the District Court also has "original jurisdiction" of the suit, since § 28 of the Judicial Code [U. S. C., Title 28, § 71] provides only for the removal of suits of which the District Courts "are given original jurisdiction." The fallacy of this argument lies in the failure to distinguish between the general jurisdiction of the District Courts, to which § 28 relates, and the local jurisdiction over the person of the defendant, to which § 51 relates. The same contention was made, in a converse form, in the General Investment Company Case, in which it was argued that a suit could not be removed from a state court to a district court in which, under § 51, it could not have been brought over the defendant's objection, since it was not a suit of which the District Court was given "original jurisdiction;" and it is completely answered by the holding in that case, at p. 275, that the term "original jurisdiction" as used in § 28 refers only to the general jurisdiction conferred on the District Courts, and does not relate to the venue provision in § 51; there being "no purpose in extending to removals the personal privilege accorded to defendants by § 51, since removals are had only at the instance of defendants." This was approved and followed in Lee v. Chesapeake Railway, supra, 657.

Whether the suit be originally brought in the District Court or removed from a state court, the general federal jurisdiction is the same; and the venue or local jurisdiction of the District Court over the person of the defendant is dependent in the one case as in the other upon the voluntary action of the nonresident defendant, being acquired in an original suit by his waiver of objection to the venue, and in a removed suit by his application for the removal to the District Court.

Since the question does not require further argument, the motion of the Railway Company is granted, and the judgment of the District Court is

Affirmed.

Section 2.—Foreign Corporations—Introductory.

BANK OF AUGUSTA v. EARLE.

1839. Supreme Court of the United States. 13 Pet. 519.

Error to the Circuit Court of the United States for the Southern District of Alabama, in an action of assumpsit on a bill of exchange, by indorsee against indorser.

Taney, C. J., delivered the opinion of the court. * * *

Upon this statement of facts the Circuit Court gave judgment for the defendant, being of opinion that a bank incorporated by the laws of Georgia, with a power among other things to purchase bills of exchange, could not lawfully exercise that power in the State of Alabama and that the contract for this bill was therefore void and did not bind the parties to the payment of the money. * * *

Much of the argument has turned on the nature and extent of the powers which belong to the artificial being called a corporation, and the rules of law by which they are to be measured. On the part of the plaintiff in error it has been contended that a corporation composed of citizens of other states are entitled to the benefit of that provision in the Constitution of the United States which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;" that the court should look behind the act of incorporation and see who are the members of it; and if in this case it should appear that the corporation of the Bank of Augusta consists altogether of citizens of the state of Georgia, that such citizens are entitled to the privileges and immunities of citizens in the State of Alabama; and as the citizens of Alabama may unquestionably purchase bills of exchange in that state it is insisted that the members of this corporation are entitled to the same privilege and cannot be deprived of it, even by express provisions in the constitution or laws of the state. The case of The Bank of the United States v. Deveaux, 5 Cranch, 61, is relied on to support this position.

It is true that in the case referred to this court decided that in a question of jurisdiction they might look to the character of the persons composing a corporation; and if it appeared that they were citizens of another state, and the fact was set forth by proper averments, the corporation might sue in its corporate name in the courts of the United States. But in that case the court confined its decision, in express terms, to a question of jurisdiction, to a right to sue, and evidently went even so far with some hesitation. We fully assent to the propriety of that decision and it has ever since been recognized as authority in this court. But the principle has never been extended any further than it was carried in that case and has never been supposed to extend to contracts made by a corporation, especially in another sovereignty. If it were held to embrace contracts and that the members of a corporation were to be regarded as individuals carrying on business in their corporate name and therefore entitled to the privileges of citizens in matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens and be bound by their contracts in like manner. The result of this would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation and he might be sued for them in any state in which he might happen to be found. * * * Whenever a corporation makes a contract it is the contract of the legal entity, of the artificial being created by the charter and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character and not the rights which belong to its members as citizens of a state; and we now proceed to inquire what rights the plaintiffs in error, a corporation created by Georgia, could lawfully exercise in another state, and whether the purchase of the bill of exchange on which this suit is brought was a valid contract and obligatory on the parties. * * *

The charter of the Bank of Augusta authorizes it, in general terms, to deal in bills of exchange and consequently gives it the power to purchase foreign bills as well as inland; in other words, to purchase bills payable in another state. The power thus given clothed the corporation with the right to make contracts out of the state, in so far as Georgia could confer it. For whenever it purchased a foreign bill and forwarded it to an agent to present for acceptance, if it was honored by the drawee, the contract of acceptance was necessarily made in another state and the general power to purchase bills without any restriction as to place, by its fair and natural import, authorized the bank to make such purchases wherever it was found most convenient and profitable to the institution and also to employ suitable agents for that purpose. The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter and was sanctioned by the law of Georgia creating the corporation, so far as that state could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction. * * *

It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law, and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places, and its residence in one state creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible; yet it is a person, for certain purposes in contemplation of law, and has been recognized as such by the decisions of this court. It was so held in the case of The United States v. Amedy, 11 Wheat. 412, and in Beaston v. The Farmers' Bank of Delaware, 12 Pet. 135. Now natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside and where they are not personally present when the contract is made, and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers in a sovereignty in which it does not reside provided such contracts are permitted to be made by them by the laws of the place? * * *

Every power, however, of the description of which we are speaking, which a corporation exercises in another state depends for its validity upon the laws of the sovereignty in which it is exercised and a corporation can make no valid contract without their sanction, express or implied. And this brings us to the question which has been so elaborately discussed, whether by the comity of nations 4 and between these states the corporations of one state are permitted to make contracts in another. * * * In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its courts since the case of Henriques v. The Dutch West India Company decided in 1729, 2 L. Raymond 1532. And it is a matter of history, which this court is bound to notice, that corporations created in this country have been in the open practice for many years past of making contracts in England of various kinds, and to very large amounts, and we have never seen a doubt suggested there of the validity of these contracts, by any court or any jurist. It is impossible to imagine that any court in the United States would refuse to execute a contract by which an American corporation had borrowed money in England; yet if the contracts of corporations made out of the state by which they were created are void, even contracts of that description could not be enforced. * * * The intimate union of these states as members of the same great political family, the deep and vital interests which bind them so closely together should lead us, in the absence of proof to the contrary, to presume a greater degree of comity and friendship and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will and the legal presumption is at once at an end. But until this is done, upon what grounds could this court refuse to administer the law of international comity between these states? They are sovereign states; and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent. Money is frequently borrowed in one state by a corporation created in another. The numerous banks established by different states are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other states and suffered to make contracts without any objection on the part of the state authorities. These usages of commerce and trade have been so general and public and have been practiced for so long a period of time and so generally acquiesced in by the states that the court cannot overlook them when a question like the one before us is under consideration. The silence of the state authorities while these events are passing before them show their assent to the ordinary laws of comity which permit a corporation to make contracts in another state. But we are not left to infer it merely from the general usages of trade and the silent acquiescence of the states. It appears from the cases cited in the argument, which it is unnecessary to recapitulate in this opinion, that it has been decided in many of the state courts, we believe in all of them where the question has arisen, that a corporation of one state may sue in the courts of another. If it may sue, why may it not make a contract? The right to sue is one of the powers which it derives from its charter. If the courts of another country take notice of its existence as a corporation so far as to allow it to maintain a suit and permit it to exercise that power, why should not its existence be recognized for other purposes, and the corporation permitted to exercise another power which is given to it by the same law and the same sovereignty where the last mentioned power does not come in conflict with the interest or policy of the state? There is certainly nothing in the nature and character of a corporation which could justly lead to such a distinction, and which should extend to it the comity of suit and refuse to it the comity of contract. If it is allowed to sue it would of course be permitted to compromise, if it thought proper, with its debtor, to give him time, to accept something else in satisfaction, to give him a release and to employ an attorney for itself to conduct its suit. These are all matters of contract and yet are so intimately connected with the right to sue that the latter could not be effectually exercised if the former were denied. * * *

But we have already said that this comity is presumed from the silent acquiescence of the state. Whenever a state sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy or are considered as injurious to its interests the presumption in favor of its adoption can no longer be made. And it remains to inquire whether there is anything in the constitution or laws of Alabama from which this court would be justified in concluding that the purchase of the bill in question was contrary to its policy. * * * [This question the opinion answered in the negative after discussing several provisions of the constitution and statutes of Alabama.] * * *

The judgment of the circuit court in these cases must therefore be reversed, with costs.

[M'Kinley, J., dissented on the ground that provisions of the constitution of Alabama clearly manifested a policy to confine all banking in that state, including the purchase of bills of exchange, to banks incorporated under the laws of Alabama.]

Section 3.—Amenability to Service of Process.

ST. CLAIR v. COX.

1882. Supreme Court of the United States. 106 U. S. 350.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

[In an action in the United States Circuit Court on two promissory notes given by the defendant to the Winthrop Mining Co. and assigned by the latter to the plaintiff, a defense was made that the plaintiff acquired the notes after their maturity and dishonor and after the plaintiff had notice of a judgment which the defendant had obtained against the Winthrop Mining Co. greater than the amount of the notes. A certified copy of the judgment was offered in evidence. It appeared therein that it was a personal judgment against the Winthrop Mining Co., an Illinois corporation, granted by the local court of Marquette County, Michigan, in an action commenced by summons served upon "Henry J. Colwell, Esq., agent of the said Winthrop Mining Company, personally, in said county," that the company had not appeared and that the judgment had been rendered by default. On plaintiff's objection that this copy of the judgment did not show that the Michigan court had obtained jurisdiction over the Mining Company, it was excluded from evidence. The ruling of the circuit court of the United States excluding this evidence was the only error assigned.]

Mr. Justice Field delivered the opinion of the court. * * *

The courts of the United States only regard judgments of the state courts establishing personal demands as having validity or as importing verity where they have been rendered upon personal citation of the party, or, what is the same thing, of those empowered to receive process for him, or upon his voluntary appearance.

In Pennoyer v. Neff [printed ante, p. 580] we had occasion to consider at length the manner in which state courts can acquire jurisdiction to render a personal judgment against nonresidents which would be received as evidence in the federal courts; and we held that personal service of citation on the party [in the state of the forum] or his voluntary appearance was, with some exceptions, essential to the jurisdiction of the court. The exceptions related to those cases where proceedings are taken in a state to determine the status of one of its citizens towards a nonresident, or where a party has agreed to accept a notification to others or service on them as citation to himself. 95 U. S. 714.

The doctrine of that case applies, in all its force, to personal judgments of state courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service [in the state of the forum] or voluntary appearance, whether the party be a corporation or a natural person. There is only this difference: a corporation being an artificial being, can act only through agents, and only through them can be reached, and process must, therefore, be served upon them. In the state where a corporation is formed it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the statutes of the state will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary of the state is passed difficulties arise; it is not so easy to determine who represent the corporation there, and under what circumstances service on them will bind it.

Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the state by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Mr. Chief Justice Taney, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his state, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary.

In McQueen v. Middleton Manufacturing Co., decided in 1819, the Supreme Court of New York, in considering the question whether the law of that state authorized an attachment against the property of a foreign corporation, expressed the opinion that a foreign corporation could not be sued in the state, and gave as a reason that the process must be served on the head or principal officer within the jurisdiction of the sovereignty where the artificial body existed; observing that if the president of a bank went to New York from another state he would not represent the corporation there; and that "his functions and his character would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived this character." 16 Johns. (N. Y.) 5. The opinion thus expressed was not, perhaps, necessary to the decision of the case, but nevertheless it has been accepted as correctly stating the law. * * *

This doctrine of the exemption of a corporation from suit in a state other than that of its creation was the cause of much inconvenience, and often of manifest injustice. * * * To meet and obviate this inconvenience and injustice, the legislatures of several states interposed, and provided for service of process on officers and agents of foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicile of a corporation is only in the state where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other states and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the state of its creation. As it was protected by the laws of those states, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.

All that there is in the legal residence of a corporation in the state of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the state. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the states for which they are respectively appointed when it is called to legal responsibility for their transactions.

The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but a corporation can only act and be reached through agents. Serving process on its agents in other states, for matters within the sphere of their agency, is, in effect, serving process on it as much so as if such agents resided in the state where it was created.

A corporation of one state cannot do business in another state without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may think proper to impose. As said by this court in Lafayette Insurance Co. v. French, "These conditions must be deemed valid and effectual by other states and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence." 18 How. 404, 407; Paul v. Virginia, 8 Wall. 168.

The state may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. The decision of this court in Lafayette Insurance Co. v. French, to which we have already referred, sustains these views.

The State of Michigan permits foreign corporations to transact business within her limits. Either by express enactment, as in the case of insurance companies, or by her acquiescence, they are as free to engage in all legitimate business as corporations of her own creation. Her statutes expressly provide for suits being brought by them in her courts; and for suits by attachment being brought against them in favor of residents of the state. And in these attachment suits they authorize the service of a copy of the writ of attachment, with a copy of the inventory of the property attached, on "any officer, member, clerk, or agent of such corporation" within the state, and give to a personal service of a copy of the writ and of the inventory on one of these persons the force and effect of personal service of a summons on a defendant in suits commenced by summons.

It thus seems that a writ of foreign attachment in that state is made to serve a double purpose,—as a command to the officer to attach property of the corporation, and as a summons to the latter to appear in the suit. We do not, however, understand the laws as authorizing the service of a copy of the writ, as a summons, upon an agent of a foreign corporation, unless the corporation be engaged in business in the state, and the agent be appointed to act there. We so construe the words "agent of such corporation within this state." They do not sanction service upon an officer or agent of the corporation who resides in another state, and is only casually in the state, and not charged with any business of the corporation there. * * * The transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient prima facie evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employee, or to a particular transaction, or that his agency had ceased when the matter in suit arose.

In the record, a copy of which was offered in evidence in this case, there was nothing to show, so far as we can see, that the Winthrop Mining Company was engaged in business in the state when service was made on Colwell. The return of the officer, on which alone reliance was placed to sustain the jurisdiction of the state court, gave no information on the subject. It did not, therefore, appear even prima facie that Colwell stood in any such representative character to the company as would justify the service of a copy of the writ on him. The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the court jurisdiction to render a personal judgment against the foreign corporation. The record was, therefore, properly excluded.

Judgment affirmed.[1]

ROSENBERG BROS. & COMPANY, INC. v. CURTIS BROWN COMPANY.

1923. Supreme Court of the United States. 260 U. S. 516.

Mr. Justice Brandeis delivered the opinion of the court.

Rosenberg Brothers & Company, Inc., a New York corporation, brought this suit in the supreme court of that state against Curtis Brown Company, an Oklahoma corporation. The only service of process made was by delivery of a summons to defendant's president while he was temporarily in New York. Defendant appeared specially; moved to quash the summons on the ground that the corporation was not found within the state; and, after evidence was taken but before hearing on the motion, removed the case to the federal court for the western district of New York. There, the motion to quash was granted, upon the ground that the defendant was not amenable to the process of the state court at the time of the service of the summons. A writ of error was sued out under § 238 of the Judicial Code; and the question of jurisdiction was duly certified. The order entered below, although in form an order to quash the summons, and not a dismissal of the suit, is a final judgment; and the case is properly here. Goldey v. Morning News, 156 U. S. 518; Conley v. Mathieson Alkali Works, 190 U. S. 406. Compare The Pesaro, 255 U. S. 216, 217.

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[1] "That to condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment needs nothing but statement. Equally well settled is it that the courts of one state cannot without a violation of the due process clause, extend their authority beyond their jurisdiction so as to condemn the resident of another state when neither his person nor his property is within the jurisdiction of the court rendering the judgment, since that doctrine was long ago established by the decision in Pennoyer v. Neff, 95 U. S. 714, and has been without deviation upheld by a long line of cases, St. Clair v. Cox, 106 U. S. 350 * * *. And that a corporation no more than an individual is subject to be condemned without a hearing or may be subjected to judicial power in violation of the fundamental principles of due process as recognized in Pennoyer v. Neff, is also established by the cases referred to and many others. * * * Without restating the St. Clair Case or the leading cases which have followed and applied it, we content ourselves with saying that it results from them that it is indubitably established that the courts of one state may not without violating the due process clause of the Fourteenth Amendment, render a judgment against a corporation organized under the laws of another state where such corporation has not come into such state for the purpose of doing business therein, or has done no business therein, or has no property therein, or has no qualified agent therein upon whom process may be served; and that the mere fact that an officer of a corporation may temporarily be in the state or even permanently reside therein, if not there for the purpose of transacting business for the corporation or vested with authority by the corporation to transact business in such state, affords no basis for acquiring jurisdiction or escaping the denial of due process under the Fourteenth Amendment which would result from decreeing against the corporation upon a service had upon such an officer under such circumstances." Riverside and Dan River Cotton Mills v. Menefee (1915) 237 U. S. 189, 193-195, 59 L. ed. 910. In this case the court also made it clear that its holding is that a personal judgment rendered by a state court when by lack of proper service it does not acquire jurisdiction of the defendant is not only not entitled to be respected by the courts of other states under the full faith and credit clause but also is void for all purposes even in the state where it is rendered.

The sole question for decision is whether, at the time of the service of process, defendant was doing business within the state of New York in such manner and to such extent as to warrant the inference that it was present there. Philadelphia & Reading Ry. Co. v. McKibbin, 243 U. S. 264, 265. The district court found that it was not. That decision was clearly correct. The Curtis Brown Company is a small retail dealer in men's clothing and furnishings at Tulsa, Oklahoma. It never applied, under the foreign corporation laws, for a license to do business in New York; nor did it at any time authorize suit to be brought against it there. It never had an established place of business in New York; nor did it, without having such established place, regularly carry on business there. It had no property in New York, and had no officer, agent, or stockholder resident there. Its only connection with New York appears to have been the purchase there from time to time of a large part of the merchandise to be sold at its store in Tulsa. The purchases were made, sometimes by correspondence, sometimes through visits to New York of one of its officers. Whether, at the time its president was served with process, he was in New York on business or for pleasure; whether he was then authorized to transact any business there; and to what extent he did transact business while there, —are questions on which much evidence was introduced; and some of it is conflicting. But the issues so raised are not of legal significance. The only business alleged to have been transacted by the company in New York, either then or theretofore, related to such purchases of goods by officers of a foreign corporation. Visits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction of the state. Compare International Harvester Co. v. Kentucky, 234 U. S. 579; People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79. And as it was not found there, the fact that the alleged cause of action arose in New York is immaterial. Compare Chipman, Limited, v. Thomas B. Jeffery Co., 251 U. S. 373, 379.

Affirmed.[2]

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[2] See also Bank of America v. Whitney Central Nat. Bank (1923) 261 U. S. 171, 67 L. ed. 594; Cannon Mfg. Co. v. Cudahy Packing Co. (1925) 267 U. S. 333,

SMOLIK v. PHILADELPHIA & READING COAL & IRON CO. TOBIAS v. SAME.

1915. United States District Court, S. D. New York, 222 Fed. 148.

At Law. Two actions, by Anthony Smolik, and by Stanley Tobias, an infant, by Wladyslaw Tiburski, his guardian ad litem, against the Philadelphia & Reading Coal & Iron Company. On motion in each action to set aside the service of process. Motions denied.

In each of these cases the defendant moves to set aside the service of process upon an agent designated by it to accept service, as provided in section 16 of the General Corporation Law of the state of New York, and in section 432 of the New York Code of Civil Procedure. In one case the action was brought in the state court, and the defendant, appearing specially for the purpose of setting aside the service, removed it to this court. The other was originally brought in this court, and the motion is made upon a special appearance only for this purpose. The ground of each motion is that the defendant is a Pennsylvania mining corporation, doing business, but having no part of its mines, in this state, and that the action arises from personal injuries suffered by the plaintiff in Pennsylvania while an employè of the defendant in its mines there situated.

Section 16 of the General Corporation Law of New York requires every corporation doing business in that state to take out a license, without which it cannot sue or defend in any action of contract, and is subject to other penalties. One condition of procuring such a

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69 L. ed. 634; James-Dickinson Farm Mortgage Co. v. Harry (1927) 273 U. S. 119, 71 L. ed. 569.

"Upon the broader question, we agree with the District Court that the American Tobacco Company at the time of the attempted service was not doing business within the State of Louisiana. The question as to what constitutes the doing of business in such wise as to make the corporation subject to service of process has been frequently discussed in the opinions of this court, and we shall enter upon no amplification of what has been said. Each case depends upon its own facts. * * *

"The fact that the company owned stock in the local subsidiary companies did not bring it into the state in the sense of transacting its own business there. * * * As to the continued practice of advertising its wares in Louisiana, and sending its soliciting agents into that state, as above detailed, the agents having no authority beyond solicitation, we think the previous decisions of this court have settled the law to be that such practices did not amount to that doing of business which subjects the corporation to the local jurisdiction for the purpose of service of process upon it. * * *

"The plaintiff in error relies upon International Harvester Co. v. Kentucky; 234 U. S. 579, but in that case the facts disclosed that there was not only a continuous course of business in the solicitation of orders within the state, but there was also authority upon the part of such agents to receive payment in money, checks and drafts on behalf of the company, and to take notes payable and collectible at banks in Kentucky; these things, taken together, we held amounted to doing business within the State of Kentucky in such manner as to make the Harvester Company amenable to the process of the courts of that state. * * *" People's Tobacco Co. v. American Tobacco Co. (1918) 246 U. S. 79, 86-88, 62 L. ed. 587, Ann. Cas. 1918C, 537.

license is the appointment of an agent within the state upon whom all process may be served. Such an agent the defendant did appoint, and service was made upon him as stated at the outset.

Learned Hand, District Judge (after stating the facts as above). In Simon v. Southern Railway, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. ed. 492, the Supreme Court decided that a court of Louisiana had not acquired jurisdiction under the following facts: The defendant was a railroad company organized in another state, having none of its railroad in Louisiana, but doing some business there. The statutes of Louisiana directed all foreign corporations doing business in the state to appoint an agent on whom process should be served, and provided that, if the corporation failed to make an appointment, service might be made upon the secretary of state. The defendant not having appointed any such agent, Simon served his process on the assistant secretary of state in an action arising upon the tort of the defendant committed within the state of Alabama. The ground of the decision was that the implied consent of the corporation arising from its doing business within Louisiana must be limited to actions arising out of the business done within the state. The same rule was laid down in Old Wayne Life Association v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. ed. 345; the action there being in Pennsylvania upon a life insurance contract executed in Indiana by an Indiana corporation.

In Simon v. Southern Railway, supra, the court especially reserved from the decision a case, such as those at bar, where a foreign corporation has complied with the state statute and appointed an agent upon whom process may be served. Such a case at first blush presents an apparent contradiction. Since 1839 (Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274) it has been the doctrine of the Supreme Court that a foreign corporation was a fictitious entity, which had no existence outside of the territory of the sovereign which created it. All its acts elsewhere must be viewed as those of an absent principal, acting through an authorized agent. It resulted that personal jurisdiction could arise only when some agent had been appointed who was expressly authorized to appear or to accept service for the absent principal. St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222. Otherwise, the foreign state must proceed in rem against the property of the corporation, or in personam against agents within its borders. In 1855 (Lafayette Insurance Co. v. French, 18 How. 404, 15 L. ed. 451), the court modified the extreme application of this doctrine by holding that when a corporation did business within a foreign state which required as a prerequisite the appointment of an agent, consent to such an appointment must be assumed from the doing of the business, and that jurisdiction in personam would be acquired, just as if there had been in fact an appointment. St. Clair v. Cox, supra.

The defendant here argues that the terms of such an implied consent cannot be supposed to be other than those which the state statute attempts to exact, and that if the implied consent is to be limited, as has now been indubitably done, the express consent must be limited in exactly the same way. Were this not true, the defendant urges, an outlaw who refused to obey the laws of the state would be in better position than a corporation which chooses to conform. The theory of implied consent dialectically requires the same limitations to be imposed upon express consents, at least in the absence of some explicit language to the contrary in the state statute.

The plaintiffs, on the other hand, urge that the express consent of a foreign corporation to the service of process upon its agent (section 16, General Corporation Law; section 432, Code of Civil Procedure) must be interpreted in the light of the statutes of the state, giving jurisdiction to its own courts, and that in the cases at bar residents of New York may, under the New York Code, section 1780, sue foreign corporations upon any cause of action whatever. While, of course, the jurisdiction of this court over the subject-matter of suits depends altogether upon federal statutes, the question now is of personal jurisdiction, and that depends upon the interpretation of the consent actually given, an interpretation determined altogether by the intent of the state statutes. That intent being determined, there is no constitutional objection to a state's exacting a consent from foreign corporations to any jurisdiction which it may please, as a condition of doing business. Intent and power uniting in the sections in question, how is it possible to confine the provision to actions arising from business done within the state?

These two arguments, treated as mere bits of dialectic, lead to opposite results, each by unquestionable deduction, so far as I can see. One must be vicious, and the vice arises I think from confounding a legal fiction with a statement of fact. When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.

The limits of that consent are as independent of any actual intent as the consent itself. Being a mere creature of justice it will have such consent only as justice requires; hence it may be limited, as it has been limited in Simon v. Southern Railway, supra, and Old Wayne Insurance Co. v. McDonough, supra. The actual consent in the cases at bar has no such latitudinarian possibilities; it must be measured by the proper meaning to be attributed to the words used, and, where that meaning calls for wide application, such must be given. There is no reason that I can see for imposing any limitation upon the effect of section 1780 of the New York Code, and as a result I find that the consents covered such actions as these. This does not, of course, touch the question of the jurisdiction of this court over the subject-matter in either case.

Motions denied.[3]

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[3] The above case was followed and its reasoning approved in Bagdon v. Philadelphia & Reading Coal & Iron Co. (1916) 217 N. Y. 432, 111 N. E. 1075, L. R. A. 1916F, 407, Ann. Cas. 1918A, 389 (opinion by Cardozo, J.); Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co. (1917) 243 U. S. 93, 61 L. ed. 610 (opinion by Holmes, J.).

"The fact that the business carried on by a corporation is entirely interstate in character does not render the corporation immune from the ordinary process of the courts of a state. International Harvester Co. v. Kentucky, 234 U. S. 579. The requirements of orderly, effective administration of justice are paramount. In Kane v. New Jersey, 242 U. S. 160, 167, a statute was sustained which required nonresident owners of motor vehicles to appoint a state official as agent upon whom process might be served in suits arising from their use within the state, because the burden thereby imposed upon interstate commerce was held to be a reasonable requirement for the protection of the public. It may be that a statute like that here assailed would be valid although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the state, (Compare International Harvester Co. v. Kentucky, 234 U. S. 579; 'Jurisdiction over nonresidents doing business within a State,' by Austin W. Scott, 32 Harv. Law Rev. 871, 887.) or if the plaintiff was, when it arose, a resident of the State. (Compare Blake v. McClung, 172 U. S. 239; Chambers v. Baltimore & Ohio R. R. Co., 207 U. S. 142; Maxwell v. Bugbee, 250 U. S. 525, 537; Canadian Northern Ry. Co. v. Eggen, 252 U. S. 553; Kenney v. Supreme Lodge, 252 U. S. 411.) These questions are not before us; and we express no opinion upon them. But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. The public and the carriers are alike interested in maintaining adequate, uninterrupted transportation service at reasonable cost."—Brandeis, J., for the court in Davis v. Farmers Co-operative Equity Co. (1923) 262 U. S. 312, 316-317, 67 L. ed. 996.

A grand jury in the Eastern Division of the Western District of Tennessee returned into the federal district court for that division an indictment of the Standard Oil Co. of Indiana charging it with committing a federal crime in that division. The corporation at that time had no place of business in Tennessee and no officer or agent in the district upon whom process might be served. A summons was issued by the court addressed to the United States marshall for the District of Indiana commanding him to summon the accused to appear. It seems that the marshall was directed to serve the summons on the highest officer of the corporation found in his district. The corporation challenged this process. The court held that Congress not having specifically prescribed a method of bringing corporate offenders into the federal courts in criminal prosecutions, the court should act under the general provisions of Sec. 716, Rev. Sts. giving the federal courts "power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." The court held that the method pursued was within this authorization, saying, "Since this defendant cannot be arrested and brought within the territorial jurisdiction of the court, as in the case of a

Section 4.—State Power to Exclude or Expel.

PAUL v. VIRGINIA.

1868. Supreme Court of the United States. 8 Wall. 168.

Error to the Supreme Court of Appeals of the State of Virginia.

[A Virginia statute required all insurance companies incorporated under any but its own laws to deposit with the treasurer of the state a large stated amount of bonds before doing business in the state and provided that no agent of any foreign insurance company should be licensed to represent it in the state unless such deposit were made. Any person acting as such agent without license was declared subject to a fine. Paul as agent for several New York insurance companies which had refused to make such deposits was

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natural person, of necessity it must be by summons, if the court obtains [is to obtain] jurisdiction of it, unless it shall voluntarily appear. United States v. John Kelso Co. (D. C.) 86 Fed. 304; United States v. Correspondence School (D. C.) 125 Fed. 94." United States v. Standard Oil Co. of Indiana (1907) 154 Fed. 728.

The court also held that Sec. 1014 Rev. St., U.S.C. Title 18, Sec. 591, has no application to corporations. (This section prescribes a procedure for arrest of natural persons in one federal district and removal for trial to the district where the crime was committed.) Accord: John Gund Brewing Co. v. United States (C. C. A. 1913) 204 Fed. 17, where the court said: "As the only punishment which can be inflicted upon a corporation is a fine (United States v. Union Supply Co., 215 U. S. 50, 30 Sup. Ct. 15, 54 L. ed. 87), a criminal proceeding against a corporation is in effect no more than an action for the recovery of a penalty, with this difference, that under the Sixth Amendment to the Constitution the trial must be had in the district where the crime has been committed." See Haas v. Henkel (1910) 216 U. S. 462, 54 L. ed. 569, 17 Ann. Cas. 1112.

Speaking about jurisdiction and process in civil suits, "Congress clearly has the power to authorize a suit under a federal law to be brought in any inferior federal court. Congress has power, likewise, to provide that the process of every district court shall run into every part of the United States. Toland v. Sprague, 12 Pet. 300, 328; United States v. Union Pacific R. R. Co., 98 U. S. 569, 604. But it has not done so either by any general law or in terms by § 310 of Transportation Act, 1920. The precise question is whether it has impliedly done so by that provision.

"In a civil suit in personam jurisdiction over the defendant, as distinguished from venue, implies, among other things, either voluntary appearance by him or service of process upon him at a place where the officer serving it has authority to execute a writ of summons. Under the general provisions of law, a United States district court cannot issue process beyond the limits of the district, Harkness v. Hyde, 98 U. S. 476; Ex parte Graham, 3 Wash. 456; and a defendant in a civil suit can be subjected to its jurisdiction in personam only by service within the district. Toland v. Sprague, 12 Pet. 300, 330. Such was the general rule established by the Judiciary Act of September 24, 1789, c. 20, § 11, 1 Stat. 73, 79, in accordance with the practice at the common law. Piquet v. Swan, 5 Mason 35, 39 et seq. And such has been the general rule ever since. Munter v. Weil Corset Co., 261 U. S. 276, 279." Brandeis, J., for the court in Robertson v. Railroad Labor Board (1925) 268 U. S. 619, 622, 69 L. ed. 1119. For an instance in which Congress has provided that in a civil action under the Clayton Act brought in a federal court in one district process may be served on a corporation defendant in any district in which it may be "found," see Eastman Kodak Co. v. South Photo Materials Co. (1927) 273 U. S. 359, 71 L. ed. 684.

refused a license but nevertheless undertook to act as agent for these companies in Virginia and issued a policy in Virginia on behalf of one of them to a citizen of Virginia. For this he was indicted and convicted. From an affirmance of this conviction he took this writ of error.]

The corporators of the several insurance companies were at the time, and still are, citizens of New York, or of some one of the states of the Union other than Virginia. And the business of insurance was then, and still is, a lawful business in Virginia, and might then, and still may, be carried on by all resident citizens of the state, and by insurance companies incorporated by the state, without a deposit of bonds, or a deposit of any kind with any officer of the commonwealth. * * *

Mr. Justice Field delivered the opinion of the court.

On the trial in the court below the validity of the discriminating provisions of the statute of Virginia between her own corporations and corporations of other States was assailed. It was contended that the statute in this particular was in conflict with that clause of the Constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and the clause which declares that Congress shall have power "to regulate commerce with foreign nations and among the several states." The same grounds are urged in this court for the reversal of the judgment. * * *

But the privileges and immunities secured to citizens of each state in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give to the laws of one state any operation in other states. They can have no such operation, except by the permission, express or implied, of those states. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other states to their enjoyment therein be given.

Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank of Augusta v. Earle, "It must dwell in the place of its creation, and cannot migrate to another sovereignty." The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each state in other states the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and the harmony of the states. At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one state, their corporate powers and franchises could be exercised in other states without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those states would soon pass into their hands. The principal business of every state would, in fact, be controlled by corporations created by other states.

If the right asserted of the foreign corporation, when composed of citizens of one state, to transact business in other states were even restricted to such business as corporations of those states were authorized to transact, it would still follow that those states would be unable to limit the number of corporations doing business therein. They could not charter a company for any purpose, however restricted, without at once opening the door to a flood of corporations from other states to engage in the same pursuits. They could not repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens; and yet it might be of the highest public interest that the number of corporations in the state should be limited, that they should be required to give publicity to their transactions, to submit their affairs to proper examination, to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed and be liable to summary removal.

"It is impossible," to repeat the language of this court, in Bank of Augusta v. Earle, "upon any sound principle, to give such a construction to the article in question,"—a construction which would lead to results like these.

We proceed to the second objection urged to the validity of the Virginia statute, which is founded upon the commercial clause of the Constitution. * * * Issuing a policy of insurance is not a transaction of commerce. * * *

We perceive nothing in the statute of Virginia which conflicts with the Constitution of the United States, and the judgment of the Supreme Court of Appeals of that state must, therefore, be

Affirmed.[1]

PHILADELPHIA FIRE ASSOCIATION v. NEW YORK.

1886. Supreme Court of the United States. 119 U. S. 110.

[The defendant below, the Philadelphia Fire Association, was a corporation organized under the laws of Pennsylvania. In 1872 it established an agency in New York and maintained it there continuously thereafter. It had complied with all requirements imposed by the laws of New York except the payment of the tax in dispute in this suit and had from year to year received certificates of authority from the New York superintendent of insurance. A New York statute of 1865 provided that if the then existing or future laws of any other state imposed upon New York corporations burdens more onerous than the New York laws imposed upon foreign corporations then the corporations of that other state should be subjected in New York to the same burdensome requirements. In 1873 Pennsylvania enacted a statute imposing a tax of three per cent. on premiums received each year by foreign insurance companies from their Pennsylvania policies. In 1882 the State of New York, in enforcement of its retaliatory statute, brought this suit to collect from the defendant a like tax on premiums received by it in 1881 for insurance of property in New York. The Court of Appeals of New York, reversing a judgment of the New York Supreme Court, directed the latter to enter judgment for the state, from which judgment the defendant brought this writ of error.]

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[1] That the word "person" in the equal protection of the laws clause of the Fourteenth Amendment includes corporations was first declared by the Supreme Court in Santa Clara County v. Southern Pac. R. Co. (1886) 118 U. S. 394, 396, 30 L. ed. 118. In Covington & L. Turnpike Road Co. v. Sandford (1896) 164 U. S. 578, 592, 41 L. ed. 560, Harlan, J., for the court said: "It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws."

"A corporation cannot be deemed to be a citizen within the meaning" of the abridgement clause of the Fourteenth Amendment. Western Turf Assn. v. Greenberg (1907) 204 U. S. 359, 363, 51 L. ed. 520. Does this holding deprive corporations of any protection which an opposite decision would have given them? In the same case it is also said: "The liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial persons. Northwestern Life Insurance Co. v. Riggs, 203 U. S. 243." Compare with this dictum, Louis K. Ligget Co. v. Baldridge (1928) 278 U. S. 105, 73 L. ed. 204: A state statute required owners of pharmacies to be pharmacists or, in case of corporations owning pharmacies, that all shareholders therein be pharmacists, excepting present owners as to presently owned pharmacies. The statute was held invalid, and inoperative to prevent a chain drug store corporation from acquiring or establishing additional stores. The court said that this restriction upon freedom to engage in business (called in the opinion a "property right") was not shown to be justified, that the specific attempt to justify it was that the statute was a health measure but that "mere stock ownership in a corporation owning and operating a drug store, can have no real or substantial relation to the public health."

Contracts made between a state and a foreign corporation, as well as contracts between a state and a domestic corporation, are within the prohibition of state legislative impairment. New York, L. E. & W. R. Co. v. Pennsylvania (1894) 153 U. S. 628, 38 L. ed. 846. Likewise private contracts made within a state by a foreign corporation lawfully doing business there. Bedford v. Eastern Building & L. Assn. (1901) 181 U. S. 227, 45 L. ed. 834.

A state may forbid a foreign corporation (at least one not engaged in foreign or interstate commerce) to acquire land in the state even by negotiations conducted outside of the state. The principle of Allgeyer v. Louisiana, ante, p. 732, does not apply. Munday v. Wisconsin Trust Co. (1920) 252 U. S. 499, 64 L. ed. 684.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

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The provision of the Fourteenth Amendment, which went into effect in July, 1868, is, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The first question which arises is, whether this corporation was a person within the jurisdiction of the State of New York, with reference to the subject of controversy and within the meaning of the Amendment.

The defendant, on the assumption that if it was within the jurisdiction of the State of New York, it was, though a foreign corporation, "a person," and so entitled to the benefit of the Amendment, contends that it was within such jurisdiction. The argument is, that it established an agency within the state in 1872, which it had ever since maintained; that it complied, from year to year, with all the requirements and conditions imposed by the laws of the state on foreign fire insurance companies doing business in the state; that it received from year to year certificates of authority from the superintendent of the insurance department, as provided by statute; that, under those circumstances, it was legally within the state and within its jurisdiction; that, being in the state, by permission of the state, continuously from 1872 to 1882, the state imposed on it, while there, in 1882, an unequal and unlawful burden; and that the New York Act of 1865 did not come into effect as to Pennsylvania corporations until the Pennsylvania Act of 1873 was passed, at which time the defendant had already been a year in the state.

But we are unable to take that view of the case. [Paul v. Virginia, 8 Wall. 168, was here summarized.]

As early as 1853, the State of New York, by a statute, c. 466, required of every fire insurance company incorporated by any other state or any foreign government, as a prerequisite to doing business in the state, that it should file an appointment of an attorney on whom process was to be served, and a statement of its pecuniary condition, and procure from a designated public officer a certificate of authority stating that the company had complied with all the requisitions of the statute; and also required the renewal from year to year of the statement and evidence of investments; and provided that such public officer, on being satisfied that the capital of the company and its securities and investments remained secure, should furnish a renewal of the certificate of authority. A violation of the provisions was made a penal offence. This act, with immaterial amendments, is still in force.

This Pennsylvania corporation came into the State of New York to do business by the consent of the state, under this act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the state for any given year under such license, and subject to the conditions prescribed by statute. The state, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given. The act of 1865 had been passed when the corporation first established an agency in the state. The amendment of 1875 changed the act of 1865 only by giving to the superintendent the power of remitting the fees and charges required to be collected by then existing laws. Therefore, the corporation was at all times, after 1872, subject, as a prerequisite to its power to do business in New York, to the same license fee its own state might thereafter impose on New York companies doing business in Pennsylvania. By going into the State of New York in 1872, it assented to such prerequisite as a condition of its admission within the jurisdiction of New York. It could not be of right within such jurisdiction, until it should receive the consent of the state to its entrance therein under the new provisions, and such consent could not be given until the tax, as a license fee for the future, should be paid.

It is not to be implied, from anything we have said, that the power of a state to exclude a foreign corporation from doing business within its limits is to be regarded as extending to an interference with the transaction of commerce between that state and other states by a corporation created by one of such other states.

Judgment affirmed.[2]

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[2] In Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania (1888) 125 U. S. 181, 189, 31 L. ed. 650, the company was a Colorado corporation with

MR. JUSTICE HARLAN dissenting. * * * At last, the real question presented is, whether Pennsylvania corporations can be subjected to higher taxes in New York, than are imposed there upon corporations of the same class from other states. * * *

If the plaintiff in error, by merely maintaining its agencies in New York, is to be held to have impliedly agreed to submit to such increased taxation, is that anything more than an implied agreement that it would not assert a right secured to it by the Constitution of the United States? Can it be that a corporation is estopped to claim the benefit of the constitutional provision securing to it the equal protection of the laws simply because it voluntarily entered and remained in a state which has enacted a statute denying such protection to it and to like corporations from the same state?

* * *

It would seem to be the result of the decision in this case, that New York may prescribe such varying rates of taxation upon insurance corporations of the remaining thirty-seven states, within her jurisdiction, as she chooses—the rate for corporations from each state differing from the rate established for corporations of the same class from all other states, and the rate in respect to corporations of other states being higher than she imposes upon her own corporations of the same class. Such legislation would be a species of commercial warfare by one state against the others, and would be hostile to the whole spirit of the Constitution, particularly the Fourteenth Amendment, securing to all persons within the jurisdiction of the respective states the equal protection of the laws.

For the reasons which have been stated, I feel obliged to withhold my assent to the opinion and judgment of the court.

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its principal office in Colorado where its mines were located. It had an office in Philadelphia "for the use of its officers, stockholders, agents and employees." On foreign corporations not investing or using their capital in the state, Pennsylvania imposed a license fee for having such an office in the state, at the rate of one-fourth of a mill on each dollar of its capital stock. In sustaining this requirement, the court, by Field, J., said: "The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the state. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it pays the required license tax it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the state, and the constitutional amendment requires nothing more. The state is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce."

BLAKE v. McCLUNG.

1898. Supreme Court of the United States. 172 U. S. 239, 259-261.

[For the facts and other portions of the opinion see ante, p. 461.]

MR. JUSTICE HARLAN. * * * As to the plaintiff in error, the Hull Coal & Coke Company of Virginia, different considerations must govern our decision. * * * A corporation is not a citizen within the meaning of the constitutional provision that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Paul v. Virginia, 8 Wall. 168, 178, 179; Ducat v. Chicago, 10 Wall. 410, 415; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, 573. The Virginia corporation, therefore, cannot invoke that provision for protection against the decree of the state court denying its right to participate upon terms of equality with Tennessee creditors in the distribution of the assets of the British corporation in the hands of the Tennessee court.

Since, however, a corporation is a "person" within the meaning of the Fourteenth Amendment, (Santa Clara County v. Southern Pacific Railroad Co., 118 U. S. 394, 396; Smyth v. Ames, 169 U. S. 466, 522), may not the Virginia corporation invoke for its protection the clause of the Amendment declaring that no state shall deprive any person of property without due process, nor deny to any person within its jurisdiction the equal protection of the laws?

We are of opinion that this question must receive a negative answer. Although this court has adjudged that the prohibitions of the Fourteenth Amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, (Ex parte Virginia, 100 U. S. 339, 346-347; Yick Wo v. Hopkins, 118 U. S. 356, 373; Scott v. McNeal, 154 U. S. 34, 45, and Chicago, Burlington &c. Railroad v. Chicago, 166 U. S. 226, 233) it does not follow that, within the meaning of that Amendment, the judgment below deprived the Virginia corporation of property without due process of law, simply because its claim was subordinated to the claims of the Tennessee creditors. That corporation was not, in any legal sense, deprived of its claim, nor was its right to reach the assets of the British corporation in other states or countries disputed. It was only denied the right to participate upon terms of equality with Tennessee creditors in the distribution of particular assets of another corporation doing business in that state. It had notice of the proceedings in the state court, became a party to those proceedings, and the rights asserted by it were adjudicated. If the Virginia corporation cannot invoke the protection of the second section of Article IV of the Constitution of the United States relating to the privileges and immunities of citizens in the several states, as its co-plaintiffs in error have done, it is because it is not a citizen within the meaning of that section; and if the state court erred in its decree in reference to that corporation, the latter cannot be said to have been thereby deprived of its property without due process of law within the meaning of the Constitution.

It is equally clear that the Virginia corporation cannot rely upon the clause declaring that no state shall "deny to any person within its jurisdiction the equal protection of the laws." That prohibition manifestly relates only to the denial by the state of equal protection to persons "within its jurisdiction." Observe, that the prohibition against the deprivation of property without due process of law is not qualified by the words "within its jurisdiction," while those words are found in the succeeding clause relating to the equal protection of the laws. The court cannot assume that those words were inserted without any object, nor is it at liberty to eliminate them from the Constitution, and to interpret the clause in question as if they were not to be found in that instrument. Without attempting to state what is the full import of the words, "within its jurisdiction," it is safe to say that a corporation not created by Tennessee, nor doing business there under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not, under the above clause of the Fourteenth Amendment, within the jurisdiction of that state. Certainly, when the statute in question was enacted the Virginia corporation was not within the jurisdiction of Tennessee. So far as the record discloses, its claim against the Embreeville Company was on account of coke sold and shipped from Virginia to the latter corporation at its place of business in Tennessee. It does not appear to have been doing business in Tennessee under the statute here involved, or under any statute that would bring it directly under the jurisdiction of the courts of Tennessee by service of process on its officers or agents. Nor do we think it came within the jurisdiction of Tennessee, within the meaning of the Amendment, simply by presenting its claim in the state court and thereby becoming a party to this cause. Under any other interpretation the Fourteenth Amendment would be given a scope not contemplated by its framers or by the people, nor justified by its language. We adjudge that the statute, so far as it subordinates the claims of private business corporations not within the jurisdiction of the State of Tennessee (although such private corporations may be creditors of a corporation doing business in the state under the authority of that statute) to the claims against the latter corporation of creditors residing in Tennessee is not a denial of the "equal protection of the laws" secured by the Fourteenth Amendment to persons within the jurisdiction of the state, however unjust such a regulation may be deemed.

SECURITY MUTUAL LIFE INSURANCE CO. v. PREWITT.

1906. Supreme Court of the United States. 202 U. S. 246.

Mr. Justice Peckham delivered the opinion of the court. * * *

The matter to be now determined is whether a state has the right to provide that if a foreign insurance company shall remove a case to the federal court, which has been commenced in a state court, the license of such company to do business within the state shall be thereupon revoked. * * * A state has the right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the federal Constitution. * * * Having the power to prevent a foreign insurance company from doing business at all within the state, we think the state can enact a statute such as is above set forth. The question is, in our opinion, settled by the decisions of this court. * * *

[Here Home Ins. Co. v. Morse, 20 Wall. 445, and Doyle v. Continental Ins. Co., 94 U. S. 535, were summarized.]

In these two cases this court decided that any agreement made by a foreign insurance company not to remove a cause to the federal court was void,[3] whether made pursuant to a statute of the state providing for such agreement, or in the absence of such statute; but that the state, having power to exclude altogether a foreign insurance company from doing business within the state, had power to enact a statute which, in addition to providing for the agreement mentioned, also provided that if the company did remove a case from the state to a federal court, its right to do business within the state should cease, and its permit should be revoked. It was held there was a distinction between the two propositions, and one might be held void and the other not. * * *

As a state has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial.

Counsel for the companies, in their brief, admit that the state "has the right at any time to pass a statute expelling a company or revoking its license, and the validity of the statute of expulsion would not be affected by the motives of the state in so doing, even though the preamble expressly recited that the license was revoked because the company had removed a case. The statute would be valid—for the company had no constitutional right to remain in the state any longer than it chose to allow; and the statute would not abridge any right of removal—for, as the case had already been fully removed before the statute was in existence, the right of removal could not be said to have been hindered or abridged by a statute not even in existence."

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[3] Void in the sense that if the foreign corporation brought a suit in the federal court or removed a suit to that court, the federal court would ignore the agreement and proceed as if no such agreement had been made.—Ed.

Thus it is admitted that a state has power to prevent a company from coming into its domain, and that it has power to take away its right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives; but what the companies deny is the right of a state to enact in advance that if a company remove a case to a federal court its license shall be revoked.

We think this distinction is not well founded. The truth is that the effect of the statute is simply to place foreign insurance companies upon a par with the domestic ones doing business in Kentucky. No stipulation or agreement being required as a condition for coming into the state and obtaining a permit to do business therein, the mere enactment of a statute which, in substance, says if you choose to exercise your right to remove a case into a federal court, your right to further do business within the state shall cease and your permit shall be withdrawn, is not open to any constitutional objection. The reasoning in the Doyle Case we think is good.

* * *

[DAY, J., delivered a dissenting opinion with which HARLAN, J., concurred.]

SOUTHERN RAILWAY COMPANY v. GREENE.

1910. United States Supreme Court. 216 U. S. 400.

[The Southern Railway Company was incorporated under the laws of Virginia. In compliance with the laws of Alabama, it filed a copy of its charter in the latter state in 1894, paid $250, the required license fee for beginning business in that state, and designated an agent upon whom process might be served. Ever since, it had operated railroads in the state engaged in interstate and intra-state transportation. Between 1894 and 1899 it acquired, as permitted and authorized by the laws of Alabama, several lines of railroad in the state and had expended large sums of money in improving them. It had paid all property and franchise taxes which were levied without discrimination upon domestic and foreign corporations engaged in like business. By an act of 1907 Alabama imposed upon foreign corporations only, a tax in addition to those above mentioned, called an annual franchise tax, upon the amount of capital employed within the state of 1/10 of 1%, and provided that no foreign corporation should do any business in Alabama except interstate commerce, or maintain any action in an Alabama court on any contract made in the state except interstate commerce contracts unless it paid this tax within 60 days from the time it should become due. The plaintiff paid the tax under protest and brought this suit to recover the amount paid. The Supreme Court of Alabama affirmed a judgment for the defendant. The company took this writ of error.]

Mr. Justice Day delivered the opinion of the court. * * *

The important federal question for our determination in this case is: When a corporation of another state has come into the taxing state, in compliance with its laws, and has therein acquired property of a fixed and permanent nature, upon which it has paid all taxes levied by the state, is it liable to a new and additional franchise tax for the privilege of doing business within the state, which tax is not imposed upon domestic corporations doing business in the state of the same character as that in which the foreign corporation is itself engaged? * * *

The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation. * * *

Is the plaintiff corporation a person within the jurisdiction of the State of Alabama? In the present case the plaintiff is taxed because it is doing business within the State of Alabama. The averments of the complaint, admitted by the demurrer, show it has acquired a large amount of railroad property by authority of and in compliance with the laws of the state; that it is subject to the jurisdiction of the courts of the state; that it has paid taxes upon its property, and also upon its franchises within the state; in short, that it came into the state in compliance with its laws, and at the time of the imposition of the tax in question had been for many years carrying on business therein under the laws of the state. We can have no doubt that a corporation thus situated is within the jurisdiction of the state. Blake v. McClung, 172 U. S. 239.

The argument on the part of the state of Alabama places much weight upon the cases in this court which have sustained the right of the state to exclude a foreign corporation from its borders and to impose conditions upon the entry of such corporations into the state for the purpose of carrying on business therein. That line of cases has been so amply discussed in the opinions and concurring opinions in the cases of Western Union Telegraph Co. v. Kansas and Pullman Co. v. Kansas, decided at the present term (216 U. S. 1, 56), that any extended discussion of them is superfluous now. It is sufficient for the present purpose to say that we are not dealing with a corporation seeking admission to the state of Alabama, nor with one which has a limited license, which it seeks to renew, to do business in that state; nor with one which has come into the state upon conditions which it has since violated. In the case at bar we have a corporation which has come into and is doing business within the state of Alabama, with the permission of the state and under the sanction of its laws, and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property, which the foreign corporation has acquired under the permission and sanction of the laws of the state. This feature of the case was dealt with by Mr. Justice Brewer, then a circuit judge, in the case of Ames v. Union Pacific R. Co., 64 Fed. 165, 177, wherein he said: "It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere and put to use at other places and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value."

Notwithstanding the ample discussion of the questions involved in the case of the Western Union Telegraph Co. v. Kansas and Pullman Co. v. Kansas, to which we have already referred, we deem it only fair to the learned counsel for the state of Alabama to notice some of the cases which it is insisted have disposed of the question herein involved and maintained the right of the state to impose a tax upon a foreign corporation, lawfully within the state, for the privilege of doing business in the state, when no such tax, or one less burdensome, is imposed upon domestic corporations engaged in the same business. The first case referred to is Ducat v. Chicago, 10 Wall. 410, in which a tax was sustained upon a foreign insurance company which had come into the state upon complying with certain terms prescribed by the state, and was thereafter subjected to a tax on all their premiums, the statute declaring it unlawful in the companies otherwise to do business in the state. It is sufficient to say of that case that it arose before the Fourteenth Amendment had become part of the federal Constitution, and that no reference is made in the opinion of the court to the Fourteenth Amendment, although the case was decided after that Amendment went into effect. * * *

In Horn Silver Mining Co. v. New York, 143 U. S. 305, 315, the tax imposed was applicable alike to corporations doing business in New York, whether organized in that state or not; and in the course of the opinion in the case Mr. Justice Field, speaking for the court said: "It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation."

In Fire Ass'n of Philadelphia v. New York, 119 U. S. 110, 119, a Pennsylvania corporation which was taxed in the state of New York was subjected to a license fee, which license ran for a period of a year, and it was held that the state had the power to change the conditions of admission to the state, and to impose as a condition of doing business in the state, at any time or for the future, the payment of a new or further tax. Mr. Justice Blatchford, speaking for the court, said: "If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state, or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given."

We have adverted to these cases with a view of showing that the precise point involved herein is not concluded by any of them. It would not be frank to say that there is not much said in the opinions in those cases which justifies the argument that the power of the state to exclude a foreign corporation, not engaged in interstate commerce, authorizes the imposition of special and peculiar taxation upon such corporations as a condition of doing business within the state. But none of the cases relied upon presents the question under the conditions obtaining in the case at bar. We have here a foreign corporation within a state, in compliance with the laws of the state, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method, not employed as to domestic corporations of the same kind, carrying on a precisely similar business. * * *

We therefore reach the conclusion that the corporation plaintiff, under the conditions which we have detailed, is, within the meaning of the Fourteenth Amendment, a person within the jurisdiction of the state of Alabama, and entitled to be protected against any statute of the state which deprives it of the equal protection of the laws.

It remains to consider the argument made on behalf of the State of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the state is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the state. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 165; Cotting v. Kansas City Stock Yards Co., 183 U. S. 79; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 559.

It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama, carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the state, and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the state, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the state does violence to the federal Constitution.

Judgment reversed.[4]

FULLER, C. J., and MCKENNA and HOLMES, JJ., dissented.

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[4] In White Company v. Massachusetts, reported with Chaney Bros. Co. v. Massachusetts (1918) 246 U. S. 147, 156, 62 L. ed. 632, the court affirmed a judgment of the Massachusetts courts denying a petition to recover an excise tax imposed by Massachusetts by statute of 1909 on every foreign corporation for the privilege of doing business in the state other than interstate commerce. Van Devanter, J., for the court said: "This is an Ohio corporation which is conducting a business, conceded to be local, in Massachusetts. On being admitted to do business therein it acquired two pieces of land in Boston and at large cost specially improved and adapted them for use, the one as an automobile service station and the other as a garage. A subsequent change in the statute made the excise tax more onerous than before, without, as it is said, any corresponding change being made in the law relating to domestic corporations. In these circumstances the company insists that by the imposition of the tax, as defined in the statute of 1909, it is denied the equal protection of the laws, and it relies on Southern Ry. Co. v. Greene, 216 U. S. 400. In overruling this objection the state court said, 218 Massachusetts 579:

"The real estate acquired by this petitioner is of a kind adapted to a very considerable and increasing business, in which there is general competition. The storage and care of automobiles and the performance of necessary service for their repair, maintenance and operation is a widespread business in which large amounts of capital are invested and considerable numbers of persons are engaged. Such establishments are frequent subjects for lease and sale. There is nothing to indicate or to warrant the inference that the petitioner's investment in real estate is not readily salable at reasonable prices. It is not property of a nature irretrievably devoted to a limited and monopolistic use, and not readily available either for other valuable uses or to other persons ready to devote it to the same uses at prices fairly equivalent, subject to the general vicissitudes of business condi-

TERRAL, SECRETARY OF STATE OF ARKANSAS, v. BURKE CONST. CO.

1922. Supreme Court of the United States. 257 U. S. 529.

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

This is an appeal from the District Court under section 238 of the Judicial Code U. S. C. in a case in which the law of a state is claimed to be in contravention of the Constitution of the United States.

The Burke Construction Company, a corporation organized under the laws of the state of Missouri, filed its bill against Terral, Secretary of State of Arkansas, averring that it had been licensed to do business in the State of Arkansas under an act of the Arkansas legislature approved May 13, 1907; that it was organized for the purpose of doing construction work, and carrying on interstate commerce, and was actually so engaged in Arkansas; that the right to do business in the state was a valuable privilege, and the revocation of the license would greatly injure it; that it had brought an original suit in the federal court of Arkansas and had removed a suit brought against it to the same federal court; that the Secretary of State was about to revoke the license because of such suit and such removal, acting under the requirement of section 1 of the act of the legislature of Arkansas of May 13, 1907, reading as follows:

"If any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this state, and to publish such revocation in some newspaper of general circulation published in this state; and if such corporation shall thereafter continue to do business in this state, it shall be subject to the penalty of this act for each day it shall continue to do business in this state after such revocation."

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tions, to the original investment. The Greene Case related to railroad property, which is not susceptible of use for any other purpose without great loss. In that opinion it was said, 'It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. * * * The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed.'"

"Assenting, as we do, to what was thus said, it suffices to add, first, that a state does not surrender or abridge its power to change and revise its taxing system and tax rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits, and, second, that 'a state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchise which the state grants in creating them.' Kansas City, Memphis & Birmingham R. R. Co. v. Stiles, 242 U. S. 111, 118."

The penalty fixed is not less than $1,000 a day. The Construction Company avers that this act is in contravention of section 2, Article III, i. e., the judiciary article of the federal Constitution, and of Section 1 of the Fourteenth Amendment.

The defendant filed an answer in which there were many denials. One was that the complainant was engaged in interstate commerce. The answer did not deny, however, that the complainant was a foreign corporation, that it had been duly granted a license to do business in the state of Arkansas, that its right to do business in the state thus licensed was a valuable right, that the complainant had brought suit in the federal District Court and removed another case to that court, that such suit and removal were violations of the license granted by the State of Arkansas, or that the defendant intended to cancel the plaintiff's license. The case was heard on bill and answer, and is to be considered on the averments of the bill which are not denied by the answer. Iowa v. Illinois, 147 U. S. 1, 7.

The sole question presented on the record is whether a state law is unconstitutional which revokes a license to a foreign corporation to do business within the state because, while doing only a domestic business in the state, it resorts to the federal court sitting in the state.

The cases in this court in which the conflict between the power of a state to exclude a foreign corporation from doing business within its borders, and the federal constitutional right of such foreign corporation to resort to the federal court has been considered, cannot be reconciled. They began with Insurance Co. v. Morse, 20 Wall. 445, which was followed by Doyle v. Continental Ins. Co., 94 U. S. 535; Barron v. Burnside, 121 U. S. 186; Southern Pacific Co. v. Denton, 146 U. S. 202; Martin v. Baltimore & Ohio R. R. Co., 151 U. S. 673, 684; Barrow Steamship Co. v. Kane, 170 U. S. 100, 111; Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246; Herndon v. Chicago, Rock Island & Pac. Ry. Co., 218 U. S. 135; Harrison v. St. Louis & San Francisco R. R. Co., 232 U. S. 318, and Wisconsin v. Philadelphia & Reading Coal Co., 241 U. S. 329.

The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the federal Constitution confers upon citizens of one state the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law. It follows that the cases of Doyle v. Continental Insurance Co., 94 U. S. 535, and Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, must be considered as overruled and that the views of the minority judges in those cases have become the law of this court. The appellant in proposing to comply with the statute in question and revoke the license was about to violate the constitutional right of the appellee. In enjoining him the District Court was right, and its decree is

Affirmed.[5]

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[5] The shift to a new point of view, of which the above decision is one of the results, started in Western Union Telegraph Co. v. Kansas (1910) 216 U. S. 1, 54 L. ed. 355. There a foreign telegraph company had been permitted to enter the state without condition and had established extensive lines and numerous offices for both intrastate and interstate business. Many years later the state attempted to subject it to payment of a tax as a condition to its being permitted to continue to engage in intrastate business in the state. In holding that the state could not oust the corporation from its intrastate business for nonpayment of this tax, the court said that the tax was of a kind that both the commerce clause and the due process clause forbade the state to levy, in general, and that the state could not use its power to impose conditions as a method of exacting payment of such a tax from a foreign corporation. Harlan, J., for the court, said that the state could not require of "the telegraph company that it should surrender rights belonging to it under the Constitution of the United States secured by that instrument against hostile state action; that any such condition was unconstitutional and void." Holmes, J., dissenting, said:

"I confess my inability to understand how a condition can be unconstitutional when attached to a matter over which a state has absolute arbitrary power. This court was equally unable to understand it in Horn Silver Mining Co. v. New York, 143 U. S. 305, 315. In that case it was said: 'Having the absolute power of excluding the foreign corporation the state may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient.' * * * The consequence is the measure of the condition. When the only consequence of a breach is a result that the state may bring about directly in the first place, the condition cannot be unconstitutional. * * * I am aware that the battle has raged with varying fortunes over this matter of unconstitutional conditions, but it appears to me ground for regret that the court so soon should abandon its latest decision, Security Mut. Life Ins. Co. v. Prewitt, 202 U. S. 246.

"Finally, in the absence of contract, the power of the state is not affected by the fact that the corporation concerned already is in the state or even has been there for some time. Waters-Pierce Oil Co. v. Texas, 177 U. S. 28. National Council of the Junior Order of United American Mechanics v. State Council of Virginia, 203 U. S. 151, 163. Whatever the corporation may do or acquire there is infected with the original weakness of dependence upon the will of the state. This is a general principle illustrated by many cases."

The doctrine that a state in granting a privilege which it may withhold can not impose upon the grantee submission to burdens which it could not constitutionally impose independently of any such grant, has had applications beyond the field of a state's dealings with foreign corporations. Thus in Frost Trucking Co. v. Railroad Commission of California (1926) 271 U. S. 583, 70 L. ed. 1101, it is held that since a state would violate the requirements of the due process clause by compelling private motor carriers for hire to submit to regulation permissible only as to public carriers, it cannot require submission to such regulation as a condition to being allowed by the state to continue to use the public highways of the state. See also Western Union Telegraph Co. v. Foster (1918) 247 U. S. 105, 114, 62 L. ed. 1006, 1 A. L. R. 1278, where Holmes, J., phrased the doctrine

KENTUCKY FINANCE CORPORATION v. PARAMOUNT AUTO EXCHANGE CORPORATION.

1923. Supreme Court of the United States. 262 U. S. 544.

Error to a judgment of the Supreme Court of Wisconsin, sustaining two orders, one for the examination of the plaintiff before answer, and the second striking out its complaint and dismissing its action for failure to comply with the first.

Mr. Justice VanDevanter delivered the opinion of the court.

The plaintiff in error, a Kentucky corporation, brought an action of replevin in a state court at Milwaukee, Wisconsin, against the defendant in error, a Wisconsin corporation, to recover an automobile,—the right of recovery asserted in the complaint being put on the ground that the plaintiff was the owner and entitled to the possession of the automobile, that one Allen had unlawfully taken it from the plaintiff's possession at Louisville, Kentucky, had fraudulently removed it to Milwaukee, and had there wrongfully delivered it to the defendant, and that the defendant was unjustly withholding it from the plaintiff under some groundless claim derived from Allen. The defendant appeared and obtained from the court an order requiring the plaintiff's secretary, who resided at Louisville and was in the plaintiff's service there, to appear in Milwaukee at a fixed time before a designated court commissioner, to bring with him all papers, files and records of the plaintiff which were under his control and relevant to the controversy, and then and there to submit to an examination by the defendant. The order was sought and granted on the ground that the examination would better enable the defendant to plead to the complaint, which as yet

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thus: "Acts generally lawful may become unlawful when done to accomplish an unlawful end, United States v. Reading Co., 226 U. S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result. Western Union Telegraph Co. v. Kansas, 216 U. S. 1." See also Sioux Remedy Co. v. Cope (1914) 235 U. S. 197, 203, 59 L. ed. 193.

Again in Fidelity & Deposit Co. v. Tafoya (1926) 270 U. S. 426, 434-435, 70 L. ed. 664, the same justice said: "It has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result. Frick v. Pennsylvania, 268 U. S. 473. American Bank & Trust Co. v. Federal Reserve Bank of Atlanta, 256 U. S. 350, 358. Badders v. United States, 240 U. S. 391, 394. United States v. Reading Co., 226 U. S. 324, 357. Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court, Terral v. Burke Construction Co., 257 U. S. 529; or to tax it upon property that by established principles the state has no power to tax, Western Union Telegraph Co. v. Kansas, 216 U. S. 1, * * * or to interfere with interstate commerce, Sioux Remedy Co. v. Cope, 235 U. S. 107, 203; Looney v. Crane Co., 245 U. S. 178, 188. Western Union Telegraph Co. v. Foster, 247 U. S. 105, 114. A state cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the company has tracks and does business in the state making the attempt. New York, Lake Erie & Western R. R. Co. v. Pennsylvania, 153 U. S. 628, 646."

it had not done. The plaintiff was not engaged in any business in Wisconsin, nor had it complied with the law of that state prescribing conditions on which it might do so. It had no property in the state other than the automobile and it had gone into the state only for the purpose of instituting and prosecuting the action to repossess itself of that vehicle. Its secretary was not within the state, nor did it have any representative there other than the attorneys who were prosecuting the action in its behalf. For itself and its secretary it consented that such an examination as was sought might be held at Louisville at any time, and before any officer, the court might designate, but it objected to any order requiring that the examination be had in Milwaukee. The objection was overruled and the court put in the order a direction that the defendant tender to the plaintiff for its secretary the railroad fare from the southern boundary of Wisconsin to Milwaukee and return, being $4.74, and one day's witness fee, being $1.50. The tender was made and declined and the secretary, with the plaintiff's approval, refused to comply with the order. Because of this the court, on the defendant's motion and over the plaintiff's objection, made a further order striking the plaintiff's complaint from the files and dismissing its cause of action, with costs. On appeal to the supreme court of the state both orders were sustained over the plaintiff's contention that they and the statute under which they were made violate the due process and equal protection clauses of the 14th Amendment. 171 Wis. 586.

[The procedure of the trial court conformed to a Wisconsin statutory provision applicable to foreign corporations. Other statutory provisions made a resident of the state subject to such oral interrogation only in the county of his residence, and where the party was a nonresident natural person the examination could be had in Wisconsin only if he could be personally served therein with notice and subpoena and then only in the county where such service was had.]

By subd. 7 of § 4096, before quoted, an exception was made as to foreign corporations, whereby examinations within the state might be ordered and compelled against them regardless of their nonresidence and of any inability to obtain service on them in the state. Thus they were subjected to a rule much more onerous than that applicable to nonresident individuals in like situations, and also more onerous than that applicable to resident suitors, whether individuals or corporations. The supreme court justified this difference in legislative treatment and also the order for an examination in this case on the ground that they amounted to no more than a reasonable exercise of the authority of the state over a nonresident corporation coming voluntarily into the state to seek a remedy in her courts against a resident defendant.

We take a different view of the matter. According to the sworn complaint, to the allegations of which due regard must be had, the automobile belonged to the plaintiff. It had been unlawfully taken from the plaintiff's possession in Kentucky and put in the defendant's possession in Wisconsin. It did not get into the latter state through any act of the plaintiff; nor did the acts by which it got there make it any the less the plaintiff's property. Only by going into that state and there instituting an action of replevin against the wrongful possessor could the plaintiff repossess itself of its property. Unless it took that course its property would be lost. The state court whose aid it invoked was one whose jurisdiction was general and adequate for the purpose. In the circumstances, the right to bring the action was plain. See Charter Oak L. Ins. Co. v. Sawyer, 44 Wis. 387; Chicago Title & T. Co. v. Bashford, 120 Wis. 281; Sioux Remedy Co. v. Cope, 235 U. S. 197. To have denied that right would, in effect, have deprived the plaintiff of its property and have been an intolerable injustice. That the plaintiff owed its corporate existence to Kentucky did not enable Wisconsin to treat its plight with indifference. It was a "person" within the meaning of both the due process clause ~~and the equal~~ protection clause of the 14th Amendment. Santa Clara County v. Southern P. R. Co., 118 U. S. 394, 396; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 592; Smyth v. Ames, 169 U. S. 466, 522; Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56. The latter clause declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws," meaning, of course, the protection of laws applying equally to all in the same situation. The words "within its jurisdiction" are comprehensive, but we have no need for attempting a full definition of them here. It is enough to say that, when the plaintiff went into Wisconsin, as it did, for the obviously lawful purpose of repossessing itself, by a permissible action in her courts, of specific personal property unlawfully taken out of its possession elsewhere and fraudulently carried into that state, it was, in our opinion, within her jurisdiction for all the purposes of that undertaking. See Southern R. Co. v. Greene, 216 U. S. 400; Blake v. McClung, 172 U. S. 239. And we think there is no tenable ground for regarding it as any less entitled to the equal protection of the laws in that state than an individual would have been in the same circumstances; for, as was held in Atchison, Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 150, 154, "a state has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

No doubt a corporation of one state seeking relief in the courts of another must conform to the prevailing modes of proceeding in those courts and submit to reasonable rules respecting the payment of costs or giving security therefor and the like (see Canadian Northern Ry. Co. v. Eggen, 252 U. S. 553, 561); but it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact and not laid on other suitors in like situations. Here the statute authorized the imposition, and there was imposed on the plaintiff a highly burdensome requirement because of its corporate origin,—a requirement which under the statute could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary. There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files and books to Milwaukee for the purpose of an adversary examination that would not apply equally to an individual resident of Louisville in a like case. The discrimination is further illustrated by the provision that, as to all residents of Wisconsin, individual and corporate, the examination should be had in the county of their residence, no matter what its distance from the place of suit.

We hold that the statute as it was applied in this case was invalid, and the orders made under it were erroneous, as denying to the plaintiff the equal protection of the laws. This conclusion renders it unnecessary to consider the contention made under the due process clause.

Judgment reversed.[6]

MR. JUSTICE BRANDEIS, dissenting, with whom MR. JUSTICE HOLMES concurs: * * * It cannot be that the due process clause of the 14th Amendment deprives a state of the power to authorize its courts to so mold their process as to secure, in this way, the adequate presentation of a case.

To sustain the contention that the statute denies to plaintiff equal protection of the laws would seem to require the court to overrule Blake v. McClung, 172 U. S. 239, 260, 261, and many other cases. The plaintiff, a foreign corporation not doing business within the state of Wisconsin, was not a person "within its jurisdiction."

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[6] Power Mfg. Co. v. Saunders (1927) 274 U. S. 490, 71 L. ed. 1165: Arkansas statutes required actions for personal injuries, if against a domestic corporation, to be brought in a county where it had a place of business or in which its chief officer resided, and, if against a natural person, in a county where he resided or might be found; but they permitted such actions, if against a foreign corporation to be brought in *any* county in the state. The court said it found no sufficient reason for this difference as to venue of actions so far as foreign corporations having a fixed place of business in the state and a resident agent were concerned and as to them held it a denial of equal protection. The court added:

"No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible; the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made."

In some circumstances reasonable classification permits a state to impose greater burdens on domestic than upon foreign corporations. Northwestern Mut. Life Ins. Co. v. Wisconsin (1918) 247 U. S. 132, 62 L. ed. 1025; Kansas City, M. & B. R. Co. v. Stiles (1916) 242 U. S. 111, 61 L. ed. 176.

Moreover, the statutory provision complained of put nonresidents substantially upon an equality with residents. Compare Kane v. New Jersey, 242 U. S. 160, 167. No question of interstate commerce is involved. In my opinion the equal protection clause does not prevent Wisconsin from molding, in the case of foreign corporations, the details of its judicial procedure to accord with the requirements of justice.

HANOVER FIRE INSURANCE COMPANY v. HARDING.

1926. Supreme Court of the United States. 272 U. S. 494.

[Section 30 of an Illinois statute of 1869 provided that every foreign insurance company should pay annually to the municipality in which an agency was located a tax on the net receipts of such agency at the rate that personal property was taxed therein.

Section 22 of the statute made it unlawful for any foreign insurance company to do business in the state without appointing an attorney upon whom process might be served, filing a copy of its articles of association, a statement of its financial condition, depositing $200,000 worth of securities to secure payment of policy holders and procuring annually a certificate of compliance with the act. By the act each company was required to pay $40 for filing its articles and statement and $2 for a permit for each of its agents.

By a statute of 1919 the state required every foreign corporation licensed and admitted to do insurance business to pay an annual state tax for the privilege of so doing equal to 2% of the gross premiums received during each preceding year; it forbade municipalities to levy thereafter any license, privilege or occupation tax, but expressly reserved the local taxes authorized by section 30, of the act of 1869.

The Hanover Insurance Company paid the 2% tax and complied with all the requirements of the act of 1869 except payment in 1923 of taxes levied under section 30. It objects to the manner in which its net receipts were assessed in 1923 for the tax payable under section 30; —— for the following reasons: The statutes for the assessment of personal property in the state required assessors to ascertain the fair cash value and take one-half of that amount as the basis for the personal property tax. It was the settled practice to take 60% of market value as fair value, the result being that personal property was assessed at only 30% of market value. Like reduction was practiced in assessing insurance companies' net receipts until 1923 when in accordance with decisions of the state supreme court the assessors assessed such net receipts at full 100% value. The Hanover Insurance Company brought suit in a state court to enjoin collection. The state supreme court affirmed a dismissal of the bill, and this writ of error was taken.]

Mr. Chief Justice Taft delivered the opinion of the court. * * * The petitioner is an insurance corporation, organized under the laws of the State of New York. By its charter, it is authorized to do a business of insurance against the hazard of fire, marine perils, inland navigation, tornado, theft, explosion, property damage to automobiles and other property by collision, crop insurance, and other similar lines of insurance, against specified hazards. There are in Illinois domestic insurance companies, which do business in all of such risks. In Fidelity & Casualty Company v. Board of Review, 264 Ill. 11, decided in 1914, the supreme court held that the only insurance companies whose receipts come within § 30 are foreign fire, marine and inland navigation insurance companies, doing business in the state. And if they do business in the other hazards above stated, as the complainant and petitioner is authorized to do, then they must pay taxes on their net receipts made, not only from fire, marine and inland navigation company business, but also from the other hazards.

The situation, then, is that a foreign fire, marine and inland navigation insurance company, like the petitioner, must pay at a rate per centum equivalent to that imposed on personal property, a tax on the cash amount or 100 per cent. of its net receipts from all its insurance business. A domestic fire, marine and inland navigation insurance company pays no tax on its net receipts from any kind of insurance. Both pay on their personal property other than net receipts, as of a fixed date in each year, on an assessment of 30 per cent. of its full value.

The Supreme Court of Illinois for many years held the payment of a tax on the net receipts was a tax on personal property. Walker v. Springfield, 94 Ill. 364; City of Chicago v. James, 114 Ill. 479; Chicago v. Phoenix Insurance Company, 126 Ill. 276; National Fire Insurance Company v. Hanberg, 215 Ill. 378; People v. Cosmopolitan Fire Insurance Company, 246 Ill. 442. The net receipts were the gross receipts from each agency after the operating expenses had been deducted. The losses from fire and other risks assumed were not deducted. National Fire Insurance Co. v. Hanberg, 215 Ill. 378. It is quite apparent from reading these cases that, in practice, the net receipts were treated as personal property, and their assessment was by equalization and debasement reduced from full value, as all other personal property, until the decisions in People v. Kent, 300 Ill. 324 (1921) and in People v. Barrett, 309 Ill. 53.

The general principle upon which the Supreme Court of Illinois holds the tax complained of herein to be valid, is that the payment of it is part of the condition which the petitioner as a foreign insurance company is obliged to perform, in order to maintain and retain its right to do business in the state. It was settled in the Bank of Augusta v. Earle, 13 Pet. 519; Paul v. Virginia, 8 Wall. 168; Ducat v. Chicago, 10 Wall. 410, and Horn Silver Mining Company v. New York, 143 U. S. 305, that foreign corporations can not do business in a state except by the consent of the state; that the state may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. But there is a very important qualification to this power of the state, the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is, that the state may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. This is illustrated, in respect of the breach of the commerce clause of the Constitution, by the cases of Sioux Remedy Company v. Cope, 235 U. S. 197, 203, and Looney v. Crane Company, 245 U. S. 178, 188. It is illustrated in cases in which a provision of a state law revoking the license of a foreign corporation for exercising its constitutional right to remove suits brought against them from the state courts to the federal courts, has been held void, Terral v. Burke Construction Company, 257 U. S. 529; in cases in which the state has vainly attempted to subject foreign corporations to a payment of a tax which is a tax not only on the property of the corporation in the state but also on its property without the state, in violation of the due process clause of the Fourteenth Amendment, Western Union Telegraph Co. v. Kansas, 216 U. S. 1; St. Louis Cotton Compress Company v. Arkansas, 260 U. S. 346; and finally in cases of a class to which it is contended the present case belongs, where a tax or license law operates to deny to the foreign corporation the equal protection of the laws. Southern Railway Co. v. Greene, 216 U. S. 400; Air Way Corporation v. Day, 266 U. S. 71. * * *

In the present case, there is no such permanent investment in the State of Illinois as there was in the Greene case in Alabama, but the averments of the bill show, that the complainant has from year to year secured renewal of its license in the State of Illinois, and has through many years past built up a large good will in the State of Illinois, and has associated with it a large number of agents in the various counties of the state, whose connection with it has resulted in a large and profitable business to the complainant, and that it has large numbers of records containing information respecting its policy holders, the character and nature of their policies, and other records, the value of all of which would be destroyed if it were excluded from the state by a denial of the equal protection of the laws. In the Greene case the license was indefinite. In this case it must be renewed from year to year, but the principle is the same, that pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens.

It is insisted that we must accept the construction of § 30 by the state supreme court, and, as the tax levied is sustained by its construction and has been held by the court to be an indispensable condition upon which the petitioner may continue to do business in Illinois, this court is bound by both those conclusions.

It is true that the interpretation put upon such a tax law of a state by its supreme court is binding upon this court as to its meaning; but it is not true that this court, in accepting the meaning thus given, may not exercise its independent judgment in determining whether, with the meaning given, its effect would not involve a violation of the federal Constitution. * * *

In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state, and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay, to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but, after its admission, the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind.

In this class of cases, therefore, the question of the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations, in engaging in business within the state. To leave the determination of such a question finally to a state court would be to deprive this court of its independent judgment in determining whether a federal constitutional limitation has been infringed. While we may not question the meaning of the tax law, as interpreted by the state court, in the manner and effect in which it is to be enforced, we must re-examine the question passed upon by the state court, as to whether the law complained of is a part of the condition upon which admission to do business of the state is permitted and is merely a regulating license by the state to protect the state and its citizens in dealing with such corporation, or whether it is a tax law for the purpose of securing contributions to the revenue of the state as they are made by other taxpayers of the state. * * * What, therefore, we have to decide here is whether the application of § 30 can be one of the conditions upon which the insurance company is admitted to do business in Illinois, or whether, under the law of 1919, the authority granted by the Department of Trade and

Commerce, for which the company paid 2 per cent. of gross premiums received the previous year by it, put it upon a level with domestic insurance companies doing business of the same character.

It is plain that compliance with § 30 is not a condition precedent to permission to do business in Illinois. The state supreme court concedes this, but its reasoning that payment of the tax under the section is a condition to its doing business in Illinois, which may vary at the will of the state without regard to taxes on similar domestic corporations, is shown by the following passages:

"The fact that a tax is a privilege tax does not necessarily require that it be paid as a condition precedent to entering the state. Such a condition, being precedent, could of course be met but once. However, the greatest financial benefit to such a company flows from the continuation of the privilege to do business. Compensation for that privilege should be based on the benefits actually derived from the business done under such privilege, and such compensation must necessarily be assessed in some manner after the business is done and the benefits thereof received. Section 30 provides the method by which the amount of this compensation shall be determined and assessed." 317 Ill. 366, 373. * * *

"It seems clear, therefore," says the court (p. 375), "that this tax is levied as compensation for the privilege of continuing their business in the state.

"While the Act of 1919 * * * imposes an annual state tax equal to two per cent. on the gross amount of the premiums received by any foreign insurance company during the preceding year, * * * that fact does not show that the tax imposed on the business of fire insurance by section 30 is not likewise a tax for the privilege of doing business. The Act of 1919 requires that the tax there levied be paid to the state. Section 30 requires that the tax be apportioned among the state and the different municipalities of the situs of the agency. A valid reason is seen for this distribution of the tax. The foreign fire insurance company takes its net proceeds largely from the vicinity of its agencies and it is but just that it return to the municipality in which its agency is located something in lieu of the taxes that would otherwise be realized from such net receipts as are taken away."

The view of the court seems to be that the constitutional necessity for equal application of the laws of the state to foreign and domestic corporations properly engaged in business, is avoided if only the state provides that failure to comply with the laws during the period, or at the end of the period, for which the license runs, justifies a revocation of the license pending the period, or a refusal to grant a new license for the following year. We do not think the state may thus relieve itself from granting the equal protection of its laws to a foreign company which has met the conditions precedent to its becoming a quasi domestic citizen. Of course, at the end of the year for which the license has been granted, the state may in its discretion impose, as conditions precedent for a renewed license, past compliance with its valid laws; but that does not enable the state to make past compliance with § 30 a condition precedent to a renewal of the license, if, as we find, that section violates the Fourteenth Amendment; for, as already said, while a state may forbid a foreign corporation to do business within its jurisdiction, or to continue it, it may not do so by imposing on a corporation a sacrifice of its constitutional rights. We have said in Cheney Bros. Co. v. Massachusetts, 246 U. S. 147, and in Kansas City, etc., Railroad Company v. Stiles, 242 U. S. 111, 118, that a state does not surrender or abridge its power to change and revise its taxing system and tax rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits, and that a state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchise which the state grants them; but the decision in Southern Railway Company v. Greene, supra, shows that this power to change the tax imposed on a foreign corporation as a condition for the license of continuing business, is not unlimited, and that any attempt, in a renewal, to vary the terms of the original license, which, however indirectly, enforces a new condition upon the corporation and involves a deprivation of its federal constitutional rights, can not be effective. The state, in dealing with foreign corporations, may properly and without discrimination as between them and domestic companies, regulate the former by a provision that, for a failure by them to comply with any valid law governing the conduct of their business in the state, the license already granted may be revoked. That is a legitimate condition in the treatment of foreign companies which do not have property and home within the state. It is a police regulation. But the power thus to revoke a license for breach of a law can only be validly exercised if the law be a constitutional one. By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign, within the state; and tax laws made to apply after it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the Fourteenth Amendment. This conclusion is not only in accord with our previous decisions, but is sustained by the reasoning in a satisfactory judgment of the Court of Errors and Appeals of New Jersey. Erie Railway Co. v. State, 31 N. J. L. 531, 542, 543, 544.

We thus reach the question whether a tax imposed upon foreign fire, marine and inland navigation insurance companies on the net receipts of all their business, whether fire, marine, inland navigation or other risks, is a denial of the equal protection of the laws, when domestic insurance companies pay no taxes on such net receipts. Under the previous decisions of the Supreme Court of Illinois, when the net receipts were treated as personal property and the assessment thereon as a personal property tax subjected to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations, in that the net receipts were personal property acquired during the year and removed by foreign companies out of the state, and could be required justly to yield a tax fairly equivalent to that which the domestic companies would have to pay on all their personal property, including their net receipts or what they were invested in. It was this view, doubtless, which led to the acquiescence by the state authorities and the foreign insurance companies in such a construction of § 30, and in the practice under it. But an occupation tax imposed upon 100 per cent. of the net receipts of foreign insurance companies admitted to do business in Illinois, is a heavy discrimination in favor of domestic insurance companies of the same class and in the same business, which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent. of the full value of that property. It is a denial of the equal protection of the laws. Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350, 352, 353; Southern Ry. Co. v. Greene, 216 U. S. 400. Analogous cases are many. Cummings v. National Bank, 101 U. S. 153; Greene v. Louisville R. R. Co., 244 U. S. 499, 516; Sioux City Bridge v. Dakota County, 260 U. S. 441, 445; Taylor v. L. & N. R. R., 88 Fed. 350; L. & N. R. R. v. Bosworth, 209 Fed. 380, 452; Washington Water Power Co. v. Kootenai County, 270 Fed. 369, 374.

One argument urged against our conclusion is that the relation of a foreign insurance company to the state which permits it to do business within its limits, is contractual, and that, by coming into the state and engaging in business on the conditions imposed, it waives all constitutional restrictions, and can not object to a condition or law regulating its obligations, even though, as a statute operating in invitum, it may be in conflict with constitutional limitations. This argument can not prevail in view of the decisions of this court in well considered cases. Insurance Co. v. Morse, 20 Wall. 445; Western Union Telegraph Company v. Kansas, 216 U. S. 1; Terral v. Burke Construction Co., 257 U. S. 529; Fidelity & Deposit Company v. Tafoya, 270 U. S. 426; Frost v. Railroad Commission, 271 U. S. 583.

The judgment of the Supreme Court of Illinois must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

QUAKER CITY CAB COMPANY v. PENNSYLVANIA.

1928. Supreme Court of the United States. 277 U. S. 389.

Mr. Justice Butler delivered the opinion of the court.

Judgment was entered in the Court of Common Pleas of Dauphin County, Pennsylvania, in favor of the Commonwealth for "gross receipts taxes for the six months ending the 31st day of December, 1923," amounting with interest and commission to $6,049.94. The tax is claimed under § 23 of an Act of June 1, 1889, P. L. 420, 431. The gross receipts taxed were derived by plaintiff in error from the use of its motor vehicles for the transportation within Pennsylvania of persons and their luggage. Plaintiff in error contended that if applied to such receipts the section violates the equal protection clause of the Fourteenth Amendment. The highest court of the state upheld the Act and affirmed the judgment. 287 Pa. 161.

Plaintiff in error is a New Jersey corporation authorized to do business in Pennsylvania as a foreign corporation; and, since June 1, 1917, it has carried on a general taxicab business in Philadelphia. The Supreme Court held that the section taxes gross receipts from the operation of taxicabs. It provides that every transportation company, whether incorporated in Pennsylvania or elsewhere, owning or operating any device for the transportation of passengers, "shall pay to the state treasurer a tax of eight mills upon the dollar upon the gross receipts of said corporation * * * received from passengers * * * transported wholly within this State * * *."

Plaintiff in error was subject to competition in its business by individuals and partnerships operating taxicabs. The Act does not apply to them, and no tax is imposed on their receipts. Corporations operating taxicabs are not exempted from any of the taxes imposed on natural persons carrying on that business. And every such corporation whether domestic or foreign pays a capital stock tax of five mills on the actual value of its capital stock and a bonus of one-third of one per cent on the par value of all stock issued if it be a domestic corporation, and a like rate on its capital employed in Pennsylvania if it be a foreign corporation. Act of July 22, 1913, P. L. 903. § 1, Act of May 3, 1899, P. L. 189. § 1, Act of May 8, 1901, P. L. 150. The supreme court said that it is immaterial whether individuals engaged in a like taxicab business are subject to the tax here involved and that corporations may be placed in a class separate from individuals and so taxed.

The equal protection clause extends to foreign corporations within the jurisdiction of the state and safeguards to them protection of laws applied equally to all in the same situation. Plaintiff in error is entitled in Pennsylvania to the same protection of equal laws that natural persons within its jurisdiction have a right to demand under like circumstances. Kentucky Finance Corp'n v.

Paramount Exch., 262 U. S. 544, 550. The equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, "but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation." Power Co. v. Saunders, 274 U. S. 490, 493. It is established that a corporation, by seeking and obtaining permission to do business in a state does not thereby become bound to comply with, or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States. The right to withhold from a foreign corporation permission to do local business therein does not enable the state to require such a corporation to surrender the protection of the federal Constitution. Power Co. v. Saunders, supra, 497. Hanover Insurance Co. v. Harding, 272 U. S. 494, 507. Frost v. Railroad Commission, 271 U. S. 583, 593 et seq. Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426, 434. Western Union Tel. Co. v. Foster, 247 U. S. 105, 114. Looney v. Crane Co., 245 U. S. 178, 188. Sioux Remedy Co. v. Cope, 235 U. S. 197, 203.

The section declares the imposition to be a tax "upon gross receipts." And the supreme court said: "The real subject of the tax is the gross receipts of a company engaged in the transportation of freight or passengers. * * *" That statement is not affected by a later expression referring to the tax as a "state tax on business or income" in contrast with a "local tax on property" such as hacks, cabs and other vehicles. The variation of language used by the court evidently is intended to be, and is, without significance. The words of the section are too plain to require explanation. They could not reasonably be given any other meaning. But, in any event, a characterization of the tax by the state court is not binding here. Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32; St. Louis Compress Co. v. Arkansas, 260 U. S. 346, 348. There is no controversy as to the application of the tax. Plaintiff in error assumes that the section covers its gross receipts, as held by the state court, but insists that the section is invalid because it does not extend to like receipts of natural persons and partnerships. No doubt there are situations in which, as appears in Cudahy Packing Co. v. Minnesota, 246 U. S. 450, and other cases, a percentage of gross earnings may be taken as a tax on property used in the business and properly may be deemed not to be a tax or burden on such earnings. But the practical operation of the section is to be regarded, and it is to be dealt with according to its effect. Frick v. Pennsylvania, 268 U. S. 473. Panhandle Oil Co. v. Mississippi, 277 U. S. 218. Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations as are taxes on their capital stock or franchise. It is not taken in lieu of any other tax or used as a measure of one intended to fall elsewhere. It is laid upon and is to be considered and tested as a tax on gross receipts; it is specifically that and nothing else.

In effect § 23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. Power Co. v. Saunders, supra. No decision of this Court gives support to such a classification. In no view can it be held to have more than an arbitrary basis. As construed and applied by the state court in this case, the section violates the equal protection clause of the Fourteenth Amendment. See The Railroad Tax Cases, 13 Fed. 722. County of Santa Clara v. Southern Pacific R. R. Co., 18 Fed. 385. Northern Pacific R. Co. v. Walker, 47 Fed. 681. The tax cannot be sustained.

Judgment reversed.[7]

MR. JUSTICE BRANDEIS, dissenting. * * *

As the statute applies equally to domestic and to foreign corporations, cases like Southern Ry. Co. v. Greene, 216 U. S. 400; Kentucky Finance Corporation v. Paramount Auto Exchange, 262 U. S. 544; Hanover Fire Insurance Co. v. Harding, 272 U. S. 494; and Power Manufacturing Co. v. Saunders, 274 U. S. 490, have no application. And no claim is made that the federal Constitution prevents a state from taxing corporations engaged in one class of business more heavily than those engaged in another. Southwestern Oil Co. v. Texas, 217 U. S. 114; Brown-Forman Co. v. Kentucky,

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[7] "Where, as we have found in this case, a foreign corporation has no federal right [because not engaged in interstate or foreign commerce] to continue to do business in a state, and where, as here, no contract right is involved and there is no employment by the federal government, it is the settled law that a state may impose conditions, in its discretion, upon the right of such a corporation to do business within the state, even to the extent of excluding it altogether. Horn Silver Mining Co. v. New York, 143 U. S. 305; Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 83, and cases cited. And in such case the inherent difference between corporations and natural persons is sufficient to sustain a classification making restrictions applicable to corporations only. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 343, 344; Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 83. And see Fort Smith Lumber Co. v. Arkansas, 251 U. S. 532, 533; American Sugar Refining Co. v. Louisiana, 179 U. S. 89; Williams v. Fears, 179 U. S. 270, 276; W. W. Cargill Co. v. Minnesota, 180 U. S. 452." Crescent Cotton Oil Co. v. Mississippi (1921) 257 U. S. 129, 137, 66 L. ed. 166. See the facts and opinion ante, p. 1239.

217 U. S. 563; Heisler v. Thomas Colliery Co., 260 U. S. 245; Oliver Iron Mining Co. v. Lord, 262 U. S. 172. The fundamental question requiring decision is a general one. Does the equality clause prevent a state from imposing a heavier burden of taxation upon corporations engaged exclusively in intrastate commerce, than upon individuals engaged under like circumstances in the same kind of business? The narrower question presented is, whether this heavier burden may be imposed by a form of tax "not peculiarly applicable to corporations." That is, by a tax of such a character that it might have been extended to individuals if the legislature had seen fit to do so.

The equality clause does not forbid a state to classify for purposes of taxation. Discrimination through classification is said to violate that clause only where it is such as "to preclude the assumption that it was made in the exercise of legislative judgment and discretion." Stebbins v. Riley, 268 U. S. 137, 143. In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor. * * *

The difference between a business carried on in corporate form and the same business carried on by natural persons is, of course, a real and important one. As was stated in Flint v. Stone-Tracy Co., 220 U. S. 107, 161-162, "it could not be said * * * that there is no substantial difference between carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals." Because of this difference Congress has repeatedly discriminated against incorporated concerns and in favor of the unincorporated. The Corporation Tax Act of August 5, 1909, c. 6, § 38, 36 Stat. 11, 112, imposed a tax of one per cent on the net income of corporations when a corresponding tax was not imposed upon the income of individuals. * * *

The imposition of the heavier tax on corporations by means of an annual tax in the form of a franchise tax declared to be for the privilege of doing business in corporate form is common, and since Home Insurance Co. v. New York, 134 U. S. 594, 606-607, the validity of such a tax has not been questioned. This heavier burden the state may impose by means of an annual franchise tax in addition to the ordinary property and excise taxes imposed upon all persons, natural and artificial. * * * Since a state is permitted to impose upon the corporation more than a pro rata share of the common burden of taxation, I find nothing in the federal Constitution which prohibits it from adopting any of the familiar kinds of taxes as the means of the heavier imposition. Surely, there is nothing inherently objectionable in the long established, commonly used gross earnings tax, which should prevent its being selected for that purpose.

Why Pennsylvania should have chosen to impose upon corporations a heavier tax than upon individuals or partnerships engaged under like circumstances in the same line of business, or why it should have selected this particular form of tax as the means of doing so, we have no occasion to enquire. The state may have done this, because, in view of the advantages inherent in corporate organization, the legislature believed that course necessary in order to insure a just distribution of the burdens of government. In Flint v. Stone-Tracy Co., 220 U. S. 107, 162, this court listed the advantages which justify the imposition of special taxes on corporations: "The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships."

In Pennsylvania the practice of imposing heavier burdens upon corporations dates from a time when there, as elsewhere in America, the fear of growing corporate power was common. The present heavier imposition may be a survival of an early effort to discourage the resort to that form of organization. The apprehension is now less common. But there are still intelligent, informed, just-minded and civilized persons who believe that the rapidly growing aggregation of capital through corporations constitutes an insidious menace to the liberty of the citizen; that it tends to increase the subjection of labor to capital; that, because of the guidance and control necessarily exercised by great corporations upon those engaged in business, individual initiative is being impaired and creative power will be lessened; that the absorption of capital by corporations, and their perpetual life, may bring evils similar to those which attended mortmain; that the evils incident to the accelerating absorption of business by corporations outweigh the benefits thereby secured; and that the process of absorption should be retarded. The court may think such views unsound. But, obviously, the requirement that a classification must be reasonable does not imply that the policy embodied in the classification made by the legislature of a state shall seem to this court a wise one. It is sufficient for us that there is nothing in the federal Constitution which prohibits a state from imposing a heavier tax burden upon corporations organized for the purpose of engaging exclusively in intrastate commerce; and that there is nothing inherently objectionable in the instrument which Pennsylvania selected for imposing the heavier burden—the gross receipts tax. * * *

[Brief dissenting opinions by both Holmes and Stone, JJ., are omitted. Holmes, J., also concurred in the opinion by Brandeis, J.]

CHAPTER XII.

CONSTITUTIONAL LIMITATIONS ON TAXATION.

Section 1.—Permissible Purposes.

LOAN ASSOCIATION v. TOPEKA.

1874. Supreme Court of the United States. 20 Wall. 655.

[The Citizens Savings and Loan Association of Cleveland, Ohio, brought this action in the United States Circuit Court for the District of Kansas against the City of Topeka, Kansas, to recover interest due on bonds issued by the city. The city, acting under the authority of a Kansas statute, had issued these bonds payable to a bridge manufacturing company as a donation to aid and encourage it to establish its works in the city, and the plaintiff had acquired them by purchase. The Circuit Court gave judgment for the defendant, sustaining its demurrer to the declaration, on two grounds (1) that the statute expressed no limit to the amount of bonds that could thus be issued and consequently violated a provision of the constitution of Kansas which required the legislature to restrict the power of cities to contract indebtedness; (2) that the statute was invalid because it attempted to authorize taxation for other than a public purpose. The plaintiff took this writ of error.]

Mr. Justice Miller delivered the opinion of the court. * * *

We find ample reason to sustain the demurrer on the second ground on which it is argued by counsel and sustained by the Circuit Court. That proposition is that the act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The proposition as thus broadly stated is not new, nor is the question which it raises difficult of solution. * * *

The subject of the aid voted to railroads by counties and towns has been brought to the attention of the courts of almost every state in the Union. It has been thoroughly discussed and is still the subject of discussion in those courts. It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the states, unless restricted by some special provisions of their constitutions, may confer upon these municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations. Also to levy the necessary taxes on the inhabitants, and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the existence of the power altogether.

In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning-point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies, by counties or towns, valid on any other ground than that the purpose for which the taxes were levied was a public use, a purpose or object which it was the right and the duty of state governments to assist by money raised from the people by taxation. The argument in opposition to this power has been, that railroads built by corporations organized mainly for purposes of gain—the roads which they built being under their control, and not that of the state—were private and not public roads, and the tax assessed on the people went to swell the profits of individuals and not to the good of the state, or the benefit of the public, except in a remote and collateral way. On the other hand it was said that roads, canals, bridges, navigable streams, and all other highways had in all times been matter of public concern. That such channels of travel and of the carrying business had always been established, improved, regulated by the state, and that the railroad had not lost this character because constructed by individual enterprise, aggregated into a corporation.

We are not prepared to say that the latter view of it is not the true one, especially as there are other characteristics of a public nature conferred on these corporations, such as the power to obtain right of way, their subjection to the laws which govern common carriers, and the like, which seem to justify the proposition. Of the disastrous consequences which have followed its recognition by the courts and which were predicted when it was first established there can be no doubt.

We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the state legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right.

It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B.

Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defence, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government. * * *

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Nor is it taxation. A "tax," says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state." "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes." Cooley on Constitutional Limitations, 479. * * *

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this, and is sanctioned by time and the acquiescence of the people, may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town. * * *

Judgment affirmed.[1]

[CLIFFORD, J., delivered a dissenting opinion.]

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[1] The assumption that judges are qualified to determine for what purposes taxes should not be levied, and that it is one of their functions is quite old in America. See Giddings v. Browne (1657) ante, p. 8.

Some state constitutions *expressly* prohibit taxation for other than "public purposes." In all the states, however, this imperfect concept is now fully accepted as a limitation upon taxation.

PERRY v. KEENE.

1876. Supreme Court of New Hampshire. 56 N. H. 514.

[Bill in equity in the state supreme court, on an agreed statement of facts which are sufficiently stated in the opinion.]

LADD, J. "Any town may, by a two-thirds vote, raise by tax or loan such sum of money as they shall deem expedient, not exceeding five per cent of the valuation thereof, * * * and appropriate the same to aid in the construction of any railroad in this State, in such manner as they shall deem proper." Gen. Stats., ch. 34, sec. 16. In accordance with the provisions of this statute, the inhabitants of the city of Keene have voted a subsidy equal to three per cent of their last property valuation, to aid in the construction of that part of the Manchester & Keene Railroad located between Greenfield and Keene. * * * The plaintiffs, who are citizens and large tax-payers in Keene * * * ask for an injunction to prevent the issuing of bonds or the levy of taxes in accordance with said vote.

* * *

Is the building of a railroad a public purpose? The legislature have undoubtedly passed their judgment on that question, and determined that it is. It is not to be denied that the levying of taxes is specially and entirely a legislative function, and the court are not to encroach upon the province of a co-ordinate branch of the government in the exercise of that power. Where is the line that divides the province of the court from that of the legislature in a matter of this sort? The court is to expound and administer the laws, and there the judicial function and duty end. How much of the question, whether a given object is public, lies within the province of the law, and how much in the domain of political science and statesmanship? When the judge has declared all the law that enters into the problem, how much is still left to the determination of the legislator? Admitting, as has indeed been more than intimated in this State (Concord Railroad v. Greeley, 17 N. H. 57), that it is for the court finally to determine whether the use is public,—what is the criterion? What are the rules which the law furnishes to the court wherewith to eliminate a true answer to the inquiry? In what respect does the question as presented to the court differ from the same question as presented to the legislature? If the court stop when they reach the borders of legislative ground, how far can they proceed?

If the legislature should take the property of A, or the property of all the tax-payers in the town of A, and hand it over, without consideration, without pretense of any public obligation or duty, to B, to be used by him in buying a farm, or building a house, or setting himself up in business, the case would be so clear that the common-sense of every one would at once say the limits of legislative power had been overstepped by a taking of private property, and devoting it to a private use. That is the broad ground upon which such cases as Allen v. Jay, 60 Me. 124, Lowell v. Boston, 111 Mass. 454, and The Citizens' Loan Association v. Topeka, Sup. Ct. U. S. (not yet reported) were decided. And yet, what rule of law do the courts find to aid them in thus revising the judgment of the legislature? Is it not clear that the question they pass upon is the same question as that decided by the legislature, and that they must determine it in the same way the legislature have done, simply by the exercise of reason and judgment? What is it that settles the character of a given purpose, in respect of its being public or otherwise? It has been said that for the legislature to declare a use public does not make it so—17 N. H. 57; and the same may certainly be said with equal truth of a like declaration by the court. A judicial christening can no more affect the nature of the thing itself, than a legislative christening. Judging a priori, and without some knowledge of the wants of mankind when organized in communities and States, I do not quite understand how it could be predicated of any use, that it is "per se" public, as is said by Dixon, C. J., in Whiting v. Sheboygan Railway Co., 9 Am. Law Reg. (N. S.) 161. Of light, air, water, etc., the common bounties of providence, it might, indeed, be said beforehand that they are in a very broad sense public; but it is not of such uses that we are speaking. Without knowledge of human nature, knowledge derived from experience and observation of what may be needful for the comfort, well-being, and prosperity of the people of a state advanced in civilization,—and knowledge, gained in the same way, as to what necessary conditions of their welfare will be supplied by private enterprise, and what will go unsupplied without interference by the state,—I do not see how any use could be said to be per se public, or how either a legislature, or a court, could form a judgment that would not be founded almost wholly upon theory and conjecture. No one doubts that the building and maintaining of our common highways is a public purpose. Why? Certainly for no other reason than that they furnish facilities for travel, the transmission of intelligence, and the transportation of goods. But why should the state take this matter under its fostering care, imposing upon the people a very great yearly burden in the shape of taxes for their support, any more than many others that might be mentioned, of equal and perhaps greater importance to its citizens? Is it of greater concern to the citizen that he should have a road to travel on, when he desires to visit his neighbor in the next town, or transport the products of his farm or of his factory to market and bring back the commodities for which they may be exchanged, than that he should have a mill to grind his corn,—a tanner, a shoemaker, and a tailor to manufacture his raw material into clothing, wherewith his body may be covered? Doubtless highways are a great public benefit. Without them I suppose the whole state would soon return to its primal condition of a howling wilderness, fit only for the habitation of wild beasts and savages. How would it be if there were no mills for the manufacture of lumber, no joiners or masons to build houses, no manufacturers of cloth, no merchants or tradesmen to assist in the exchange of commodities? These suppositions may appear somewhat fanciful, but they illustrate the inquiry, Why is the building of roads to be regarded as a public service, while many other things equally necessary for the upholding of life, the security of property, the preservation of learning, morality, and religion, are by common consent regarded as private, and so left to the private enterprise of the citizens? The answer to this question, surely, is not to be found in any abstract principle of law. It is essentially a conclusion of fact and public policy, the result of an inquiry into the individual necessities of every member of the community (which in the aggregate show the character and urgency of the public need), and the likelihood that those necessities will be supplied without interference from the state. Obviously it bears a much closer resemblance to the deduction of a politician, than the application of a legal principle by a judge. Should it be found by experience that no person in the state would, voluntarily and unaided, establish and carry on any given trade or calling, necessary, and universally admitted to be necessary, for the upholding of life, the preservation of health, the maintenance of decency, order, and civilization among the people, would not the carrying on of such necessary trade or calling thereupon become a public purpose, for which the legislature might lawfully impose a tax?

Experience shows that highways would not be built, or, if built, would not be located in the right places with reference to convenient transit between distant points, nor kept in suitable repair, but for the control assumed over the whole matter by the state; and so the state interferes, and establishes a system, and imposes an enormous burden upon the people in the shape of taxes, compelling them to supply themselves with what they certainly need, but need no more than they need shoes or bread,—and nobody ever complained that the interference was unauthorized, or the purpose other than a public one.

Enough has been said to show the delicate nature of the task imposed upon the court when they are called upon to revise the judgment of the legislature in a matter of this description. It is especially delicate for two reasons,—first, because the discretion of the legislature, with respect to the whole subject of levying taxes, is so very large, and their power so exclusive, that it is not always easy to say when the limits of that discretion and power have been passed; and, second, because the rule to be applied is furnished, not so much by the law as by those general considerations of public policy and political economy to which allusion has been made. I do not deny the power and duty of the court, when private rights of property are in question, to settle those rights according to a just interpretation of the Constitution; and the discharge of that duty may involve a revision of the judgment of the legislature upon a question which, like this, partakes more or less of a political character. But before the court can reverse the judgment of the legislature and the executive, and declare a statute levying or authorizing a tax to be inoperative and void, a very clear case must be shown. After the legislature and the executive have both decided that the purpose for which a tax is laid is public, nothing short of a moral certainty that a mistake has been made, can, in my judgment, warrant the court in overruling that decision, especially when nothing better can be set up in its place than the naked opinion of the court as to the character of the use proposed. Certainly it is not for the court to shrink from the discharge of a constitutional duty; but, at the same time, it is not for this branch of the government to set an example of encroachment upon the province of the others. It is only the enunciation of a rule that is now elementary in the American States, to say that, before we can declare this law unconstitutional, we must be fully satisfied—satisfied beyond a reasonable doubt—that the purpose for which the tax is authorized is private and not public.

I have spoken incidentally of our common highways; and it has been said that their purpose is, to furnish to the public facilities for travel, for the transmission of intelligence, and the carrying of goods. No one will contend that to build and maintain them is not a public purpose. Indeed, the public nature of this use is so very obvious, that it has been classed among those said to be public per se (Whiting v. Sheboygan Railway Co., supra), standing in need of no credentials from the court to entitle it to legislative recognition. Wherein does the use of a railroad differ? What public benefit can be mentioned, that comes from the building of a common road, that does not come, in kind if not in degree, from the building of a railroad? It is not necessary to enlarge upon the benefits of either: they are, doubtless, numerous and varied,—so numerous, indeed, so interwoven with everything that distinguishes an intelligent, virtuous, rich, well-organized, and well-governed state, from a tribe of primitive barbarians, that an attempt to trace them all would be little less than an attempt to search out the sources of our civilization. The point is, they are alike in kind; and when it is admitted that the construction of one class of roads is clearly, beyond all possibility of doubt, a public purpose, I cannot conceive upon what ground it is to be said that the construction of the other class is, beyond all reasonable doubt, a private purpose.

It is said that railroad corporations are private; that the roads are built and run for private gain; that the public can only enjoy the benefits offered by them upon payment of a toll,—and, therefore, their purpose is private. The short and conclusive answer to all this, in my mind, is, that the character of the agency employed does not and cannot determine the nature of the end to be secured. To say of a railroad corporation that it is a private corporation, and therefore the construction of a railroad is a private purpose, seems to me, in truth, no more logical, if less absurd, than to say of any officer or agent of the state,—He is an individual, with all the private interests and private associations of other citizens; therefore the purpose of his office and of all his official acts is private. The argument that because a toll is granted, therefore the purpose must be private, carried to its logical results, would certainly declare the purpose of a very large number of public offices in the state to be private,—among them the Secretary of State, justices of the peace and of police courts, registers of probate, registers of deeds, sheriffs, clerks of the courts, town-clerks, etc., etc.

If the purpose is public, it makes no difference that the agent by whose hand it is to be attained is private. Nor, if the purpose were private, would it make any difference that a public agent was employed. The question, therefore, whether a railroad corporation is to be regarded as public, or private, or both,—that is, public in one aspect and private in another,—seems to me quite immaterial, and that the decision of that question one way or the other does not advance the inquiry we have in hand.

It has been admitted by some, who have maintained with singular ability and zeal the position of the plaintiffs in this case, that the state might legally take into its own hands the whole matter of railroads within its limits; might build, equip, operate, and control them, making use of no intermediate agents in the business,—because in that case the people would remain owners of the property into which their money had been converted. With great deference, it seems to me, this is a concession of the very point in dispute. The form of the argument seems to be this: The state cannot levy a tax for a private purpose. So much, all admit. The building of a railroad is a private purpose; but the state may nevertheless levy a tax to build a railroad, provided the tax be large enough to carry through the whole enterprise without calling in the aid of any other agency;—or, to draw from the same premises the conclusion sought to be established here, the state cannot levy a tax for a private purpose. The state may levy a tax to wholly build, equip, and run a railroad; therefore the building of a railroad is a private purpose. This does not bear examination. * * *

Bill dismissed.

[Concurring opinions by Smith and Rand, JJ., omitted.]

GREEN ET AL. v. FRAZIER, GOVERNOR ET AL.

1920. Supreme Court of the United States. 253 U. S. 233.

Error to the Supreme Court of the State of North Dakota.

MR. JUSTICE DAY delivered the opinion of the court.

This is an action by taxpayers of the State of North Dakota against Lynn J. Frazier, Governor, John N. Hagan, Commissioner of Agriculture and Labor, William Langer, Attorney General, and Obert Olson, State Treasurer, [constituting] the Industrial Commission of that state, to enjoin the enforcement of certain state legislation. * * *

The legislation involved consists of a series of acts passed under the authority of the state constitution, which are:

(1) An act creating an Industrial Commission of North Dakota [Laws, 1919, c. 151] which is authorized to conduct and manage on behalf of that state certain utilities, industries, enterprises and business projects, to be established by law. The act gives authority to the Commission to manage, operate, control and govern all utilities, enterprises and business projects, owned, undertaken, administered or operated by the State of North Dakota, except those carried on in penal, charitable or educational institutions. To that end certain powers and authority are given to the Commission, among others: the right of eminent domain; * * * to procure the necessary funds for such utilities, industries, enterprises and business projects by negotiating the bonds of the state in such amounts and in such manner as may be provided by law. $200,000 of the funds of the state are appropriated to carry out the provisions of the act.

(2) The Bank of North Dakota Act, [Laws 1919, c. 147] which establishes a bank under the name of "The Bank of North Dakota," operated by the state. The Industrial Commission is placed in control of the operation and management of the bank, and is given the right of eminent domain to acquire necessary property. Public funds are to be deposited in the bank, and the deposits are guaranteed by the State of North Dakota. Authority is given to transfer funds to other departments, institutions, utilities, industries, enterprises or business projects, and to make loans to counties, cities or political sub-divisions of the state, or to state or national banks on such terms as the Commission may provide. Loans to individuals, associations, and private corporations are authorized, when secured by duly recorded first mortgages on lands in the State of North Dakota. An appropriation of $100,000 is made immediately available to carry out the provisions of the act.

(3) An act providing for the issuing of bonds of the state in the sum of $2,000,000, the proceeds of which are to constitute the capital of the Bank of North Dakota. [Laws 1919, c. 148.] The earnings of the bank are to be paid to the state treasurer. * * *

(4) An act providing for the issuing of bonds in the sum of not exceeding $10,000,000, to be known as "Bonds of North Dakota, Real Estate Series." [Laws 1919, c. 154.] These bonds are to be issued for the purpose of raising money to procure funds for the Bank of North Dakota to replace such funds as may have been employed by it from time to time in making loans upon first mortgages upon real estate. The faith and credit of the State of North Dakota are pledged for the payment of the bonds. * * *

(5) An act declaring the purpose of the State of North Dakota to engage in the business of manufacturing and marketing farm products, and to establish a warehouse, elevator, and flour mill system under the name of "North Dakota Mill and Elevator Association" to be operated by the state. [Laws 1919, c. 152.] * * * The Industrial Commission is placed in control of the Association with full power, and it is authorized to acquire by purchase, lease or right of eminent domain, all necessary property or properties, etc.; to buy, manufacture, store, mortgage, pledge, sell and exchange all kinds of raw and manufactured farm food products, and by-products, and to operate exchanges, bureaus, markets and agencies within and without the state, and in foreign countries. Provision is made for the bringing of a civil action against the State of North Dakota on account of causes of action arising out of the business. * * *

(7) The Home Building Act declares the purpose of the state to engage in the enterprise of providing homes for its residents and to that end to establish a business system operated by it under the name of "The Home Building Association of North Dakota"; and defines its duties and the extent of its powers. [Laws 1919, c. 150.] The Industrial Commission is placed in control of "The Home Building Association," and is given the power of eminent domain, and the right to purchase and lease the requisite property. Provision is made for the formation of home building unions. The price of town homes is placed at $5,000, and of farm homes at $10,000. A bond issue of $2,000,000, known as "Bonds of North Dakota Home Building Series," is provided for.

There are certain principles which must be borne in mind in this connection, and which must control the decision of this court upon the federal question herein involved. This legislation was adopted under the broad power of the state to enact laws raising by taxation such sums as are deemed necessary to promote purposes essential to the general welfare of its people. Before the adoption of the Fourteenth Amendment this power of the state was unrestrained by any federal authority. That Amendment introduced a new limitation upon state power into the federal Constitution. * * *

The due process of law clause contains no specific limitation upon the right of taxation in the states, but it has come to be settled that the authority of the states to tax does not include the right to impose taxes for merely private purposes. Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 155. In that case the province of this court in reviewing the power of state taxation was thoroughly discussed by the late Mr. Justice Peckham speaking for the court. Concluding the discussion of that subject (p. 158) the Justice said: "In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the state is confined to its depriving any person of life, liberty or property, without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the state instead of the federal government." Accepting this as settled by the former adjudications of this court, the enforcement of the principle is attended with the application of certain rules equally well settled.

The taxing power of the states is primarily vested in their legislatures, deriving their authority from the people. When a state legislature acts within the scope of its authority it is responsible to the people, and their right to change the agents to whom they have entrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority of the state undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.

In the present instance under the authority of the constitution and laws prevailing in North Dakota the people, the legislature, and the highest court of the state have declared the purpose for which these several acts were passed to be of a public nature, and within the taxing authority of the state. With this united action of people, legislature and court, we are not at liberty to interfere unless it is clear beyond reasonable controversy that rights secured by the federal Constitution have been violated. What is a public purpose has given rise to no little judicial consideration. Courts, as a rule, have attempted no judicial definition of a "public" as distinguished from a "private" purpose, but have left each case to be determined by its own peculiar circumstances. Gray, Limitations of Taxing Power, § 176. "Necessity alone is not the test by which the limits of state authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people." Cooley, Justice, in People v. Salem, 20 Michigan, 452. * * *

With the wisdom of such legislation, and the soundness of the economic policy involved we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire.

We come now to examine the grounds upon which the Supreme Court of North Dakota held this legislation not to amount to a taking of property without due process of law. The questions involved were given elaborate consideration in that court, and it held, concerning what may in general terms be denominated the "banking legislation," that it was justified for the purpose of providing banking facilities, and to enable the state to carry out the purposes of the other acts, of which the Mill & Elevator Association Act is the principal one. It justified the Mill & Elevator Association Act by the peculiar situation in the State of North Dakota, and particularly by the great agricultural industry of the state. It estimated from facts of which it was authorized to take judicial notice, that 90% of the wealth produced by the state was from agriculture; and stated that upon the prosperity and welfare of that industry other business and pursuits carried on in the state were largely dependent; that the state produced 125,000,000 bushels of wheat each year. The manner in which the present system of transporting and marketing this great crop prevents the realization of what are deemed just prices was elaborately stated. It was affirmed that the annual loss from these sources (including the loss of fertility to the soil and the failure to feed the by-products of grain to stock within the state), amounted to fifty-five millions of dollars to the wheat raisers of North Dakota. It answered the contention that the industries involved were private in their nature, by stating that all of them belonged to the State of North Dakota, and therefore the activities authorized by the legislation were to be distinguished from business of a private nature having private gain for its objective.

As to the Home Building Act, that was sustained because of the promotion of the general welfare in providing homes for the people, a large proportion of whom were tenants moving from place to place. It was believed and affirmed by the Supreme Court of North Dakota that the opportunity to secure and maintain homes would promote the general welfare, and that the provisions of the statutes to enable this feature of the system to become effective would redound to the general benefit.

As we have said, the question for us to consider and determine is whether this system of legislation is violative of the federal Constitution because it amounts to a taking of property without due process of law. The precise question herein involved so far as we have been able to discover has never been presented to this court. The nearest approach to it is found in Jones v. City of Portland, 245 U. S. 217, in which we held that an act of the State of Maine authorizing cities or towns to establish and maintain wood, coal and fuel yards for the purpose of selling these necessaries to the inhabitants of cities and towns, did not deprive taxpayers of due process of law within the meaning of the Fourteenth Amendment. In that case we reiterated the attitude of this court towards state legislation, and repeated what had been said before, that what was or was not a public use was a question concerning which local authority, legislative and judicial, had especial means of securing information to enable them to form a judgment; and particularly, that the judgment of the highest court of the state declaring a given use to be public in its nature, would be accepted by this court unless clearly unfounded. In that case the previous decisions of this court, sustaining this proposition, were cited with approval, and a quotation was made from the opinion of the Supreme Court of Maine justifying the legislation under the conditions prevailing in that state. We think the principle of that decision is applicable here.

This is not a case of undertaking to aid private institutions by public taxation as was the fact in Citizens' Savings & Loan Association v. Topeka, 20 Wall. 655, 665. In many instances states and municipalities have in late years seen fit to enter upon projects to promote the public welfare which in the past have been considered entirely within the domain of private enterprise.

Under the peculiar conditions existing in North Dakota, which are emphasized in the opinion of its highest court, if the state sees fit to enter upon such enterprises as are here involved, with the sanction of its constitution, its legislature and its people, we are not prepared to say that it is within the authority of this court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision.

Affirmed.[2]

Section 2.—Limitations on Taxation by Congress.

POLLOCK v. FARMERS LOAN & TRUST CO.

1895. Supreme Court of the United States. 157 U. S. 429; 158 U. S. 601.

[This was a shareholder's bill filed in the United States District Court for the Southern District of New York by Pollock, a citizen of

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[2] For specific decisions as to what are public purposes see Breck P. McAllister, Public Purpose in Taxation (1930) 18 Calif. L. Rev. 137-148, 241-254; Charles M. Kneir, Municipal Functions and the Law of Public Purpose (1928) 76 U. of P. L. Rev. 824-842; Frederick N. Judson, Public Purposes for which Taxation is Justifiable (1908) 17 Yale L. J. 162-169; and notes in (1928) 41 Harv. L. Rev. 775-779; (1922) 7 Minn. L. Rev. 63-64; (1926) 26 Col. L. Rev. 762-763; (1918)

Massachusetts, against the defendant company, a New York corporation, and against its directors to restrain their threatened payment of income taxes (see ante, p. 87, n. 9) under an Act of Congress passed August 15, 1894 (28 Stat. 509, c. 349) on ~~the ground that~~ the income provisions of the Act were unconstitutional. The Act provided that there should be levied "annually upon the gains, profits, and income received in the preceding calendar year by ~~every citizen~~ of ~~the United~~ States, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, a tax of two per centum on the amount so derived over and above four thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits and income from all property owned and of every business, trade, or profession carried on in the United States by persons residing without the United States." * * * The act extended to corporations and associations (with exceptions). ~~The income of~~ the Farmers' Loan and Trust Co. was derived from land, bonds of the City of New York and from bonds and stocks of private corporations. The Circuit Court dismissed the bill and this appeal was taken.]

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

* * *

The constitution provides that representatives and direct taxes shall be apportioned among the several states according to numbers, and that no direct tax shall be laid except according to the enumeration provided for; and also that all duties, imposts and excises shall be uniform throughout the United States.[1] * * *

And this view was expressed by Mr. Chief Justice Chase in The License Tax Cases, 5 Wall. 462, 471, when he said: "It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports[2], and it must impose direct taxes by the rule of apportionment[3], and indirect taxes by the rule of

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27 Yale L. J. 824-835; (1928) 1 So. Calif. L. Rev. 390-391; and see 1 Cooley, Taxation (1924) §§ 174-222.

[1] See Art. I, Sec. 2, Cl. 3; Art. I, Sec. 8, Cl. 1; Art. I, Sec. 9, Cl. 4.

[2] The prohibition in Art. I, Sec. 9, Cl. 5: "No Tax or Duty shall be laid on Articles exported from any State" will be found discussed in the section which deals with the restrictions upon the taxation of commerce.

[3] Illustrating the rule of apportionment as it would operate if applied to an income tax, Jackson, J., said: "Take the illustration suggested in the opinion of the court. Congress lays a tax of thirty millions upon the incomes of the country above a certain designated amount, and directs that tax to be apportioned among the several states according to their numbers, and when so apportioned to be pro-rated amongst the citizens of the respective states coming within the operation of the law. * * * Take the new State of Washington and the old State of Rhode Island, having about the same population. To each

uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

And although there have been, from time to time, intimations that there might be some tax which was not a direct tax, nor included under the words "duties, imports, and excises," such a tax, for more than 100 years of national existence, has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.

The first question to be considered is whether a tax on the rents or income of real estate is a direct tax within the meaning of the Constitution. Ordinarily, all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estate, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes. Nevertheless, it may be admitted that, although this definition of direct taxes is prima facie correct, and to be applied in the consideration of the question before us, yet the Constitution may bear a different meaning, and that such different meaning must be recognized. But in arriving at any conclusion upon this point we are at liberty to refer to the historical circumstances attending the framing and adoption of the Constitution, as well as the entire frame and scheme of the instrument, and the consequences naturally attendant upon the one construction or the other.

We inquire, therefore, what, at the time the Constitution was framed and adopted, were recognized as direct taxes? What did those who framed and adopted it understand the terms to designate and include? * * *

They were, of course, familiar with the modes of taxation pursued in the several states. From the report of Oliver Wolcott, when Secretary of the Treasury, on direct taxes, to the House of Representatives, December 14, 1796, his most important state paper, (Am. State Papers, 1 Finance, 431,) and the various state laws then existing, it appears that prior to the adoption of the Constitution nearly all the states imposed a poll tax, taxes on land, on cattle of all kinds, and various kinds of personal property, and that, in addition, Massachusetts, Connecticut, Pennsylvania, Delaware, New Jersey, Virginia, and South Carolina assessed their citizens upon their profits from professions, trades, and employments.

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would be assigned the same amount of the general assessment. In the former, we will say, there are 5000 citizens subject to the operation of the law, in the latter 50,000. The citizen of Washington will be required to pay ten times as much as the citizen of Rhode Island on the same amount of taxable income. Extend the rule to all the states, and the result is that the larger the number of those subject to the operation of the law in any given state, the smaller their proportion of the tax and the smaller their rate of taxation, while, in respect to the smaller number in other states, the greater will be their rate of taxation on the same income." 158 U. S. 703, 704.

Congress under the articles of confederation had no actual operative power of taxation. It could call upon the states for their respective contributions or quotas as previously determined on; but in case of the failure or omission of the states to furnish such contribution, there were no means of compulsion, as Congress had no power whatever to lay any tax upon individuals. This imperatively demanded a remedy; but the opposition to granting the power of direct taxation in addition to the substantially exclusive power of laying imposts and duties was so strong that it required the convention, in securing effective powers of taxation to the federal government, to use the utmost care and skill to so harmonize conflicting interests that the ratification of the instrument could be obtained.

* * *

On May 29, 1787, Charles Pinckney presented his draft of a proposed constitution, which provided that the proportion of direct taxes should be regulated by the whole number of inhabitants of every description, taken in the manner prescribed by the legislature; and that no tax should be paid on articles exported from the United States. 1 Elliot, 147, 148.

Mr. Randolph's plan declared "that the right of suffrage, in the national legislature, ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other may seem best, in different cases." 1 Elliot, 143.

On June 15, Mr. Paterson submitted several resolutions, among which was one proposing that the United States in Congress should be authorized to make requisitions in proportion to the whole number of white and other free citizens and inhabitants, including those bound in servitude for a term of years, and three-fifths of all other persons, except Indians not taxed. 1 Elliot, 175, 176.

On the ninth of July the proposition that the legislature be authorized to regulate the number of representatives according to wealth and inhabitants was approved, and on the eleventh it was voted that "in order to ascertain the alterations that may happen in the population and wealth of the several states a census shall be taken;" although the resolution of which this formed a part was defeated. 5 Elliot (Madison Papers), 288, 295; 1 Elliot, 200.

On July 12, Gouverneur Morris moved to add to the clause empowering the legislature to vary the representation according to the amount of wealth and number of the inhabitants, a proviso that taxation should be in proportion to representation, and, admitting that some objections lay against his proposition, which would be removed by limiting it to direct taxation, since "with regard to indirect taxes on exports and imports, and on consumption, the rule would be inapplicable," varied his motion by inserting the word "direct," whereupon it passed as follows: "Provided, always, that direct taxation ought to be proportioned to representation." 5 Elliot (Madison Papers), 302.

Amendments were proposed by Mr. Ellsworth and Mr. Wilson to the effect that the rule of contribution by direct taxation should be according to the number of white inhabitants and three-fifths of every other description, and that in order to ascertain the alterations in the direct taxation which might be required from time to time a census should be taken; the word wealth was struck out of the clause on motion of Mr. Randolph; and the whole proposition, proportionate representation to direct taxation, and both to the white and three-fifths of the colored inhabitants, and requiring a census, was adopted. * * *

Thus was accomplished one of the great compromises of the constitution, resting on the doctrine that the right of representation ought to be conceded to every community on which a tax is to be imposed, but crystallizing it in such form as to allay jealousies in respect of the future balance of power; to reconcile conflicting views in respect of the enumeration of slaves; and to remove the objection that, in adjusting a system of representation between the states, regard should be had to their relative wealth, since those who were to be most heavily taxed ought to have a proportionate influence in the government.

The compromise, in embracing the power of direct taxation, consisted not simply in including part of the slaves in the enumeration of population, but in providing that as between state and state such taxation should be proportioned to representation. * * *

We repeat that the right of the federal government to directly assess and collect its own taxes, at least until after requisitions upon the states had been made and failed, was one of the chief points of conflict, and Massachusetts, in ratifying, recommended the adoption of an amendment in these words: "That Congress do not lay direct taxes but when the moneys arising from the impost and excise are insufficient for the public exigencies, nor then until Congress shall have first made a requisition upon the states to assess, levy, and pay, their respective proportions of such requisition, agreeably to the census fixed in the said constitution, in such way and manner as the legislatures of the states shall think best." 1 Elliot, 322. And in this South Carolina, New York, New Hampshire, and Rhode Island concurred. Id. 325, 326, 329, 336. * * *

The act [of June 5, 1794, 1 Stat. 373, c. 45] provided in its first section "that there shall be levied, collected, and paid upon all carriages for the conveyance of persons, which shall be kept by or for any person for his or her own use, or to be let out to hire or for the conveyance of passengers, the several duties and rates following," and then followed a fixed yearly rate on every coach; chariot, phaeton and coachee; every four-wheel and every two-wheel top carriage; and upon every other two-wheel carriage; varying according to the vehicle.

In Hylton v. United States, 3 Dall. 171, decided in March, 1796, this court held the act to be constitutional, because not laying a direct tax. Chief Justice Ellsworth and Mr. Justice Cushing took no part in the decision, and Mr. Justice Wilson gave no reasons.

Mr. Justice Chase said that he was inclined to think, but of this he did not "give a judicial opinion," that "the direct taxes contemplated by the constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on land;" and that he doubted "whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax." But he thought that "an annual tax on carriages for the conveyance of persons, may be considered as within the power granted to Congress to lay duties. The term duty, is the most comprehensive next to the generical term tax; and practically in Great Britain (whence we take our general ideas of taxes, duties, imposts, excises, customs, etc.,) embraces taxes on stamps, tolls for passage, etc., and is not confined to taxes on importation only. It seems to me, that a tax on expense is an indirect tax; and I think, an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable commodity; and such annual tax on it, is on the expense of the owner."

Mr. Justice Paterson said "* * * Whether direct taxes, in the sense of the Constitution, comprehended any other tax than a capitation tax, and taxes on land, is a questionable point. * * * But as it is not before the court, it would be improper to give any decisive opinion upon it." And he concluded: "All taxes on expenses or consumption are indirect taxes. A tax on carriages is of this kind, and of course is not a direct tax." This conclusion he fortified by reading extracts from Adam Smith on the taxation of consumable commodities. * * *

It will be perceived that each of the justices, while suggesting doubt whether anything but a capitation or a land tax was a direct tax within the meaning of the Constitution, distinctly avoided expressing an opinion upon that question or laying down a comprehensive definition, but confined his opinion to the case before the court. * * *

By the act of July 14, 1798, when a war with France was supposed to be impending, a direct tax of two millions of dollars was apportioned to the states respectively, in the manner prescribed, which tax was to be collected by officers of the United States and assessed upon "dwelling houses, lands, and slaves," according to the valuations and enumerations to be made pursuant to the act of July 9, 1798, entitled "an act to provide for the valuation of lands and dwelling houses and the enumeration of slaves within the United States." 1 Stat. 597, c. 75; Id. 580, c. 70. Under these acts every dwelling house was assessed according to a prescribed value, and the sum of fifty cents upon every slave enumerated, and the residue of the sum apportioned was directed to be assessed upon the lands within each state according to the valuation made pursuant to the prior act and at such rate per centum as would be sufficient to produce said remainder. [Reference is here made to similar Acts passed during or in relation to the War of 1812 and the Civil War.]

From the foregoing it is apparent (1) that the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it; (2) that, under the state systems of taxation, all taxes on real estate or personal property or the rents or income thereof were regarded as direct taxes; (3) that the rules of apportionment and of uniformity were adopted in view of that distinction and those systems; (4) that whether the tax on carriages was direct or indirect was disputed, but the tax was sustained as a tax on the use and an excise; (5) that the original expectation was that the power of direct taxation would be exercised only in extraordinary exigencies; and down to August 15, 1894, this expectation has been realized. The act of that date was passed in a time of profound peace, and if we assume that no special exigency called for unusual legislation, and that resort to this mode of taxation is to become an ordinary and usual means of supply, that fact furnishes an additional reason for circumspection and care in disposing of the case.

We proceed then to examine certain decisions of this court under the acts of 1861 and following years. * * *

In Pacific Insurance Co. v. Soule, 7 Wall. 433, the validity of a tax which was described as "upon the business of an insurance company" was sustained on the ground that it was "a duty or excise," and came within the decision in Hylton's case. * * *

Scholey v. Rew, 23 Wall. 331, was the case of a succession tax which the court held to be "plainly an excise tax or duty" upon the devolution of the estate or the right to become beneficially entitled to the same, or the income thereof, in possession or expectancy." * * *

In Railroad Company v. Collector, 100 U. S. 595, 596, the validity of a tax collected of a corporation upon the interest paid by it upon its bonds was held to be "essentially an excise on the business of the class of corporations mentioned in the statute." * * *

All these cases are distinguishable from that in hand, and this brings us to consider that of Springer v. United States, 102 U. S. 586, 602, chiefly relied on and urged upon us as decisive.

That was an action of ejectment brought on a tax deed issued to the United States on sale of defendant's real estate for income taxes. The defendant contended that the deed was void because the tax was a direct tax, not levied in accordance with the constitution. Unless the tax were wholly invalid, the defence failed.

The statement of the case in the report shows that Springer returned a certain amount as his net income for the particular year, but does not give the details of what his income, gains, and profits consisted in.

The original record discloses that the income was not derived in any degree from real estate but was in part professional as attorney-at-law and the rest interest on United States bonds. It would seem probable that the court did not feel called upon to advert to the distinction between the latter and the former source of income, as the validity of the tax as to either would sustain the action.

The opinion thus concludes: "Our conclusions are that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty."

While this language is broad enough to cover the interest as well as the professional earnings, the case would have been more significant as a precedent if the distinction had been brought out in the report and commented on in arriving at judgment, for a tax on professional receipts might be treated as an excise or duty, and therefore indirect, when a tax on the income of personalty might be held to be direct.

Be this as it may, it is conceded in all these cases, from that of Hylton to that of Springer, that taxes on land are direct taxes, and in none of them is it determined that taxes on rents or income derived from land are not taxes on land. * * *

As no capitation or other direct tax was to be laid otherwise than in proportion to the population, some other direct tax than a capitation tax (and, it might well enough be argued, some other tax of the same kind as a capitation tax) must be referred to, and it has always been considered that a tax upon real estate eo nomine, or upon its owners in respect thereof, is a direct tax, within the meaning of the Constitution. But is there any distinction between the real estate itself or its owners in respect of it and the rents or income of the real estate coming to the owners as the natural and ordinary incident of their ownership?

If the Constitution had provided that Congress should not levy any tax upon the real estate of any citizen of any state, could it be contended that Congress could put an annual tax for five or any other number of years upon the rent or income of the real estate? And if, as the Constitution now reads, no unapportioned tax can be imposed upon real estate, can Congress without apportionment nevertheless impose taxes upon such real estate under the guise of an annual tax upon its rents or income? * * *

The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment—the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes—and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate eo nomine. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income.

* * *

It is true that the effect of requiring direct taxes to be apportioned among the states in proportion to their population is necessarily that the amount of taxes on the individual taxpayer in a state having that taxable subject-matter to a larger extent in proportion to its population than another state has, would be less than in such other state; but this inequality must be held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers.

It is not doubted that property owners ought to contribute in just measure to the expenses of the government. * * *

But the acceptance of the rule of apportionment was one of the compromises which made the adoption of the Constitution possible, and secured the creation of that dual form of government, so elastic and so strong, which has thus far survived in unabated vigor. If, by calling a tax indirect when it is essentially direct, the rule of protection could be frittered away, one of the great landmarks defining the boundary between the nation and the states of which it is composed, would have disappeared, and with it one of the bulwarks of private rights and private property.

We are of opinion that the law in question, so far as it levies a tax on the rents or income of real estate, is in violation of the Constitution, and is invalid.

Another question is directly presented by the record as to the validity of the tax levied by the act upon the income derived from municipal bonds. The averment in the bill is that the defendant company owns two millions of the municipal bonds of the city of New York, from which it derives an annual income of $60,000, and that the directors of the company intend to return and pay the taxes on the income so derived.

The Constitution contemplates the independent exercise by the nation and the state, severally, of their constitutional powers.

As the states cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a state.

A municipal corporation is the representative of the state and one of the instrumentalities of the state government. It was long ago determined that the property and revenues of municipal corporations are not subjects of federal taxation. Collector v. Day, 11 Wall. 113, 124 [See p. 246, ante.]; United States v. Railroad Company, 17 Wall. 322, 332. * * *

It is contended that although the property or revenues of the states or their instrumentalities cannot be taxed, nevertheless the income derived from state, county, and municipal securities can be taxed. But we think the same want of power to tax the property or revenues of the states or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason, and that reason is given by Chief Justice Marshall in Weston v. Charleston, 2 Pet. 449, 468. * * * Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the states and their instrumentalities to borrow money, and consequently repugnant to the Constitution.

Upon each of the other questions argued at the bar * * * the justices who heard the argument are equally divided, and, therefore, no opinion is expressed.

[JACKSON, J., did not participate in the above decision, being absent on account of illness. HARLAN and WHITE, JJ., dissented, except on the point as to bonds of a state municipality.[4] The above opinion was delivered April 8, 1895. The undecided points were reargued May 6, 7 and 8, Jackson, J., being present and on May 20, (158 U. S. 601) the Chief Justice delivered the opinion of a five to four majority as follows.]

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[4] On this point White, J., said: "In regard to the right to include in an income tax the interest upon the bonds of municipal corporations, I think the decisions of this court, holding that the federal government is without power to tax the agencies of the state government, embrace such bonds, and that this settled line of authority is conclusive upon my judgment here. It determines the question that where there is no power to tax for any purpose whatever, no direct or indirect tax can be imposed. The authorities cited in the opinion are decisive of this question. They are relevant to one case and not to the other, because, in the one case, there is full power in the federal government to tax, the only controversy being whether the tax imposed is direct or indirect; while in the other there is no power whatever in the federal government, and, therefore, the levy, whether direct or indirect, is beyond the taxing power." 157 U. S. at p. 652.

Fuller, C. J. * * * Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed because of want of power to tax the source, and no reference was made to the nature of the tax as being direct or indirect.

We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person's entire income—whether derived from rents or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property—belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself that it is not a direct, but an indirect tax, in the meaning of the Constitution. * * *

Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership, and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property and the property itself.

Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income, or ordinarily yielding income, and to the income therefrom.

All the real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power if an apportionment be made according to the Constitution. The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, "upon the same objects of taxation on which the direct taxes levied under the authority of the state are laid and assessed." * * *

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real-estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power, as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and, although once not taxable, have become transmuted, in their new form, into taxable subject-matter,—in other words, that income is taxable, irrespective of the source from whence it is derived.

This was the view entertained by Mr. Pitt, as expressed in his celebrated speech on introducing his income tax law of 1799, and he did not hesitate to carry it to its logical conclusion. The English loan acts provided that the public dividends should be paid "free of all taxes and charges whatsoever;" but Mr. Pitt successfully contended that the dividends for the purposes of the income tax were to be considered simply in relation to the recipient as so much income, and that the fund holder had no reason to complain. And this, said Mr. Gladstone, fifty-five years after, was the rational construction of a pledge. Financial Statements, 32.

The dissenting justices proceeded, in effect, upon this ground in Weston v. City of Charleston, 2 Pet. 449, but the court rejected it. That was a state tax, it is true; but the states have power to lay income taxes, and, if the source is not open to inquiry, constitutional safeguards might be easily eluded.

We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the states and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest, when received, has become merely money in the recipient's pocket, and taxable, as such, without reference to the source from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the attorney general, with characteristic candor; and it follows that if the revenue derived from municipal bonds cannot be taxed, because the source cannot be, the same rule applies to revenue from any other source not subject to the tax, and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom. Admitting that this act taxes the income of property, irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax, in the meaning of the Constitution. * * *

We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

Being of opinion that so much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole. * * *

[It was held that all the income tax provisions were intended as "one entire scheme of income taxation" and that the whole fell with the invalid parts. From this decision of points involved in the rehearing, Harlan, Brown, Jackson and White, JJ., dissented, each delivering an opinion.]

FLINT v. STONE TRACY CO.

1911. Supreme Court of the United States. 220 U. S. 107.

Mr. Justice Day delivered the opinion of the court.

These cases involve the constitutional validity of § 38 of the act of Congress approved August 5, 1909, known as "The Corporation Tax" law. 36 Stat. c. 6, 11, 112-117. * * *

"Sec. 38. That every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States or of any State or Territory * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, * * *."

This tax, it is expressly stated, is to be equivalent to one per centum of the entire net income over and above $5,000 received from *all sources* during the year—this is the measure of the tax explicitly adopted by the statute. The income is not limited to such as is received from property used in the business, strictly speaking, but is expressly declared to be upon the entire net income above $5,000 from all sources, excluding the amounts received as dividends on stock in other corporations, joint stock companies or associations, or insurance companies also subject to the tax. In other words, the tax is imposed upon the doing of business of the character described, and the measure of the tax is to be the income, with the deduction stated, received not only from property used in business, but from every source. * * *

The act * * * does not impose direct taxation upon property solely because of its ownership, but the tax is within the class which Congress is authorized to lay and collect under Art. I, § 8, cl. 1 of the Constitution, and described generally as taxes, duties, imposts and excises, upon which the limitation is that they shall be uniform throughout the United States.

Within the category of indirect taxation, as we shall have further occasion to show, is embraced a tax upon business done in a corporate capacity, which is the subject-matter of the tax imposed in the act under consideration. The Pollock Case construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the acts is not merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way. * * *

The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, i. e., with the advantages which arise from corporate or quasi-corporate organization; or, when applied to insurance companies, for doing the business of such companies. As was said in the Thomas Case, 192 U. S. 363 supra, the requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable. * * *

It is further contended that some of the corporations, notably insurance companies, have large investments in municipal bonds and other non-taxable securities, and in real estate and personal property not used in the business, that therefore the selection of the measure of the income from all sources is void, because it reaches property which is not the subject of taxation—upon the authority of the Pollock Case, supra. But this argument confuses the measure of the tax upon the privilege, with direct taxation of the estate or thing taxed. In the Pollock Case, as we have seen, the tax was held unconstitutional, because it was in effect a direct tax on the property solely because of its ownership. * * *

It is * * * well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. * * *[5]

KNOWLTON v. MOORE.

1900. Supreme Court of the United States. 178 U. S. 41.

[The case involved the validity of an act of Congress passed in 1898 which taxed the passing of legacies and distributive shares of personalty. The court interpreted the act as exacting basic percentages of the value of each beneficiary's legacy or share, varying with the degree of relation, or with lack of relation, of the beneficiary to the deceased, with progressively higher percentage rates on legacies and shares that were larger than those to which the basic rates applied.]

MR. JUSTICE WHITE delivered the opinion of the court. * * *

The inquiry whether the taxes are direct or indirect must involve the prior determination of the objects or rights upon which by law they are imposed and assessed, since it becomes essential primarily to know what the law assesses and taxes in order to completely learn the nature of the burden. * * * For these reasons we shall first, in a general way, consider upon what rights or objects death duties, as they are termed in England, are imposed. * * *

It is conceded on all sides that the levy and collection of some form of death duty is provided by the sections of the law in question. * * * Taxes of this general character are universally deemed to relate, not to property eo nomine, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy. Such taxes so considered were known to the Roman law and the ancient law of the continent of Europe. Smith's Wealth of Nations, London ed. of 1811, vol. 3, p. 311. Continuing the rule of the ancient French law, at the present day in France inheritance and legacy taxes are enforced, being collectible as stamp duties. They are included officially under the general denomination of indirect taxes; for the reason that all inheritance and legacy taxes are considered as levied on the "occasion of a particular isolated act." This view of the inheritance and legacy tax conforms to the official definition of indirect taxes, among which inheritance and legacy taxes are classed, which prevails in France at the present day. The definition is as follows:

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[5] Compare the federal tax on domestic corporations levied by the Revenue Act of 1918: "Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of the capital stock the surplus and undivided profits shall be included." Of this provision the court said: "The tax is a special excise imposed on the privilege of carrying on business in the form of a corporation. Congress might have measured the value of the privilege by the net income of the year, as in the corporation tax, Flint v. Stone-Tracy Co., 220 U. S. 108, 174; by the annual gross receipts, as in the sugar refiners' tax, Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397; by the amount of capital employed, as in the bankers' tax, Fidelity Title & Trust Co. v. United States, 259 U. S. 304, 308; or by the fixed capitalization, as in the taxing acts of many states. It might have taken as the measure, the aggregate value of all of the outstanding shares of stock and have directed that their value be computed by multiplying the average selling price, during the year, of a single share by the total number of shares outstanding. Compare The Delaware Railroad Tax, 18 Wall. 206, 209, 231." Ray Consol. Copper Co. v. United States (1925) 268 U. S. 373, 376, 69 L. ed. 1003.

"Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights; indirect taxes are levied upon the happening of an event or an exchange." * * *

Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them, that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several states of the Union, the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested. * * *

[Here in answer to a contention that since the states had exclusive power to regulate the disposition of property at death this act of Congress was an encroachment upon that power, it was said, in effect, that the act did not undertake to regulate or determine what dispositions could or could not be made but taxed only where legacies and distributive shares passed in accordance with state law. After interpreting the act as above stated, the opinion continues:]

The precise meaning of the law being thus determined, the question whether the tax which it imposes is direct, and hence subject to the requirement of apportionment, arises for consideration. * * * In Scholey v. Rew, 23 Wall. 331, 349, to which we have heretofore referred, the question presented was the constitutionality of the provisions of the act of 1864, imposing a succession duty as to real estate. The assertion was that the duty was repugnant to the Constitution, because it was a direct tax and had not been apportioned. The tax was decided to be constitutional. * * *

The argument is that the decision in Scholey v. Rew was overruled in Pollock v. Farmers' Loan & Trust Company, 157 U. S. 429; 158 U. S. 601. * * *

But there was no intimation in the Pollock case that inheritance taxes—which had been held in Scholey v. Rew not to be direct, which had from all time been considered as being imposed not on property, real or personal, as ordinarily understood, but as being levied on the transmission or receipt of property occasioned by death, and which had from the foundation of the government been treated as a duty or excise—were direct taxes within the meaning of the Constitution. Undoubtedly, in the course of the opinion in the Pollock case, it was said that, if a tax was direct within the constitutional sense, the mere erroneous qualification of it as an excise or duty would not take it out of the constitutional requirement as to apportionment. But this language related to the subject-matter under consideration, and was but a statement that a tax which was in itself direct, because imposed upon property solely by reason of its ownership, could not be changed by affixing to it the qualification of excise or duty. Here we are asked to decide that a tax is a direct tax on property which has at all times been considered as the antithesis of such a tax; that is, has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.

But it is asserted that it was decided in the income tax cases that, in order to determine whether a tax be direct within the meaning of the Constitution, it must be ascertained whether the one upon whom by law the burden of paying it is first cast, can thereafter shift it to another person. * * * From this assumed premise it is argued that death duties cannot be shifted from the one on whom they are first cast by law, and therefore they are direct taxes requiring apportionment.

The fallacy is in the premise. It is true that in the income tax cases the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same was adverted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word direct was the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall. The proposition now relied upon was considered and refuted in Nicol v. Ames, 173 U. S. 509, 515, where the court said:

"* * * As a mere abstract, scientific or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. * * * Taxation is eminently practical, and is, in fact, brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy."

Concluding, then, that the tax under consideration is not direct within the meaning of the Constitution, but, on the contrary, is a duty or excise, we are brought to consider the question of uniformity.

The contention is that because the statute exempts legacies and distributive shares in personal property below ten thousand dollars, because it classifies the rate of tax according to the relationship or absence of the relationship of the taker to the deceased, and provides for a rate progressing by the amount of the legacy or share, therefore the tax is repugnant to that portion of the first clause of Section 8 of Article 1 of the Constitution, which provides "the duties, imposts and excises shall be uniform throughout the United States." * * * The two [opposing] contentions then may be summarized by saying that the one asserts that the Constitution prohibits the levy of any duty, impost or excise which is not intrinsically equal and uniform in its operation upon individuals, and the other that the power of Congress in levying the taxes in question is by the terms of the Constitution restrained only by the requirement that such taxes be geographically uniform.

[After twenty pages of discussion of this point:]

By the result then of an analysis of the history of the adoption of the Constitution it becomes plain that the words "uniform throughout the United States" do not signify an intrinsic but simply a geographical uniformity. * * *

It is yet further asserted that the tax does not fulfill the requirements of geographical uniformity, for the following reason: As the primary rate of taxation depends upon the degree of relationship or want of relationship to a deceased person, it is argued that it cannot operate with geographical uniformity, inasmuch as testamentary and intestacy laws may differ in every state. It is certain that the same degree of relationship or want of relationship to the deceased, wherever existing, is levied on at the same rate throughout the United States. The tax is hence uniform throughout the United States, despite the fact that different conditions among the states may obtain as to the objects upon which the tax is levied. The proposition in substance assumes that the objects taxed by duties, imposts and excises must be found in uniform quantities and conditions in the respective states, otherwise the tax levied on them will not be uniform throughout the United States. But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several states.

* * *

Mr. Justice Brewer dissented from so much of the opinion as holds that a progressive rate of tax can be validly imposed. In other respects he concurred.

Mr. Justice Peckham took no part in the decision.

[Mr. Justice Harlan and Mr. Justice McKenna dissented from the interpretation of the statute.]

CHASE NAT. BANK ET AL. v. UNITED STATES.

1929. Supreme Court of the United States. 278 U. S. 327.

Mr. Justice Stone delivered the opinion of the court.

This case comes here from the Court of Claims, under § 288, Title 28, U. S. Code, 43 Stat. 939, on certified questions of law concerning which instructions are desired for the proper disposition of the cause. The facts certified are: on September 13, 1922, after the effective date of the Revenue Act of 1921, Herbert W. Brown procured three insurance policies on his life aggregating $200,000, each naming his wife as beneficiary. Each policy reserved to the insured the right to change the beneficiary. All premiums on the policies were paid by the insured. On April 10, 1924, he died testate, leaving the plaintiffs below his executors and an estate subject to the estate tax imposed by the Revenue Act of 1921, c. 136, 42 Stat. 227. The tax as assessed by the commissioner included $9,146.76 imposed by reason of the inclusion in the estate of the proceeds of the three insurance policies, less $40,000 exemption authorized by the statute. The executors paid the tax and, upon denial of a claim for refund, brought the present suit in the Court of Claims to recover the tax as illegally assessed.

The questions certified are:

Question I: Whether the tax imposed by the final clause of section 402 (f), Revenue Act of 1921, 42 Stat. 278, on life insurance policies payable in terms to beneficiaries "other than the decedent or his estate" is a direct tax on property and void because not apportioned.

Question II: Whether the $9,146.76 tax imposed bears such an unreasonable relation to the subject matter of the tax as to render it void.

Similar questions were mooted by counsel, but not decided, in Lewellyn v. Frick, 268 U. S. 238, 251.

Section 401 of the Revenue Act of 1921 imposes a tax upon "the transfer of the net estate of every decedent" dying after the passage of the act, and § 402 provides: "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * * tangible or intangible * * * (f). To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life." By § 406 the executor is required to pay the tax, but, if so paid, he is given by § 408 the right to recover from the beneficiaries a part of the tax, and by § 409 they are made personally liable for a share of it if not so paid.

In the present case there is no question of the construction of the statute. The tax is plainly imposed by the explicit language of §§ 401 and 402 (f) if those sections are constitutionally applied. Plaintiffs challenge the validity of the tax on the ground that it is not an excise or privilege tax but a direct tax on property, the insurance policies or their proceeds, and so is invalid because not apportioned as required by Art. I, §§ 2, 9 of the federal Constitution, and that in any case the measure of the tax and the methods of securing its payment are so arbitrary and capricious as to violate the due process clause of the Fifth Amendment.

The statute in terms taxes transfers. Like provisions in earlier acts have been generally upheld as imposing a tax on the privilege of transferring the property of a decedent at death, measured by the value of the interest transferred or which ceases at death. Cf. Y. M. C. A. v. Davis, 264 U. S. 47, 50[6]; Edwards v. Slocum, 264 U.

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[6] In the cited case, Taft, C. J., for the court said: "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death."

S. 61, 62; New York Trust Co. v. Eisner, 256 U. S. 345, 349; Nichols v. Coolidge, 274 U. S. 531.

It is true, as emphasized by plaintiffs, that the interest of the beneficiaries in the insurance policies effected by decedent "vested" in them before his death and that the proceeds of the policies came to the beneficiaries not directly from the decedent but from the insurer. But until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them. The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, as is true of the termination by death of any of the other legal incidents of property through which its use or economic enjoyment may be controlled.

A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors, Cohen v. Samuels, 245 U. S. 50 (see Burlingham v. Crouse, 228 U. S. 459), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts, N. Y. Domestic Relations Law, c. 14, Consol. Laws § 52; Kittel v. Domeyer, 175 N. Y. 205; Guardian Trust Co. v. Straus, 139 App. Div. 884, aff'd 201 N. Y. 546, is by no means the least substantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death. * * *

We think that the rule applied in Saltonstall v. Saltonstall, 276 U. S. 260, to a succession tax is equally applicable to a transfer tax where, as here, the power of disposition is reserved exclusively to the transferor for his own benefit. Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers.

But the plaintiff says that the tax here must be deemed to be a tax on property because the beneficiaries' interests in the policies were not transferred to them from the decedent, but from the insurer, and hence there was nothing to which a transfer or privilege tax could apply. Obviously, the word "transfer" in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another. Sec. 402 (c) taxes transfers made in contemplation of death. It would not, we assume, be seriously argued that its provisions could be evaded by the purchase by a decedent from a third person of property, a savings bank book for example, and its delivery by the seller directly to the intended beneficiary on the purchaser's death, or that the measure of the tax would be the cost and not the value or proceeds at the time of death. It is of some significance also that by the local law applicable to the insurer and the insured in this case, a beneficiary's rights in the policy and its proceeds are deemed to be the proceeds of the premiums expended by the insured and as such recoverable in full by one having an equitable claim attaching to the premiums. Holmes v. Gilman, 138 N. Y. 369.

The plaintiffs point to no requirement, constitutional or statutory, that the termination of the power of disposition of property by death whereby the transfer of property is completed, which we have said is here the subject of the tax, must be preceded by a transfer directly from the decedent to the recipient of his bounty, of the property subject to the power. And we see no necessity to debate the question whether the policies themselves were so transferred, for we think the power to tax the privilege of transfer at death cannot be controlled by the mere choice of the formalities which may attend the donor's bestowal of benefits on another at death, or of the particular methods by which his purpose is effected, so long as he retains control over those benefits with power to direct their future enjoyment until his death. Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax, Chanler v. Kelsey, 205 U. S. 466. "To make a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes." Sugden, Powers, 8th ed., 396; see Gray, Perpetuities, 3d ed. 1915, § 526 (b). And the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death, Bullen v. Wisconsin, 240 U. S. 625; cf. United States v. Robbins, 269 U. S. 315, 327; Cohen v. Samuels, supra.

The objection urged by plaintiffs under the second question, that the statutory method of fixing the tax and securing its payment infringes the Fifth Amendment, need not detain us. It is said that both the tax on those who share in the decedent's estate and that paid by the beneficiaries is larger than it otherwise would be if the proceeds of the insurance had not been included in the decedent's gross estate. But the increase in the tax to both is a consequence of including the amount of the policies in the gross estate in determining the net which is made the measure of the graduated transfer tax. The objection amounts to no more than saying that if the transfer of the policies or their proceeds be taxed, they should not be included with the other property of the estate in determining the rate of the tax. As it is the termination of the power of disposition of the policies by decedent at death which operates as an effective transfer and is subjected to the tax, there can be no objection to measuring the tax or fixing its rate by including in the gross estate the value of the policies at the time of death, together with all the other interests of decedent transferred at his death. Stebbins v. Riley, 268 U. S. 137. The inclusion in the gross estate of gifts made in contemplation of death under § 402 (c) has a like effect.

Other objections to the operation of the statute are not discussed either because they are not of weight or are not presented by the certified facts.

The questions propounded by the Court of Claims in form suggest that the tax is one imposed by the statute upon the policies. This we have shown is not the case. It is the transfer, which is a concomitant of the criteria laid down by the statute for imposing the tax, which is the subject of the tax. The tax is not on the policies, but we answer the question as if inquiring about the true subject of the tax.

Both questions are answered, No.[7]

Mr. Justice McReynolds concurs in the result.

Mr. Justice Sutherland and Mr. Justice Butler dissent.

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[7] In New York Trust Co. v. Eisner (1921) 256 U. S. 345, 348-349, 65 L. ed. 963, 16 A. L. R. 660, sustaining the federal estate tax statute of 1916, the court, by Holmes, J., said: "These provisions are assailed by the plaintiffs in error as an unconstitutional interference with the rights of the states to regulate descent and distribution, as unequal and as a direct tax not apportioned as the Constitution requires. * * * It is admitted, as since Knowlton v. Moore, 178 U. S. 41, it has to be, that the United States has power to tax legacies, but it is said that this tax is cast upon a transfer while it is being effectuated by the state itself and therefore is an intrusion upon its processes, whereas a legacy tax is not imposed until the process is complete. * * * Knowlton v. Moore, 178 U. S. 41, dealt, it is true, with a legacy tax. But the tax was met with the same objection; that it usurped or interfered with the exercise of state powers, and the answer to the objection was based upon general considerations and treated the 'power to transmit or the transmission or receipt of property by death' as all standing on the same footing. 178 U. S. 57, 59. After the elaborate discussion that the subject received in that case we think it unnecessary to dwell upon matters that in principle were disposed of there. The same may be said of the argument that the tax is direct and therefore is void for want of apportionment. It is argued that when the tax is on the privilege of receiving, the tax is indirect because it may be avoided, whereas here the tax is inevitable and therefore direct. But that matter also is disposed of by Knowlton v. Moore, not by an attempt to make some scientific distinction, which would be at least difficult, but on an in-

terpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; 'has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.' 178 U. S. 81-83. Upon this point a page of history is worth a volume of logic."

"That the federal government has power to tax the transmission of legacies was settled by Knowlton v. Moore, 178 U. S. 41; and that it has the power to tax the transfer of the net assets of a decedent's estate was settled by New York Trust Co. v. Eisner, 256 U. S. 345. The latter case has established also that the estate tax imposed by the Act of 1916, like the earlier legacy or succession tax, is a duty or excise, and not a direct tax like that on income from municipal bonds. Pollock v. Farmers' Loan & Trust Co., supra. A state may impose a legacy tax on a bequest to the United States, United States v. Perkins, 163 U. S. 625, or on a bequest which consists wholly of United States bonds, Plummer v. Coler, 178 U. S. 115; Orr v. Gilman, 183 U. S. 278. Likewise the federal government may impose a succession tax upon a bequest to a municipal corporation of a state, Snyder v. Bettman, 190 U. S. 249, or may, in determining the amount for which the estate tax is assessable, under the Act of 1916, include sums required to be paid to a state as inheritance tax, for the estate tax is the antithesis of a direct tax, New York Trust Co. v. Eisner, supra. Municipal bonds of a state stand in this respect in no different position from money payable to it. The transfer upon death is taxable, whatsoever the character of the property transferred and to whomsoever the transfer is made. It follows that in determining the amount of decedent's net estate municipal bonds were properly included." Brandeis, J., for the court, in Greiner v. Lewellyn (1922) 258 U. S. 384, 387, 66 L. ed. 676.

Where A has an estate for life, remainder to B in fee and A dies, is there a "transfer" taxable within the statute? See Girard Trust Co. v. McCaughn (1925) 3 Fed. (2d) 618; United States v. Provident Trust Co. (1929) 35 Fed. (2d) 339, 342; Blount v. United States (1924) 59 Ct. Cl. 328, 346.

May Congress constitutionally make the death of a life tenant an occasion or event of a tax levy to be collected from the land without observing the rule of apportionment,—say a tax upon the act of coming into present enjoyment of the land?

As examples of the difficulty of fitting a federal estate tax to the different sets of legal relations that constitute property in the several states, particularly the property regime as between husband and wife see Talcott v. United States (1928, C. C. A. 9th Cir.) 23 Fed. (2d) 897, overruling its earlier decision and now holding that the widow's half in California community property is subject to the federal estate tax, meaning that it is to be included in the gross estate in arriving at the net estate in determining the amount to be paid. Will the new definition by the state legislature (Stats. 1927, p. 484, Calif. Civ. Code 161a) of a wife's interest in the Community make it not so taxable? As to almost pure common law estates by the entirety in Maryland and Pennsylvania see United States v. Tyler (1929, C. C. A. 4th Cir.) 33 Fed. (2d) 724, affirmed in Tyler v. United States (1930) 281 U. S. —, — L. ed. —, and contra, United States v. Provident Trust Co. (1929, C. C. A. 3rd Cir.) 35 Fed. (2d) 339 and notes in (1930) 18 Calif. L. Rev. 302-311; (1930) 14 Minn. L. Rev. 391-404. As to widow's interest in Nebraska and Missouri respectively, see Allen v. Henggeler (1929) 32 Fed. (2d) 69; United States v. Waite (1929) 33 Fed. (2d) 567.

"The case was argued on the assumption that there is a conflict between the state and federal decisions. There is no room for conflict in this case. Each jurisdiction has its own field, and in that field it is supreme. That the state statutes and decisions are binding on the federal courts, as to the interest which the wife and husband have in his property, is not open to dispute. Warburton v. White, 176 U. S. 484, 20 S. Ct. 404, 44 L. ed. 555; U. S. v. Robbins, 269 U. S. 315, 46 S. Ct. 148, 70 L. ed. 285. * * * In every case, the state statutes and state decisions are looked to for the purpose of determining the quantity and quality of the decedent's interest in property left by him. But, when that quantity and quality is found, then the federal courts must determine whether such

BROMLEY v. McCAUGHN, COLLECTOR OF INTERNAL REVENUE.

1929. Supreme Court of the United States. 280 U. S. 124.

MR. JUSTICE STONE delivered the opinion of the court.

In this case, pending in the Court of Appeals for the Third Circuit, that court has certified to this questions of law concerning which it asks instructions for the proper disposition of the cause. Judicial Code, § 239, as amended by Act of February 13, 1925.

Bromley, a resident of the United States, brought the present suit in the District Court for Eastern Pennsylvania, to recover a tax alleged to have been illegally exacted, upon gifts made by him after the effective date of § 319 of the Revenue Act of 1924 (43 Stat. 253, 313, as amended by § 324 (a) of the Revenue Act of 1926, 44 Stat. 9, 86). This section imposes a graduated tax "upon the transfer by a resident by gift" during the calendar year "of any property wherever situated * * *." In computing the amount of the gift subject to the tax, § 321, in the case of a resident, exempts gifts aggregating $50,000, gifts to any one person which do not exceed $500, and certain gifts for religious, charitable, educational, scientific and like purposes. The questions certified are:

1. Are the provisions of Sections 319-324 of the Revenue Act of 1924, as amended by Section 324 of the Revenue Act of 1926, when applied to transfers of property by gift inter vivos, made after the effective dates of the cited Revenue Acts and not made in contemplation of death, invalid, because they violate (a) the third clause of Section 2 and (b) the fourth clause of Section 9 of Article 1 of the Constitution in that the tax they impose is a direct tax and has not been apportioned?

2. Are the cited provisions, when applied to transfers of property made in like circumstances, invalid because they violate (a) the Fifth Amendment to the Constitution and (b) the first clause of Section 8 of Article 1 of the Constitution in that they impose a tax which is graduated and subject to exemptions and therefore lacks uniformity, and also deprive a person of his property without due process of law?

1. The first question was mooted by counsel, but not decided, in Blodgett v. Holden, 275 U. S. 142, and Untermyer v. Anderson, 276 U. S. 440. The general power to "lay and collect taxes, duties, im-

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interest is taxable under the federal estate tax law." McDermott, J., in Allen v. Henggeler (1929) 32 Fed. (2d) 69, 70-71.

"Congress, it is true, cannot change the law of property in the states. It is just as true, however, that no state can, by declaring the law of property to be different from what it is in other jurisdictions, force the hand of Congress in respect to how the tax shall be admeasured." Dickinson, J., in Fidelity Trust Co. v. McCaughn (1924) 1 Fed. (2d) 987, 988.

See Reuben Oppenheimer, Proceeds of Life Insurance Policies Under the Federal Estate Tax (1930) 43 Harv. L. Rev. 724-758.

posts and excises" conferred by Article I, § 8 of the Constitution, and required by that section to be uniform throughout the United States, is limited by § 2 of the same article, which requires "direct" taxes to be apportioned, and § 9, which provides that "no capitation or other direct tax shall be laid unless in proportion to the census" directed by the Constitution to be taken. As the present tax is not apportioned, it is forbidden if direct.

The meaning of the phrase "direct taxes" and the historical background of the constitutional requirement for their apportionment have been so often and exhaustively considered by this Court, Hylton v. United States, 3 Dall. 171; Pollock v. Farmers Loan & Trust Company, 157 U. S. 429, 158 U. S. 601; Knowlton v. Moore, 178 U. S. 41; Nicol v. Ames, 173 U. S. 509, 515, that no useful purpose would be served by renewing the discussion here. Whatever may be the precise line which sets off direct taxes from others, we need not now determine. While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct, Pollock v. Farmers Loan & Trust Company, 157 U. S. 429, 158 U. S. 601, this court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned, and it is enough for present purposes that this tax is of the latter class. Hylton v. United States, supra, cf. Veazie Bank v. Fenno, 8 Wall. 533; Thomas v. United States, 192 U. S. 363, 370; Billings v. United States, 232.U. S. 261; Nicol v. Ames, supra; Patton v. Brady, 184 U. S. 608; McCray v. United States, 195 U. S. 27; Scholey v. Rew, 23 Wall. 331; Knowlton v. Moore, supra; see also Flint v. Stone Tracy Co., 220 U. S. 107; Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397; Stratton's Independence v. Howbert, 231 U. S. 399; Doyle v. Mitchell Brothers Co., 247 U. S. 179, 183; Stanton v. Baltic Mining Co., 240 U. S. 103, 114.

It is a tax laid only upon the exercise of a single one of those powers incident to ownership, the power to give the property owned to another. Under this statute all the other rights and powers which collectively constitute property or ownership may be fully enjoyed free of the tax. So far as the constitutional power to tax is concerned, it would be difficult to state any intelligible distinction, founded either in reason or upon practical considerations of weight, between a tax upon the exercise of the power to give property inter vivos and the disposition of it by legacy, upheld in Knowlton v. Moore, supra, the succession tax in Scholey v. Rew, supra, the tax upon the manufacture and sale of colored oleomargarine in McCray v. United States, supra, the tax upon sales of grain upon an exchange in Nicol v. Ames, supra, the tax upon sales of shares of stock in Thomas v. United States, supra, the tax upon the use of foreign built yachts in Billings v. United States, supra, the tax upon the use of carriages in Hylton v. United States, supra; compare Veazie Bank v. Fenno, supra, 545, Thomas v. United States, supra, 370.

It is true that in each of these cases the tax was imposed upon the exercise of one of the numerous rights of property, but each is clearly distinguishable from a tax which falls upon the owner merely because he is owner, regardless of the use or disposition made of his property. See Billings v. United States, supra; cf. Pierce v. United States, 232 U. S. 290. The persistence of this distinction and the justification for it rest upon the historic fact that taxes of this type were not understood to be direct taxes when the Constitution was adopted and, as well, upon the reluctance of this court to enlarge by construction, limitations upon the sovereign power of taxation by Article I, § 8, so vital to the maintenance of the national government. Nicol v. Ames, supra, 514, 515.

It is said that since property is the sum of all the rights and powers incident to ownership, if an unapportioned tax on the exercise of any of them is upheld, the distinction between direct and other classes of taxes may be wiped out, since the property itself may likewise be taxed by resort to the expedient of levying numerous taxes upon its uses; that one of the uses of property is to keep it, and that a tax upon the possession or keeping of property is no different from a tax on the property itself. Even if we assume that a tax levied upon all the uses to which property may be put, or upon the exercise of a single power indispensable to the enjoyment of all others over it, would be in effect a tax upon property, see Dawson v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288, and hence a direct tax requiring apportionment, that is not the case before us.

The power to give cannot be said to be a more important incident of property than the power to use, the exercise of which was taxed in Billings v. United States, and even though differences in degree may be carried to a point where they produce distinctions in kind, the present levy falls so far short of taxing generally the uses of property that it cannot be likened to the taxes on property itself which have been recognized as direct. It falls, rather, into that category of imposts or excises which, since they apply only to a limited exercise of property rights, have been deemed to be indirect and so valid although not apportioned.

2. The uniformity of taxation throughout the United States enjoined by Article I, § 8, is geographic, not intrinsic. A graduated tax, on legacies, granting exemptions, Knowlton v. Moore, supra, or on incomes, Brushaber v. Union Pacific R. Co., 240 U. S. 1, does not violate this clause of the Constitution, nor are such taxes infringements on the Fifth Amendment. Knowlton v. Moore, supra, p. 109; Brushaber v. Union Pacific R. Co., supra, pp. 24, 25. Graduated taxes on inheritances or successions, with provisions for

exemptions, have so often been upheld as not violating either the due process or the equal protection clauses of the Fourteenth Amendment, Stebbins v. Riley, 268 U. S. 137, as to leave little ground for supposing that taxation by Congress embracing these features, and otherwise valid, could be deemed a denial of the due process clause of the Fifth. See Van Oster v. Kansas, 272 U. S. 465, 468.

It is suggested that the schemes of graduation and exemption in the present statute, by which the tax levied upon donors of the same total amounts may be affected by the size of the gifts to individual donees, are so arbitrary and unreasonable as to deprive the taxpayer of property without due process. But similar features of state death taxes have been held not to infringe the Fourteenth Amendment since they bear such a relation to the subject of the tax as not "to preclude the assumption that the legislature, in enacting the statute, did not act arbitrarily or without the exercise of judgment and discretion which rightfully belong to it." Stebbins v. Riley, supra, p. 145. No more can they be a basis for holding that the graduation and exemption features of the present statute violate the Fifth Amendment.

The answer to both questions is, No.

Opinion of Mr. Justice Sutherland, dissenting.

In the convention which framed the Constitution, Mr. King on one occasion asked what was the precise meaning of "direct taxation," and Mr. Madison informs us that no one answered. That Mr. Madison took the pains to record the incident indicates that it challenged attention but that no one was able to formulate a definition. And though we understand generally what is a direct tax and what taxes have been declared to be direct, we are still as incapable of formulating an exact definition as were those who wrote the taxation clauses into the Constitution. Since the Pollock case, however, we know that a tax on property, whether real or personal, or upon the income derived therefrom, is direct; and that to levy a tax by reason of ownership of property is to tax the property. Dawson v. Kentucky Distilleries Co., 255 U. S. 288, 294.

The right to give away one's property is as fundamental as the right to sell it or, indeed, to possess it. To give away property is not to exercise a separate element or incident of ownership, like the use of a carriage, but completely to sever the donor's relation to the property and leave in him no element or incident of ownership whatsoever. Reasonably it cannot be doubted that the power to dispose of property according to the will of the owner is a property right. If a tax upon the sale of property, irrespective of special circumstances, is a direct tax, it is clear that a tax upon the gift of property, irrespective of special circumstances, is, likewise, direct. In my opinion, both are direct because they are in substance and effect not excise taxes but taxes upon property. By repeated decisions of this court it has become axiomatic that it is the substance and not the form that controls in such matters. * * *

To me it seems plain that a tax imposed upon an ordinary gift, to be measured by the value of the property given and without regard to any qualifying circumstances, is a tax by indirection upon the property, as much, for example, as a tax upon the mere possession by the owner of a farm, measured by the value of the land possessed, would be a tax on the land. To call either of them an excise is to sacrifice substance to a mere form of words. I think, therefore, the first question certified, without stopping to consider the second, should be answered in the affirmative.

Mr. Justice Van Devanter and Mr. Justice Butler concur in this opinion.

EISNER v. MACOMBER.

✓ 1920. Supreme Court of the United States. 252 U. S. 189.

Mr. Justice Pitney delivered the opinion of the court.

This case presents the question whether, by virtue of the Sixteenth Amendment, Congress has the power to tax, as income of the stockholder and without apportionment, a stock dividend made lawfully and in good faith against profits accumulated by the corporation since March 1, 1913.

It arises under the Revenue Act of September 8, 1916, c. 463, 39 Stat. 756, et seq., which, in our opinion (notwithstanding a contention of the government that will be noticed), plainly evinces the purpose of Congress to tax stock dividends as income.

The facts, in outline, are as follows:

On January 1, 1916, the Standard Oil Company of California, a corporation of that state, out of an authorized capital stock of $100,000,000, had shares of stock outstanding, par value $100 each, amounting in round figures to $50,000,000. In addition, it had surplus and undivided profits invested in plant, property, and business and required for the purposes of the corporation, amounting to about $45,000,000, of which about $20,000,000 had been earned prior to March 1, 1913, the balance thereafter. In January, 1916, in order to readjust the capitalization, the board of directors decided to issue additional shares sufficient to constitute a stock dividend of 50 per cent. of the outstanding stock, and to transfer from surplus account to capital stock account an amount equivalent to such issue. Appropriate resolutions were adopted, an amount equivalent to the par value of the proposed new stock was transferred accordingly, and the new stock duly issued against it and divided among the stockholders.

Defendant in error, being the owner of 2,200 shares of the old stock, received certificates for 1,100 additional shares, of which 18.07 per cent., or 198.77 shares, par value $19,877, were treated as representing surplus earned between March 1, 1913, and January 1, 1916. She was called upon to pay, and did pay under protest, a tax imposed under the Revenue Act of 1916, based upon a supposed income of $19,877 because of the new shares; and an appeal to the Commissioner of Internal Revenue having been disallowed, she brought action against the Collector to recover the tax. In her complaint she alleged the above facts, and contended that in imposing such a tax the Revenue Act of 1916 violated Art. I, § 2, cl. 3, and Art. I, § 9, cl. 4, of the Constitution of the United States, requiring direct taxes to be apportioned according to population, and that the stock dividend was not income within the meaning of the Sixteenth Amendment. A general demurrer to the complaint was overruled upon the authority of Towne v. Eisner, 245 U. S. 418; and, defendant having failed to plead further, final judgment went against him. To review it, the present writ of error is prosecuted.

* * *

The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the amendment was adopted. In Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, under the Act of August 27, 1894, c. 349, § 27, 28 Stat. 509, 553, it was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arose, imposed by reason of ownership; and that Congress could not impose such taxes without apportioning them among the states according to population, as required by Art. I, § 2, cl. 3, and § 9, cl. 4, of the original Constitution.

Afterwards, and evidently in recognition of the limitation upon the taxing power of Congress thus determined, the Sixteenth Amendment was adopted, in words lucidly expressing the object to be accomplished:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

As repeatedly held, this did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income.[8] Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 17-19;

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[8] "It is clear on the face of this text [Sixteenth Amendment] that it does not purport to confer power to levy income taxes in a generic sense—an authority already possessed and never questioned * * *. In the light of the history which we have given and of the decision in the Pollock Case and the ground upon which the ruling in that case was based, there is no escape from the conclusion

Stanton v. Baltic Mining Co., 240 U. S. 103, 112 et seq.; Peck & Co. v. Lowe, 247 U. S. 165, 172, 173.

A proper regard for its genesis, as well as its very clear language, requires also that this amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.

In order, therefore, that the clauses cited from Article I of the Constitution may have proper force and effect, save only as modified by the Amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not "income," as the term is there used, and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised.

The fundamental relation of "capital" to "income" has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter as the outlet stream, to be measured by its flow during a period of time. For the present purpose we require only a clear definition of the term "income," as used in common speech, in order to determine its meaning in the amendment, and, having formed also a correct judgment as to the nature of a stock dividend, we shall find it easy to decide the matter at issue.

After examining dictionaries in common use (Bouv. L. D.; Standard Dict.; Webster's Internat. Dict.; Century Dict.), we find little

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that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock Case was decided, that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment." White, J., for the court in Brushaber v. Union Pac. R. Co. (1916) 240 U. S. 1, 17-18, 60 L. ed. 493, L. R. A. 1917D, 414, Ann. Cas. 1917B, 713.

"It was not the purpose or effect of that Amendment to bring any new subject within the taxing power. Congress already had power to tax all incomes. But taxes on incomes from some sources had been held to be 'direct taxes' within the meaning of the constitutional requirement as to apportionment. Art. I, § 2, cl. 3, § 9, cl. 4; Pollock v. Farmers' Loan and Trust Co., 158 U. S. 601. The Amendment relieved from that requirement and obliterated the distinction in that respect between taxes on income that are direct taxes and those that are not, and so put on the same basis all incomes 'from whatever source derived.' Brushaber v. Union Pac. R. R., 240 U. S. 1, 17." Bowers v. Kerbaugh-Empire Co. (1926) 271 U. S. 170, 174, 70 L. ed. 886.

to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 (Stratton's Independence v. Howbert, 231 U. S. 399, 415; Doyle v. Mitchell Bros. Co., 247 U. S. 179, 185—"Income may be defined as the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle Case, (pp. 183, 185).

Brief as it is, it indicates the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy. The government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word "gain," which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. *"Derived—from—capital"*; "the *gain—derived—from —capital,"* etc. Here we have the essential matter: *not* a gain *accruing to* capital; not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in,* being *"derived"*—that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal—*that* is income derived from property. Nothing else answers the description.

The same fundamental conception is clearly set forth in the Sixteenth Amendment—"incomes, *from* whatever *source derived*"—the essential thought being expressed with a conciseness and lucidity entirely in harmony with the form and style of the Constitution.

Can a stock dividend, considering its essential character, be brought within the definition? To answer this, regard must be had to the nature of a corporation and the stockholder's relation to it. We refer, of course, to a corporation such as the one in the case at bar, organized for profit, and having a capital stock divided into shares to which a nominal or par value is attributed.

Certainly the interest of the stockholder is a capital interest, and his certificates of stock are but the evidence of it. They state the number of shares to which he is entitled and indicate their par value and how the stock may be transferred. They show that he or his assignors, immediate or remote, have contributed capital to the enterprise, that he is entitled to a corresponding interest proportionate to the whole, entitled to have the property and business of the company devoted during the corporate existence to attainment of the common objects, entitled to vote at stockholders' meetings, to receive dividends out of the corporation's profits if and when declared, and, in the event of liquidation, to receive a proportionate share of the net assets, if any, remaining after paying creditors. Short of liquidation, or until dividend declared, he has no right to withdraw any part of either capital or profits from the common enterprise; on the contrary, his interest pertains not to any part, divisible or indivisible, but to the entire assets, business, and affairs of the company. Nor is it the interest of an owner in the assets themselves, since the corporation has full title, legal and equitable, to the whole. The stockholder has the right to have the assets employed in the enterprise, with the incidental rights mentioned; but, as stockholder, he has no right to withdraw, only the right to persist, subject to the risks of the enterprise, and looking only to dividends for his return. If he desires to dissociate himself from the company he can do so only by disposing of his stock.

For bookkeeping purposes, the company acknowledges a liability in form to the stockholders equivalent to the aggregate par value of their stock, evidenced by a "capital stock account." If profits have been made and not divided they create additional bookkeeping liabilities under the head of "profit and loss," "undivided profits," "surplus account," or the like. None of these, however, gives to the stockholders as a body, much less to any one of them, either a claim against the going concern for any particular sum of money, or a right to any particular portion of the assets or any share in them unless or until the directors conclude that dividends shall be made and a part of the company's assets segregated from the common fund for the purpose. The dividend normally is payable in money, under exceptional circumstances in some other divisible property; and when so paid, then only (excluding, of course, a possible advantageous sale of his stock or winding-up of the company) does the stockholder realize a profit or gain which becomes his separate property, and thus derive income from the capital that he or his predecessor has invested. * * *

A "stock dividend" shows that the company's accumulated profits have been capitalized, instead of distributed to the stockholders or retained as surplus available for distribution in money or in kind should opportunity offer. Far from being a realization of profits of the stockholder, it tends rather to postpone such realization, in that the fund represented by the new stock has been transferred from surplus to capital, and no longer is available for actual distribution.

The essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit; on the contrary, every dollar of his original investment, together with whatever accretions and accumulations have resulted from employment of his money and that of the other stockholders in the business of the company, still remains the property of the company, and subject to business risks which may result in wiping out the entire investment. Having regard to the very truth of the matter, to substance and not to form, he has received nothing that answers the definition of income within the meaning of the Sixteenth Amendment. * * *

It is said that a stockholder may sell the new shares acquired in the stock dividend; and so he may, if he can find a buyer. It is equally true that if he does sell, and in doing so realizes a profit, such profit, like any other, is income, and so far as it may have arisen since the Sixteenth Amendment is taxable by Congress without apportionment. The same would be true were he to sell some of his original shares at a profit. But if a shareholder sells dividend stock he necessarily disposes of a part of his capital interest, just as if he should sell a part of his old stock, either before or after the dividend. * * *

Throughout the argument of the government, in a variety of forms, runs the fundamental error already mentioned—a failure to appraise correctly the force of the term "income" as used in the Sixteenth Amendment, or at least to give practical effect to it. Thus the government contends that the tax "is levied on income derived from corporate earnings," when in truth the stockholder has "derived" nothing except paper certificates which, so far as they have any effect, deny him present participation in such earnings. * * *

We must treat the corporation as a substantial entity separate from the stockholder, not only because such is the practical fact but because it is only by recognizing such separateness that any dividend—even one paid in money or property—can be regarded as income of the stockholder. Did we regard corporation and stockholders as altogether identical, there would be no income except as the corporation acquired it; and while this would be taxable against the corporation as income under appropriate provisions of law, the individual stockholders could not be separately and additionally taxed with respect to their several shares even when divided, since if there were entire identity between them and the company they could not be regarded as receiving anything from it, any more than if one's money were to be removed from one pocket to another. * * *

That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question, and that such interests might be valued in view of the condition of the company, including its accumulated and undivided profits, is equally clear. But that this would be taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution, is settled beyond peradventure by previous decisions of this court. * * *

The Revenue Act of 1916, in so far as it imposes a tax upon the stockholder because of such dividend contravenes the provisions of Article I, § 2, cl. 3, and Article I, § 9, cl. 4, of the Constitution, and to this extent is invalid, notwithstanding the Sixteenth Amendment.

Judgment affirmed.

[Dissenting opinions by HOLMES and BRANDEIS, JJ., are omitted. DAY and CLARKE, JJ., also dissented.]

TAFT v. BOWERS.

1929. Supreme Court of the United States. 278 U. S. 470.

Mr. Justice McReynolds delivered the opinion of the court.

Abstractly stated, this is the problem—

In 1916 A purchased 100 shares of stock for $1,000 which he held until 1923 when their fair market value had become $2,000. He then gave them to B who sold them during the year 1923 for $5,000. The United States claim that, under the Revenue Act of 1921, B must pay income tax upon $4,000, as realized profits. B maintains that only $3,000—the appreciation during her ownership—can be regarded as income; that the increase during the donor's ownership is not income assessable against her within intendment of the Sixteenth Amendment.

The District Court ruled against the United States; the Circuit Court of Appeals held with them.

Act of Congress approved November 23, 1921, Chap. 136, 42 Stat. 227, 229, 237—

"Sec. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—* * *

"(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. * * *

"Sec. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—* * *

"(b) Does not include the following items, which shall be exempt from taxation under this title:

"(1) * * * (2) * * *

"(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income); * * *"

We think the manifest purpose of Congress expressed in paragraph (2), Sec. 202, supra, was to require the petitioner to pay the exacted tax.

The only question subject to serious controversy is whether Congress had power to authorize the exaction.

It is said that the gift became a capital asset of the donee to the extent of its value when received and, therefore, when disposed of by her no part of that value could be treated as taxable income in her hands.

The Sixteenth Amendment provides—

"The Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

Income is the thing which may be taxed—income from any source. The Amendment does not attempt to define income or to designate how taxes may be laid thereon, or how they may be enforced.

Under former decisions here the settled doctrine is that the Sixteenth Amendment confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income.

Also, this court has declared—"Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets." Eisner v. Macomber, 252 U. S. 189, 207. The "gain derived from capital," within the definition, is "not a gain accruing to capital, nor a growth or increment of value in the investment, but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested, and coming in, that is, received or drawn by the claimant for his separate use, benefit and disposal." United States v. Phellis, 257 U. S. 156, 169.

If, instead of giving the stock to petitioner, the donor had sold it at market value, the excess over the capital he invested (cost) would have been income therefrom and subject to taxation under the Sixteenth Amendment. He would have been obliged to share the realized gain with the United States. He held the stock—the investment—subject to the right of the sovereign to take part of any increase in its value when separated through sale or conversion and reduced to his possession. Could he, contrary to the express will of Congress, by mere gift enable another to hold this stock free from such right, deprive the sovereign of the possibility of taxing the appreciation when actually severed, and convert the entire property into a capital asset of the donee, who invested nothing, as though the latter had purchased at the market price? And after a still further enhancement of the property, could the donee make a second gift with like effect, etc.? We think not.

In truth the stock represented only a single investment of capital—that made by the donor. And when through sale or conversion the increase was separated therefrom, it became income from that investment in the hands of the recipient subject to taxation according to the very words of the Sixteenth Amendment. By requiring the recipient of the entire increase to pay a part into the public treasury, Congress deprived her of no right and subjected her to no hardship. She accepted the gift with knowledge of the statute and, as to the property received, voluntarily assumed the position of her donor. When she sold the stock she actually got the original sum invested, plus the entire appreciation; and out of the latter only was she called on to pay the tax demanded.

The provision of the statute under consideration seems entirely appropriate for enforcing a general scheme of lawful taxation. To accept the view urged in behalf of petitioner undoubtedly would defeat, to some extent, the purpose of Congress to take part of all gain derived from capital investments. To prevent that result and insure enforcement of its proper policy, Congress had power to require that for purposes of taxation the donee should accept the position of the donor in respect of the thing received. And in so doing, it acted neither unreasonably nor arbitrarily.

The power of Congress to require a succeeding owner, in respect of taxation, to assume the place of his predecessor is pointed out by United States v. Phellis, 257 U. S. 156, 171—* * *.

There is nothing in the Constitution which lends support to the theory that gain actually resulting from the increased value of capital can be treated as taxable income in the hands of the recipient only so far as the increase occurred while he owned the property. And Irwin v. Gavit, 268 U. S. 161, 167, is to the contrary.

The judgments below are

Affirmed.

The Chief Justice took no part in the consideration or decision of these causes.

Section 3.—Exemption of Governmental Instrumentalities.

McCULLOCH v. THE STATE OF MARYLAND.

1819. Supreme Court of the United States. 4 Wheat. 316, 425.

[For other facts and the first part of the opinion see ante, p. 256. The Maryland statute forbade any bank or branch in the state, not chartered by the state, to issue notes except upon stamped paper to be bought from the state at rates varying from 1 to 2% of the face value of the notes, provided that such bank or branch could relieve itself of this requirement by paying $15,000 annually.]

Marshall, C. J. * * * It being the opinion of the court, that the Act [of Congress] incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:—

2. Whether the State of Maryland may, without violating the Constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied. But, such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve. 3d. That where this repugnance exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever, surpassed, have been displayed.

The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the Constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by, the Constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution.

The argument on the part of the State of Maryland, is, not that the states may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Constitution leaves them this right in the confidence that they will not abuse it.

Before we proceed to examine this argument, and to subject it to the test of the Constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the states. It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the states. They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all.

It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction.

This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power, which the people of a single state cannot give.

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective states, consistently with a fair construction of the Constitution?

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word "confidence." Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the State of Maryland contends, to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states.

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states.

Gentlemen say, they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the 10th section of the 1st article of the Constitution; that, with respect to everything else, the power of the states is supreme, and admits of no control. If this be true, the distinction between property and other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

In the course of the argument, the "Federalist" has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the Constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and, to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. The subject of those numbers, from which passages have been cited, is the unlimited power of taxation which is vested in the general government. The objection to this unlimited power, which the government seeks to remove, is stated with fulness and clearness. It is "that an indefinite power of taxation in the latter (the government of the Union) might, and probably would, in time, deprive the former (the government of the states) of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it; the national government might at any time abolish the taxes imposed for state objects, upon the pretence of an interference with its own. It might allege a necessity for doing this, in order to give efficacy to the national revenues; and thus all the resources of taxation might, by degrees, become the subjects of Federal monopoly, to the entire exclusion and destruction of the state governments."

The objections to the Constitution which are noticed in these numbers, were to the undefined power of the government to tax, not the incidental privilege of exempting its own measures from state taxation. The consequences apprehended from this undefined power were, that it would absorb all the objects of taxation, "to the exclusion and destruction of the state governments." The arguments of the "Federalist" are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of state taxation. Arguments urged against these objections, and these apprehensions, are to be understood as relating to the points they mean to prove. Had the authors of those excellent essays been asked, whether they contended for that construction of the Constitution, which would place within the reach of the states those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit, that their answer must have been in the negative.

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government.

But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

But if the full application of this argument could be admitted, it might bring into question the right of Congress to tax the state banks, and could not prove the right of the states to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

THE COLLECTOR v. DAY.

1870. Supreme Court of the United States. 11 Wall. 113.
[Printed ante, p. 246.]

BANK OF CALIFORNIA v. RICHARDSON, TREASURER OF THE STATE OF CALIFORNIA.

1919. Supreme Court of the United States. 248 U. S. 476.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Except as to real estate, which is taxed directly in the name of the owner, all the available resources of banks for the purposes of taxation are reached under the law of California, not by an immediate levy on the banks as the owner, but by annual assessment and tax thereon made by the State Board of Equalization against the stockholders of banks. The state law places the duty upon the banks to pay the tax assessed against their stockholders, with the obligation on the stockholders to repay, sanctioned by a right conferred upon the banks to sell the stock of any stockholder failing to refund.

The Bank of California, organized under the National Banking Law and established in San Francisco, commenced this suit to recover the amount of a tax, levied against its stockholders in 1915 under the law previously stated, which it had paid under protest claiming that the tax was not only unlawful under the state law but illegal under the law of the United States governing the right of a state to tax national banks and their stockholders. The case is here to review a judgment denying the right to recover, on the ground that the tax had been lawfully exacted under both the law of the state and that of the United States.

The decision below, in so far as it rested upon the state law, is binding and we put that subject out of view. To understand the contentions as to the law of the United States requires a brief statement of the tax levied and the particulars in which it is complained of. The capital of the bank was $8,500,000, evidenced by 85,000 shares of the par value of $100 each. D. O. Mills & Company was a national bank established at Sacramento and the California Bank was a stockholder in that bank to the extent of 2,501 shares. The California Bank was also the owner of 1,001 shares of stock in the Mission Bank, a banking corporation organized under the state law and doing business in San Francisco. The Board of Equalization in 1915 fixed the value of all the assets of the California Bank at the sum of $15,775,252.67. The Board included in the assets making up this amount the stock standing in the name of the California Bank, both in the D. O. Mills National Bank and in the Mission State Bank; the first, the Mills National Bank stock, being computed as worth $625,546.30, and the second, the Mission State Bank stock, as worth $121,916.52.

Upon these valuations, the Board assessed the California Bank as a stockholder in the D. O. Mills National Bank and as a stockholder in the Mission State Bank for the shares of stock which it held in those banks, valuing each at the sum previously stated. Besides, the stockholders of the California National were assessed for the value of the assets of that bank, including in the amount the full value of the shares of stock owned by the bank in the Mills National and Mission State Banks.

The controversy grows out of the asserted illegality of the twofold tax levied on the assessments of the California Bank as a stockholder in the Mills National Bank and in the Mission State Bank. Its solution depends upon the effect of Rev. Stats., § 5219, the text of which is in the margin.[1]

Without considering some modifications made by the Act of February 10, 1868, c. 7, 15 Stat. 34, which are negligible for the purposes of the questions before us, the section is but the reproduction of a provision of § 41 of the Act of June 3, 1864, dealing with the organization of national banks. (13 Stat. 99, 112.) The forms of expression used in the section make it certain that in adopting it the legislative mind had in view the subject of how far the banking associations created were or should be made subject to state taxation, which presumably it was deemed necessary to deal with in view of the controversies growing out of the creation of the Bank of the United States and dealt with by decisions of this court. McCulloch v. Maryland, 4 Wheat. 316, 436; Osborn v. United States Bank, 9 Wheat. 738, 867; Weston v. Charleston, 2 Pet. 449.

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[1] "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

There is also no doubt from the section that it was intended to comprehensively control the subject with which it dealt and thus to furnish the exclusive rule governing state taxation as to the federal agencies created as provided in the section. All possibility of dispute to the contrary is foreclosed by the decisions of this court. People v. Weaver, 100 U. S. 539; Mercantile Bank v. New York, 121 U. S. 138, 154; Owensboro National Bank v. Owensboro, 173 U. S. 664; Covington v. First National Bank, 198 U. S. 100.

Two provisions in apparent conflict were adopted. First, the absolute exclusion of power in the states to tax the banks, the national agencies created, so as to prevent all interference with their operations, the integrity of their assets, or the administrative governmental control over their affairs. Second, preservation of the taxing power of the several states so as to prevent any impairment thereof from arising from the existence of the national agencies created, to the end that the financial resources engaged in their development might not be withdrawn from the reach of state taxation, but on the contrary that every resource possessed by the banks as national agencies might in substance and effect remain liable to state taxation.

The first aim was attained by the non-recognition of any power whatever in the states to tax the federal agencies, the banks, except as to real estate specially provided for, and, therefore, the exclusion of all such powers. The second was reached by a recognition of the fact that, considered from the point of view of ultimate and beneficial interest, every available asset possessed or enjoyed by the banks would be owned by their stockholders and would be, therefore, reached by taxation of the stockholders as such. Full and express power on that subject was given, accompanied with a limitation preventing its exercise in a discriminatory manner, a power which again from its very limitation was exclusive of other methods of taxation and left, therefore, no room for taxation of the federal agency or its instrumentalities or essential accessories, except as recognized by the provision in question.

Let us come to consider whether the taxation in question was sanctioned by the Act of Congress as thus understood. We do so, first, from the point of view of the twofold tax which was based on the ownership by the California Bank of stock in the D. O. Mills National Bank, and second, as to the taxes which resulted from the ownership by the California Bank of stock in the Mission State Bank.

In Bank of Redemption v. Boston, 125 U. S. 60, it was determined that the stock held by one national bank in another is governed by the power to tax stockholders given by the statute. Hence, the circumstance of the ownership of the stock by the California Bank in the D. O. Mills National Bank in no way deflects the operation of the statute. This being the case, as the taxation of the California Bank as a stockholder in the Mills Bank conformed to the grant of power to tax stockholders of national banks, it results that the assessment for taxation made upon that basis was within the state authority and was rightly decided so to be.

But the principle upon which this rests inevitably leads to the further conclusion, that the inclusion of the stock ownership of the California Bank in the Mills Bank as an asset of the California Bank for the purpose of taxing the stockholders of the latter bank was a disregard of the provision as to taxing stockholders fixed by the statute.

Indeed, it is apparent that the use of the power conferred by the statute to tax the California Bank as a stockholder in the Mills National Bank, and in addition to avail of such stock ownership for the purpose of taxing the shareholders of the California Bank, was but to accept the statute on the one hand, and to exert on the other a power which could have no existence consistently with the statute. To say that the two taxes, the one levied on the bank as a stockholder in the Mills National Bank, and the other levied on the stockholders of the California Bank, were valid because a taxation of different persons, the California Bank on the one hand and the stockholders of the California Bank on the other, serves only to emphasize the plain disregard of the statute which would result from the enforcement of the taxes in question.

It is undoubted that the statute from the purely legal point of view, with the object of protecting the federal corporate agencies which it created from state burdens and securing the continued existence of such agencies despite the changing incidents of stock ownership, treated the banking corporations and their stockholders as different. But it is also undoubted that the statute for the purpose of preserving the state power of taxation, considering the subject from the point of view of ultimate beneficial interest, treated the stock interest, that is, the stockholder, and the bank as one and subject to one taxation by the methods which it provided.

Again, when the purposes of the statute are taken into view, the conclusion cannot be escaped that the transmutation of the stock interest of the California in the Mills Bank, into an asset of the California Bank subject to be taxed for the purpose of reaching its stockholders, is to overthrow the very fundamental ground upon which the taxation of stockholders must rest.

We do not stop to point out the double burden resulting from the taxation of the same value twice which the assessment manifested, as to do so could add no cogency to the violation of the one power to tax by the one prescribed method conferred by the statute and which was the sole measure of the state authority.

Coming to consider the tax on the California National Bank as a stockholder in the Mission State Bank, different considerations are controlling, since the provisions of the statute and the ruling in the Bank of Redemption Case, supra, both in letter and spirit apply only to stock ownership by a national bank in another national bank. It therefore follows that as the California National Bank was subject to state taxation as a federal agency only to the extent authorized by the statute, the taxation of that bank as a stockholder in the Mission State Bank was without the scope of the statute and beyond the power which it conferred.

But while this is true, it also follows that as the stock in the Mission Bank belonged to the California Bank and was part of its general assets embraced by the comprehensive power conferred to tax such assets in the absence of some provision of the statute to the contrary, which, as we have seen, was the case with regard to the stock held in the D. O. Mills National Bank, the assessment of the stock in the Mission Bank as an asset of the California Bank against its stockholders was within the scope of the grant[2] given by the statute and was, therefore, valid.

From what we have said, it follows that court below erred in refusing to order the refunding of the sum paid for the taxes levied on the assessment made against the stockholders of the California Bank for the value of the stock held by that bank in the D. O. Mills National Bank, and which had been assessed against the California Bank as a stockholder in the Mills Bank; and further erred in so far as it refused to decree a refund of the amount paid for the tax levied on the California Bank as the result of the assessment on that bank as a stockholder in the Mission State Bank. In these particulars, therefore, its decree must be, and is reversed.[3]

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[2] Is it sound constitutional theory to regard the present power of the states to tax national banks as being vested in them by grant from Congress?

The states have power to tax all things within their boundaries that are not exempted by superior authority. An instrumentality appropriate to accomplish a federal governmental purpose may be created by Congress. Congress has a range of discretion in determining the character of such an instrumentality. It seems that Congress would be acting within this discretion in determining that freedom from state taxation is an essential characteristic, or freedom to a specified extent, or that subjection to state taxation of stated kinds would not prevent the instrumentality from being all that Congress deems needful.

What power the states would have to tax national banks if Congress were wholly silent on the subject has never been subjected to the judicial test.

[3] Some interpretations of § 5219 are: Personal property of a national bank is not taxable by a state, even after the bank has passed into the hands of a receiver. Rosenblatt v. Johnston (1881) 104 U. S. 462, 26 L. ed. 832. A state may not tax a national bank on its capital stock, surplus and undivided profits, but these elements may be made the measure of the value of the shares when a tax is laid on the shareholders, Des Moines Nat. Bank v. Fairweather (1923) 263 U. S. 103, 68 L. ed. 191; First Nat. Bank v. Adams (1922) 258 U. S. 362, 66 L. ed. 661; and in imputing this value to the shares the full capital and surplus may be considered without deducting the value of federal bonds in which a part of it is invested, Des Moines Nat. Bank v. Fairweather, supra; Van Allen v. The Assessors (1865) 3 Wall. 573, 18 L. ed. 229, nor need there be a deduction of the value of land outside the state owned by the bank, Commercial Nat. Bank v. Chambers (1901) 182 U. S. 556, 45 L. ed. 1227. A state tax on the franchise of a national bank is invalid. Owensboro Nat. Bank v. Owensboro (1899) 173 U. S. 664, 43 L. ed. 850.

For the principal interpretations of the phrase, "other moneyed capital" as used in § 5219 Rev. Stat. and its successors, see First Nat. Bank of Hartford v. Hart-

[Pitney, J., with the concurrence of Brandeis and Clarke, JJ., delivered a dissenting opinion, summing up thus:]

It seems to me that to allow a deduction from the taxable value of national bank shares because the bank happens to hold stock in another national bank is not only contrary to the clear intent of § 5219, but is inconsistent with all previous decisions of this court bearing upon the point, especially those that have denied a similar deduction because of tax-exempt securities held by the bank, or because of real estate taxed against it.

WESTON ET AL. v. THE CITY COUNCIL OF CHARLESTON.

1829. Supreme Court of the United States. 2 Pet. 449.

This was a writ of error to the Constitutional Court of South Carolina.

On the 20th of February, 1823, the City Council of Charleston passed "an ordinance to raise supplies for the use of the city of Charleston, for the year 1823." The ordinance provides "that the following species of property, owned and possessed within the limits of the city of Charleston, shall be subject to taxation in the manner, and at the rate, and conformably to the provisions hereinafter specified; that is to say, all personal estate, consisting of bonds, notes, insurance stock, six and seven per cent stock of the United States, or other obligations upon which interest has been or will be received during the year, over and above the interest which has been paid (funded stock of this state, and stock of the incorporated banks of this state and the United States Bank excepted) twenty-five cents upon every hundred dollars."

MARSHALL, C. J. * * * This brings us to the main question. Is the stock issued for loans made to the government of the United States liable to be taxed by states and corporations?

Congress has power "to borrow money on the credit of the United States." The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the con-

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ford (1927) 273 U. S. 548, 71 L. ed. 767, 59 A. L. R. 1, cases there cited, and Minnesota v. First Nat. Bank of St. Paul (1927) 273 U. S. 561, 71 L. ed. 774.

Section 5219 of the Revised Statutes as enlarged in 1923 and again in 1926, 44 Stat. 223, 12 U. S. C. § 548 (1928) offers several alternative methods by which a state may tax national banks. For an analysis of the present (1930) statute and summary of its interpretation, see Roger J. Traynor, National Bank Taxation in California (1929) 17 Calif. L. Rev. 83, 232, 456, at pp. 462-471, and the whole article for the complication of state systems of taxation which results from these limitations on their power to tax national banks. (All but pp. 471-528 deal with questions common to all the states.)

tract subsisting between the government and the individual. It bears directly upon that contract, while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract.

If the states and corporations throughout the Union possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?

But it is unnecessary to pursue this principle through its diversified application to all the contracts, and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our republic. In war, when the honor, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigencies, the urgent demands of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make these anticipations, "to borrow money on the credit of the United States." Can anything be more dangerous, or more injurious, than the admission of a principle which authorizes every state and every corporation in the Union which possesses the right of taxation, to burden the exercise of this power at their discretion?

If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend; may be burdened, impeded, if not arrested, by any of the organized parts of the confederacy.

In a society formed like ours, with one supreme government for national purposes, and numerous state governments for other purposes, in many respects independent, and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a state, and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise, is undoubtedly among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land in its application to the cases of individuals. This duty has more than once devolved on this court. In the performance of it we have considered it as a necessary consequence from the supremacy of the government of the whole, that its action in the exercise of its legitimate powers, should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a state cannot rightfully be so exercised as to impede and obstruct the free course of those measures which the government of the states united may rightfully adopt.

This subject was brought before the court in the case of McCulloch v. The State of Maryland, 4 Wheat. 316, when it was thoroughly argued and deliberately considered. The question decided in that case bears a near resemblance to that which is involved in this. It was discussed at the bar in all its relations, and examined by the court with its utmost attention. We will not repeat the reasoning which conducted us to the conclusion thus formed; but that conclusion was, that "all subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are upon the soundest principles exempt from taxation." "The sovereignty of a state extends to every thing which exists by its own authority, or is introduced by its permission;" but not "to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States." "The attempt to use" the power of taxation "on the means employed by the government of the Union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give." * * *

It is admitted that the power of the government to borrow money cannot be directly opposed, and that any law directly obstructing its operation would be void; but a distinction is taken between direct opposition and those measures which may consequentially affect it; that is, that a law prohibiting loans to the United States would be void, but a tax on them to any amount is allowable.

It is, we think, impossible not to perceive the intimate connection which exists between these two modes of acting on the subject.

* * *

The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

It is admitted by the counsel for the defendants, that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States.

The distinction is, we think, apparent. When lands are sold, no connection remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country with no implied exemption from common burdens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it may then assume is not questioned. The connection between the borrower and the lender is dissolved. It is no burden on loans, it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government, stands, we think, on very different principles from a tax on lands which the government has sold. * * *

The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution. * * *

We are, therefore, of opinion that the said judgment ought to be reversed and annulled, and the cause remanded to the Constitutional Court for the State of South Carolina, that further proceedings may be had therein according to law.[4]

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[4] In the majority opinion of the Constitutional Court of South Carolina the question was stated as follows, "May the annual profit or interest of the six per cent. stock of the United States be taxed in the hands of individual citizens, without violating the Constitution of the United States," and was answered, "Although the right to borrow money, or more properly, the operation or contract of borrowing as practiced by the United States cannot be taxed, yet the interest or income from the loan, when once paid into the hands of individual lenders, being no longer an instrument of government, is liable to the common burden of taxes, like any other dollars and cents. Suppose for a moment, instead of paying six or seven dollars per annum, the United States had contracted to pay six or seven acres of land for the use of $100 as long as the money remained unpaid, could not the land when conveyed to the lender be taxed, and where is the difference between a premium paid in silver and one in land?" City Council v. Weston (s. c. 1824) Harp. L. Rep. 340, 344-345.

Compare: Certain lands in Oklahoma belonging to Indians over whom the United States still exercised a guardianship were leased by authority of the United States, with a view to produce income for these Indian wards. In three cases various forms of state taxes on the interest of the lessee in such leases were held invalid. Choctaw, O. & Gulf R. Co. v. Harrison (1914) 235 U. S. 292, 59 L. ed. 234; Indian Territory Illuminating Oil Co. v. Oklahoma (1916) 240 U. S. 522, 60 L. ed. 779; Gillespie v. Oklahoma (1922) 257 U. S. 501, 66 L. ed. 338. In the last of these cases, holding that an Oklahoma income tax could not embrace the income earned by a lessee from the exercise of his rights to take oil and gas from the leased land, the court said: "The criterion of interference by the states with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the states are to exist and make laws. * * * The rule as to instrumentalities of the United States on the other hand is absolute in form and at least stricter in substance. * * * 'A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them.' 240 U. S. 530. The step from this to the invalidity of the tax upon income from the leases is not long. In cases where the principal is absolutely immune from interference an inquiry is allowed into the sources from which net income is derived and if a part of it comes from such a source the tax is pro tanto void; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; 158 U. S. 601; * * *. Whether this property could

THOMPSON, J., dissenting. * * *

What then is the ordinance, in substance? It is a tax upon the net income of interest upon money secured by bonds, notes, insurance stock, six and seven per centum stock of the United States, or other obligations, upon which interest has been received, etc. It is the net interest received upon which the tax is laid. For the ordinance declares the tax shall be on the interest received over and above that which has been paid. For example, he who received $1,000 interest, and pays out $500 interest, is taxed only upon the balance. It is, therefore, a general tax upon an income from money at interest, and this too only included as one item in the enumeration of taxable property. It is not an objection that can be made here, if anywhere, that the tax is not upon the whole income. It is a tax general in its application to income, from interest derived from investments of every description, (with the exception mentioned,) and money on loan. It cannot be considered as an exorbitant tax, or in any manner partaking of the character of a penalty, it being only a tax of a quarter of one per centum.

If the objection to this tax is to be sustained, it must be on the broad ground that stock of the United States is not taxable in any shape or manner whatever; that it is not to be included in the estimate of property subject to taxation; and that I understand is the extent to which a majority of this court mean to carry the exemption. * * *

To consider this a tax upon the means employed by the general government for carrying on its operations, is, certainly, very great refinement. It is not a tax that operates directly upon any power or credit of the United States. The utmost extent to which the most watchful jealousy can lead is, that it may, by possibility, prevent the government from borrowing money on quite so good terms. And even this inconvenience is extremely questionable; for the stock only pays the same tax that the money with which it was purchased did. And whether the property exists in one form or the other, would seem to be matter of very little importance to the owner. But great injustice is done to others, by exempting men who are living upon the interest of their money, invested in stock of the United States, from the payment of taxes; thereby establishing a privileged class of public creditors, who, though living under the protection of the government, are exempted from bearing any of its burdens. A construction of the Constitution, drawing after it such consequences, ought to be very palpable before it is adopted. * * *

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be taxed in any other form or not, it cannot be reached as profits or income from leases such as those before us. The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases, and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards. Weston v. Charleston, 2 Pet. 449, 468."

Upon the whole, considering that the tax in question is a general tax upon the interest of money on loan, I cannot think it any violation of the Constitution of the United States, to include therein interest accruing from stock of the United States.

[Johnson, J., also dissented with similar and other reasons.]

HOME INSURANCE CO. v. NEW YORK.

1890. Supreme Court of the United States. 134 U. S. 594.

The plaintiff in error, The Home Insurance Company of New York, is a corporation created under the laws of that state. Its capital stock during the year 1881 was three millions of dollars, divided into thirty thousand shares of the par value of one hundred dollars each, all fully paid. In the months of January and July of that year a dividend of $150,000 was declared by the company, making together ten per cent upon the par value of its capital stock. A portion of that capital stock was invested in bonds of the United States, amounting, when the dividend was declared in July, 1881, and also on the first of November of that year, to $1,940,000.

By an act of the legislature of New York, passed May 26, 1881, c. 361, amending a previous act providing for the taxation of certain corporations, joint stock companies and associations, it was declared that every corporation, joint stock company or association, then or thereafter incorporated under any law of the state, or of any other state or country, and doing business in the state, with certain designated exceptions not material in this case, should be subject to a tax upon "its corporate franchise or business," to be computed as follows: If its dividend or dividends made or declared during the year ending the first day of November amount to six per cent or more upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per cent of the dividends. A less rate is provided where there is no dividend, or a dividend less than six per cent and also where the corporation, company or association has more than one kind of capital stock—as, for instance, common and preferred stock—and upon one of them there is a dividend amounting to six or more per cent and upon the other there is no dividend or a dividend of less than six per cent. The purpose of the act is to fix the amount of the tax each year upon the franchise or business of the corporation by the extent of dividends upon its capital stock, or, where there are no dividends, according to the actual value of the capital stock during the year. We are concerned in this case, however, only with the tax where the amount is computed by the extent of the dividends.

The tax payable by the Home Insurance Company, estimated according to its dividends, under the above law of the state, aggregated $7,500. The company resisted its payment, assuming that the tax was in fact levied upon the capital stock of the company, and contending that there should be deducted from it a sum bearing the same ratio thereto that the amount invested in bonds of the United States bears to its capital stock, and that the law requiring a tax without such reduction is unconstitutional and void. An agreed case was accordingly made up embodying a statement of the facts, between the company and the attorney general of New York representing the state, and submitted to the Supreme Court of the state. That court gave judgment in favor of the state against the company, which on appeal to the Court of Appeals of the state was affirmed. 92 N. Y. 328. The judgment of the latter court, having been remitted to the Supreme Court and entered there, the case is brought to this court for review on writ of error.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

The contention of the plaintiff in error is that the tax in question was levied upon its capital stock, and therefore invalid so far as the bonds of the United States constitute a part of that stock. If that contention were well founded there would be no question as to the invalidity of the tax. That the bonds or obligations of the United States for the payment of money cannot be the subject of taxation by a state is familiar law settled by numerous adjudications of this court. It is a tax upon the exercise of the power of Congress to borrow money: a tax which, if permitted, could be limited in amount only by the discretion of the state, and might therefore be carried to an extent impairing, if not destructive of, the efficiency of the power, to the serious detriment of the general government. * * *

Nor can this inhibition upon the states be evaded by any change in the mode or form of the taxation, provided the same result is effected—that is, an impediment is thereby interposed to the exercise of a power of the United States. That which cannot be accomplished directly cannot be accomplished indirectly. Through all such attempts the court will look to the end sought to be reached, and if that would trench upon a power of the government, the law creating it will be set aside or its enforcement restrained. * * *

Looking now at the tax in this case upon the plaintiff in error, we are unable to perceive that it falls within the doctrines of any of the cases cited, to which we fully assent, not doubting their correctness in any particular. It is not a tax in terms upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock. The statute designates it a tax upon the "corporate franchise or business" of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.

By the term "corporate franchise or business," as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the state to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the state, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the state each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. * * *

The doctrine of the taxibility of the franchises of a corporation without reference to the character of the property in which its capital stock or its deposits are invested is sustained by the judgments in Society for Savings v. Coite, 6 Wall. 594, and Provident Institution v. Massachusetts, 6 Wall. 611, which were before this court at December Term, 1867. In the first of these cases it appeared that a law of Connecticut of 1863 provided that savings banks in that state should make an annual return to the controller of public accounts "of the total amounts of all deposits in them, respectively, on the first day of July in each successive year," and should pay to the treasurer of the state a sum equal to three-fourths of one per cent on the total amount of deposits in such banks on those days, and that the tax should be in lieu of all other taxes upon the banks or their deposits. On the first day of July, 1863, the Society for Savings, one of the banks, had invested over $500,000 of its deposits in securities of the United States, which were declared by Congress to be exempted from taxation by state authority, whether held by individuals, corporations, or associations. 12 Stat. 346, c. 33, § 2. Upon the amount of its deposits thus invested the society refused to pay the sum equal to the prescribed percentage. * * *

It was contended in that case that the deposits in the bank were subjected to taxation from the fact that the extent of the tax was determined by their amount. But the court said: "Reference is evidently made to the total amount of deposits on the day named, not as the subject matter for assessment, but as the basis for computing the tax required to be paid by the corporation defendants. They enjoy important privileges, and it is just that they should contribute to the public burdens. Views of the defendants are, that the sums required to be paid to the treasury of the state is a tax on the assets of the institution, but there is not a word in the provision which gives any satisfactory support to that proposition." * * *

In this case we hold, as well upon general principles as upon the authority of the first two cases cited from 6th Wallace, that the tax for which the suit is brought is not a tax on the capital stock or property of the company, but upon its corporate franchise, and is not therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States. * * *

Affirmed.[5]

MR. JUSTICE MILLER * * * dissenting. MR. JUSTICE HARLAN and myself dissent from the judgment in this case, because we think that, notwithstanding the peculiar language of the statute of New York, the tax in controversy is, in effect, a tax upon the bonds of the United States held by the insurance company.

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[5] Plummer v. Coler (1900) 178 U. S. 115, 44 L. ed. 998: Plummer died domiciled in New York leaving an estate of $40,000 in bonds of the United States. In holding that New York could collect an inheritance tax from this estate, the court, after citing as decisive Home Insurance Co. v. New York and like cases, and United States v. Perkins said:

"We think the conclusion, fairly to be drawn from the state and federal cases, is, that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the state may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of federal securities, does not invalidate the tax or the law under which it is imposed. * * *

"The propositions chiefly relied on are, first, that an inheritance tax, if assessed upon a legacy or interest composed of United States bonds, is within the very letter of the United States statute which declares that such bonds 'shall be exempt from taxation in *any form* by or under state, municipal or local authority;' and, second, that the tax in question is unconstitutional, because impairing and burdening the borrowing power of the United States.

"But if the first proposition is sound and decisive of the question in this case, then it must follow that the cases in which this court has held that, in assessing a tax upon corporate franchises, the amount of such a tax may be based upon the entire property or capital possessed by the corporation even when composed in whole or in part of United States bonds, must be overruled. Plainly in those

NORTHWESTERN MUT. LIFE INS. CO. v. WISCONSIN.

1927. Supreme Court of the United States. 275 U. S. 136.

[The plaintiff, a Wisconsin corporation, sued in a court of that state to recover portions of taxes paid, upon the ground that to the extent of these portions the tax fell upon its income from United States bonds. The tax was levied under ~~§ 76.34~~, Wisconsin Statutes, ~~1923~~, which required every domestic insurance company and association, transacting business in the state (except fraternal societies), to pay ~~each year~~ "as ~~an~~ annual license fee for transacting such business" 3% of its gross income from all sources except premiums collected and ~~rents from land~~ upon which taxes had been paid. A judgment dismissing the suit was affirmed by the Supreme Court of Wisconsin and this writ of error taken.] 50

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cases, as in this, there was taxation *in a form,* and in them as in this the amount of the tax was reached by including in the assessment United States bonds.

"So that we return to the authorities, by which it has been established that a tax upon a corporate franchise, or upon the privilege of taking under the statutes of wills and of descents, is a tax not upon United States bonds if they happen to compose a part of the capital of a corporation or a part of the property of a decedent, but upon rights and privileges created and regulated by the state. * * *

"In fact, the mischief, if it exists at all and is not merely fanciful, might be supposed to be much greater in the case of state laws taxing franchises than the case of taxing the estates of decedents. So small now is the income derivable from federal securities that few individuals and those only of great wealth, can afford to invest in them; and the demand for them is mostly confined to banking associations and to large trading and manufacturing companies which invest their surplus in securities that can be readily and quickly converted into cash. Moreover, no inconsiderable portion of the United States loans is taken and held, as everyone knows, in foreign countries, where doubtless it is subjected to municipal taxation. * * *

"It may be opportune to mention that, even while we have been considering this case, the United States government has negotiated a public loan of large amount at a lower rate of interest than ever before known. From this it may be permissible to infer that the existence of legislation, whether state or federal, including federal securities as part of the mass of private property subject to inheritance taxes, has not practically injured or impaired the borrowing power of the government. * * *

"It is often impracticable to secure from living persons their fair share of contribution to maintain the administration of the state, and such laws seem intended to enable to secure payment from the estate of the citizen when his final account is settled with the state. Nor can it be readily supposed that such obligations can be evaded or defeated by the particular form in which the property of the decedent was invested."

United States v. Perkins (1896) 163 U. S. 625, 41 L. ed. 287, cited above, held that a state legacy tax might apply to a gift by will to the United States, the court saying:

"The act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

Compare Greiner v. Lewellyn (1922) 258 U. S. 384, 66 L. ed. 676, state bonds need not be deducted from an estate in assessing it under the federal estate tax, and Snyder v. Bettman (1903) 190 U. S. 249, 47 L. ed. 1035, the United States may tax bequests payable to states.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

* * *

Counsel for the state maintain that the effect of § 76.34 is to impose upon domestic insurance companies a privilege or franchise tax, and not one on property or income; that no charge is laid upon bonds of the United States, but the fee exacted is for granted privileges, including exemption from personal property taxation and right to do business; that the state may require domestic corporations to pay privilege, franchise or license taxes measured by gross income, although partly derived from United States bonds; and that in no proper sense can the challenged tax be regarded as one directly imposed upon gross income.

They also suggest that this court has interpreted the statute and pointed out its real nature. Northwestern Mutual Life Ins. Co. v. State of Wisconsin, 247 U. S. 132, 137. Speaking there of this same statute we did declare:

"The tax in question, is, therefore, not only one for the privilege of doing life insurance business within the state, but is in effect a commutation tax, levied by the state in place of all other taxation upon the personal property of the company in the state of Wisconsin."

But no question was then raised concerning taxation of income derived from United States bonds. The point now presented was not involved.

It cannot be denied (and denial is not attempted) that bonds of the United States are beyond the taxing power of the states. Home Savings Bank v. City of Des Moines, 205 U. S. 503, 509; Farmers & Mechanics Bank v. Minnesota, 232 U. S. 516; and First National Bank v. Anderson, 269 U. S. 341, 347. Certainly since Gillespie v. Oklahoma, 257 U. S. 501, 505, it has been the settled doctrine here that where the principal is absolutely immune, no valid tax can be laid upon income arising therefrom. To tax this would amount practically to laying a burden on the exempted principal. Accordingly if the challenged act, whatever called, really imposes a direct charge upon interest derived from United States bonds, it is pro tanto void.

The fundamental question often presented in cases similar to these, is whether by the true construction of the statute the assessment must be regarded as a tax upon property or one on privileges or franchise of the corporation. Society for Savings v. Coite, 6 Wall. 594; Home Insurance Co. v. New York, 134 U. S. 594.

Section 76.34 undertakes to impose a charge not measured by dividends paid, as in Home Insurance Co. v. New York, 134 U. S. 594, nor by net income, as in Flint v. Stone-Tracy Co., 220 U. S. 107; and those cases are not controlling. The distinction between an imposition the amount of which depends upon dividends or net receipts and one measured by gross returns is clear. U. S. Glue Co.

v. Town of Oak Creek, 247 U. S. 321, 328, and earlier opinions there cited. * * *

Here the statute undertook to impose a charge of 3 per cent. upon every dollar of interest received by the company from United States bonds. So much, in any event, the state took from these very receipts. This amounts, we think, to an imposition upon the bonds themselves and goes beyond the power of the state.

The judgment below is reversed, and the cause will be remanded to the Supreme Court of the State of Wisconsin for further proceedings not inconsistent with this opinion.

Reversed.[6]

MACALLEN CO. v. MASSACHUSETTS.

1929. Supreme Court of the United States. 279 U. S. 620.

[A Massachusetts ~~statute of 1923~~ levied upon domestic business corporations annually "an excise equal to the sum of the following * * *: (1) An amount equal to five dollars per thousand upon the value of its corporate excess. (2) An ~~amount~~ equal to 2½% of ~~that part of its net income~~ * * * which is derived from business carried on within the commonwealth." Prior to an amendment enacted in 1925, "net income" for the purposes of (2) above was to be taken as the amount of net income in the corporation's federal income tax return with certain additions not adding, however, interest upon bonds, notes and certificates of indebtedness of the United States. The amendment of 1925 required all interest not included in the federal return to be added in making the return to the state. Under this statute as amended the tax herein complained of was paid, and the corporation sued in the state court for an abatement to the extent that it was illegally exacted. His petition was denied on demurrer. On appeal to the state supreme court the petition was dismissed and this appeal taken. Further facts appear in the opinion.]

Mr. Justice Sutherland delivered the opinion of the court.

* * *

Appellant, a business corporation organized under the laws of Massachusetts, owned a large number of United States Liberty bonds and Federal Farm Loan bonds. The Liberty bonds by statute of the United States are expressly made exempt from all taxation imposed by any state, except estate or inheritance taxes. C. 56,

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[6] May the value of a non-taxable subject be made the base for determining the tax to be levied upon a taxable subject? Compare with the above case, Home Insurance Co. v. New York, ante, p. 1578 and Flint v. Stone Tracy Co., ante, p. 1537. Note the recurrence of this question elsewhere in this chapter.

40 Stat. 288, 291, § 7. Federal Farm Loan bonds are issued under authority of c. 245, 39 Stat. 360, and, by § 26, p. 380, declared to be instrumentalities of the United States and both as to principal and income exempt from all state taxation. The corporation also owned a large number of bonds of Massachusetts counties and municipalities which, when issued and acquired by the corporation, were exempt from taxation by the terms of a state statute. * * *

The taxing authorities of the state assessed against appellant, for the year 1926, a tax * * * adding, for the purpose of computing the assessment, to the amount of the net income of appellant as determined by the federal income tax returns of appellant, all sums of interest received by appellant from the foregoing United States, Farm Loan, and county and municipal bonds. Without this addition, and under the original definition of net income, the amount of the tax assessed would have been materially less.

Appellant paid the amount assessed under protest and brought a petition for abatement of the tax under the provisions of the state law, setting forth the foregoing facts and alleging the unconstitutionality, under the federal Constitution, of the statute insofar as it was held to include interest derived from the tax-exempt securities: (1) as impairing the obligation of contracts; (2) as an attempt to impose a tax upon income derived from securities and instrumentalities of the United States; (3) as depriving petitioner of its property without due process of law and denying it the equal protection of the law in violation of the Fourteenth Amendment; (4) as an impairment and in derogation of the power of Congress to borrow money on the credit of the United States; and for other reasons not necessary for present purposes to be set forth. * * *

The court below predicates its decision upon a series of decisions of which Flint v. Stone Tracy Co., 220 U. S. 107, 163-165, is the extreme example, holding that a tax lawfully imposed upon the exercise of corporate privileges within the taxing power may be measured by income from the property of the corporation although a part of such income is derived from non-taxable property. See also Home Ins. Co. v. New York, 134 U. S. 594; Society for Savings v. Coite, 6 Wall. 594; Provident Institution v. Massachusetts, 6 Wall. 611. The distinction pointed out in these cases is between an attempt to tax the property or income as such and to measure a legitimate tax upon the privileges involved in the use thereof. It is implicit in all that the thing taxed in form was in fact and reality the subject aimed at, and that any burden put upon the non-taxable subject by its use as a measure of value was fortuitous and incidental.

The aphorism of Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 431, that "the power to tax involves the power to destroy," has frequently been reiterated by this court. The principle, of course, is important only where the tax is sought to be imposed upon a non-taxable subject, or, as said in Knowlton v. Moore, 178 U. S. 41, 60, "* * * the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope." Not only may the power to tax be exercised oppressively, but for one government—state or national—to lay a tax upon the instrumentalities or securities of the other is derogatory to the latter's dignity, subversive of its powers, and repugnant to its paramount authority. See California v. Pacific Railroad Co., 127 U. S. 1, 41. These constitute special and compelling reasons why courts, in scrutinizing taxing acts like that here involved, should be acute to distinguish between an exaction which in substance and reality is what it pretends to be, and a scheme to lay a tax upon a non-taxable subject by a deceptive use of words. The fact that a tax ostensibly laid upon a taxable subject is to be measured by the value of a non-taxable subject at once suggests the probability that it was the latter rather than the former that the law-maker sought to reach. If inquiry discloses persuasive grounds for the conclusion that such is the real purpose and effect of the legislation, the tax cannot be upheld without subverting the well-established rule that "* * * what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result * * * constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the latter, yet in substance and effect destroy the grant or limitation." Fairbank v. United States, 181 U. S. 283, 294, 300.

In the consideration of such legislation, the controlling principle, constantly to be borne in mind, is that the state cannot tax the instrumentalities or bonds of the United States, or, what is the same thing, the income derived therefrom, directly or indirectly—that is to say, it cannot tax *them* in any form. Words which, literally considered, import a tax upon something else,—a tax, for example, as here, upon the privilege of doing business measured in part by the amount of non-taxable interest received—may, nevertheless, be adjudged to lay a tax upon the interest, if that purpose be fairly inferable from a consideration of the history, the surrounding circumstances, or the statute itself considered in all its parts. See Home Savings Bank v. Des Moines, 205 U. S. 503, 510, 521.

On the one hand, the state is at liberty to tax a corporation with respect to the doing of its business. On the other hand, the state cannot tax the income of the corporation derived from non-taxable securities. It necessarily follows that the legislature may not, by an artful use of words, deprive this court of its authority to look beyond the words to the real legislative purpose. And the power and the duty of the court to do so is of great practical importance. For when the aim of the legislature is simply to tax the former, it is less likely to impose an injurious burden upon the latter than when the aim is directed primarily against the latter. See Galveston, Harrisburg, &c., Ry. Co. v. Texas, 210 U. S. 217, 227.

In Miller v. Milwaukee, 272 U. S. 713, this court had occasion to consider a question quite analogous to that here involved. In that case the state statute exempted the income from bonds of the United States held by corporations, but provided for taxing so much of the stockholders' dividends as corresponded to the income of the corporation not assessed. This court, holding the tax invalid, said (p. 715):

"It is a familiar principle that conduct which in usual situations the law protects may become unlawful when part of a scheme to reach a prohibited result. If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good. Under the laws of Wisconsin the income from the United States bonds may not be the only item exempted from the income tax on corporations, but it certainly is the most conspicuous instance of exemption at the present time. A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act. On that assumption the immunity of the national bonds is too important to allow any narrowing beyond what the Acts of Congress permit. We think it would be going too far to say that they allow an intentional interference that is only prevented from being direct by the artificial distinction between a corporation and its members. A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them, but it becomes a more serious attack upon their immunity when they are its obvious aim. In such a case the court must consider the public welfare rather than the artifices contrived for private convenience and must look at the facts."

See also Northwestern Ins. Co. v. Wisconsin, 275 U. S. 136; Alpha Cement Co. v. Massachusetts, 268 U. S. 203, 218; Frick v. Pennsylvania, 268 U. S. 473, 494-495; Nat'l Life Ins. Co. v. United States, 277 U. S. 508, 519.

A liberal application of the foregoing principles, which find confirmation especially in the latter decisions of this court, is essential to the preservation of the constitutional limitations imposed upon the taxing power of the states. Let it once be conceded that such limitations may be evaded by the adoption of a delusive name to characterize the tax or form of words to describe it, and the destruction of the vitality of these necessary safeguards will soon follow.

In the present case, it appears that the original statute exempted from consideration as a part of the measure of the tax all interest upon the non-taxable securities. The amended act now in force has the effect of repealing this original provision and imposing a burden upon the securities from which, by express language, they had theretofore been free. This was a distinct change of policy on the part of the commonwealth, adopted, as though it had been so declared in precise words, for the very purpose of subjecting these securities pro tanto to the burden of the tax. This conclusion is confirmed, if that be necessary, by the report of the special commission appointed by the legislature to investigate the subject of taxation of banking institutions, Mass. 1925 House Documents, No. 233, from which we quote:

"Further, the commission addressed itself to the question of what might properly be considered as 'net income' for the purposes of this proposed tax. The national banks and trust companies in their returns to the federal government and to the state under the 12½ per cent. income tax law are allowed certain deductions of income from specified types of securities in addition to the expense of conducting their business, bad debts, losses, etc. The business corporations, also, are allowed the same deductions. In the opinion of the commission there is no valid reason why, for purposes of this tax, such income exemption should be allowed. Corporations differ from the individual. Business corporations hold tax exempt securities generally, not because they fit into the purpose of their organization, but for the bearing they may have upon tax payments.

"The commission believes that the income upon which this tax should be laid, so far as national banks are concerned, should be the total net income from whatever source, after the proper deductions have been made for the cost of doing business and losses. So far as relates to the business corporations, the same should be the case in respect to the 2½ per cent. part of the excise measure based on net income.

"It is true that this extension of 'net income' for the purpose of this tax would increase the tax which business corporations now pay, but the commission after investigation believes that such increased tax would be relatively small. Many corporations invested in Liberty Bonds and other government securities during the war for patriotic reasons, which practice, so far as business corporations are concerned, is not generally prevalent at present, and the Commission believes will not exist in the future to any appreciable extent. So that it is its opinion that such, if any, increased burden upon business corporations will not be appreciable.

"In respect to national banks and trust companies the situation is somewhat different. Considerable in amount of the assets or surplus funds of financial institutions are invested from time to time in securities now exempt from taxation either under federal or state law. The income of banking institutions from these sources is relatively much greater than that of other corporations. In endeavoring to reach a basis for a fair and equitable tax on national banks the Commission, as previously stated in this report was limited to the methods permitted under Section 5219 of the United States Revised Statutes. A tax in the nature of an excise tax upon the income of the bank is an equitable and proper tax, * * *."

This report received the consideration of the legislature and, it is fair to suppose, constituted the basis for adopting the amendment here assailed. The effect of the report is that non-taxable bonds nevertheless should be subjected to the burden of the tax; and, since that it could not be imposed directly, the clear intimation is that it be imposed indirectly through the medium of the so-called "excise."

It has been suggested that the object of the change was to conform the taxation of business corporations to that authorized by Congress for the taxation of national banks. Whether under recent federal statutes, states are authorized to impose a tax upon the income from United States bonds held by national banks, we need not stop to inquire. Certainly there is no statute of the United States which undertakes to authorize a state to impose a tax upon such bonds held by other kinds of corporations. And what power Congress has under the Constitution in respect of such authorization we need not now determine. It is clear that authority, even if given, to impose a tax on federal bonds in the case of national banks does not include, by implication or otherwise, the authority to impose a tax upon such bonds held by ordinary corporations.

It is also suggested in that connection that the amendment in question is necessary, and that its real object was, to avoid discrimination forbidden by federal statutes against national banks. But it is enough to say that if such discrimination would otherwise result it must be avoided by some method which does not involve the imposition of a tax which uniformly for a century has been condemned by this court as unconstitutional. The state may not save itself from infringing an Act of Congress by violating the Constitution.

We conclude that the amended act in substance and effect imposes a tax upon federal bonds and securities; and it necessarily follows that the act in substance and effect also imposes a tax upon the county and municipal bonds. In both respects, the act is void. As to the former, the act is in derogation of the constitutional power of Congress to borrow money on the credit of the United States, as well as in violation of the Acts of Congress declaring such bonds and securities to be non-taxable; and as to the latter, the act impairs the obligation of the statutory contract of the state by which such bonds were made exempt from state taxation.

Judgment reversed.

Dissenting opinion of MR. JUSTICE STONE.

Petitioner is a corporation of the State of Massachusetts. Its very existence and the conduct of its business in corporate form are privileges conferred by the state, which, under the Constitution, it may tax. Under the constitution of Massachusetts the present tax can be upheld only if an excise and it and its predecessors have been consistently sustained as excises. S. S. White Dental Mfg. Co. v. Commonwealth, 212 Mass. 35, 37; Portland Bank v. Apthorp, 12 Mass. 252; Commonwealth v. Provident Institution, 94 Mass. 312; Commonwealth v. Hamilton Mfg. Co., 94 Mass. 298, 306; Eaton Crane & Pike Co. v. Commonwealth, 237 Mass. 523, 527; Alpha Portland Cement Co. v. Commonwealth, 244 Mass. 547. This interpretation of the nature of the exaction has been repeatedly approved by this court. Provident Institution v. Massachusetts, 6 Wall. 611; Hamilton Co. v. Massachusetts, 6 Wall. 632; cf. Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 84; National Leather Co. v. Massachusetts, 277 U. S. 413; Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 216. It is imposed "with respect to the carrying on or doing business," and is collectible only when the corporation has in fact been so engaged during the taxable year, see Fore River Shipbuilding Corp. v. Commonwealth, 248 Mass. 137, 140; Attorney General v. Boston & Albany R. R. Co., 233 Mass. 460. It is measured by the value of the corporate assets (with appropriate deductions for machinery and real estate otherwise taxed) and by net income earned within the state, which this court has often said are fair measures of the exercise of the corporate franchise. The tax is not measured by gross income as in Northwestern Mutual Life Insurance Co. v. Wisconsin, 275 U. S. 136, where the validity of an excise measured by net income including that from tax exempt securities of the United States was recognized. The distinction between net income and gross as the measure of a tax is well established. Peck & Co. v. Lowe, 247 U. S. 165; compare Crew Levick Co. v. Pennsylvania, 245 U. S. 292; United States Glue Co. v. Oak Creek, 247 U. S. 321, 328. Being on net income, the tax does not vary in exact proportion to the gross income from the tax exempt securities included in the aggregate.

There is no constitutional principle and no decision of this court, of which I am aware, which would deny to the state the power so to tax the privileges which it has conferred upon petitioner, even though all its property were tax exempt securities of the United States and income derived from them. For seventy years this court has consistently adhered to the principle that either the federal or state governments may constitutionally impose an excise tax on corporations for the privilege of doing business in corporate form, and measure the tax by the property or net income of the corporation, including the tax exempt securities of the other or income derived from them. Provident Institution v. Massachusetts, supra; Society for Savings v. Coite, 6 Wall. 594; Hamilton Co. v. Massachusetts, supra; Home Insurance Co. v. New York, 134 U. S. 594; Flint v. Stone Tracy Co., 220 U. S. 107, 162-5. In Flint v. Stone Tracy Co., a federal tax on corporations "with respect to carrying on or doing business" measured by net income, was held to be an excise, not a direct tax on property or income, and so was valid, although not apportioned under Art. I, § 2, cl. 3, § 9, cl. 4 of the Constitution and notwithstanding the fact that net income from tax exempt municipal bonds was included in the measure of the tax. In no technical sense does this tax seem open to objection. Being an excise the tax is not one on property or income and may include either in its measurement although not directly taxable.

Upon like principle a state inheritance tax may be measured by including the value of United States bonds of the decedent. Plummer v. Coler, 178 U. S. 115; Blodgett v. Silberman, 277 U. S. 1, 12; compare Greiner v. Lewellyn, 258 U. S. 384. Similarly an excise on a corporation may be measured by its outstanding capital stock, International Shoe Co. v. Shartel, ante, p. 429; Hump Hairpin Co. v. Emmerson, 258 U. S. 290; or by its net income, Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 120; United States Glue Co. v. Oak Creek, supra, even though a part of its capital is used in or some of its income is derived from interstate commerce.

It would seem that only considerations of public policy of weight, which appear to be here wholly wanting, would justify overturning a principle so long established. It has survived a great war, financed by the sale of government obligations; and it has never even been suggested that in any practical way it has impaired either the dignity or credit of the national government.

I suppose a certain advantage would be enjoyed by a corporation if the exercise of its corporate franchise in the purchase and use of securities of one government could not be taxed by the other. Theoretically the advantage would inure to each government in the marketing of its securities, just as would be the case if such securities of the taxpayer could not be seized and sold for the payment of any taxes lawfully levied by the state or national government. But the advantage of the one would be gained only at the expense of the other, and it would seem that neither immunity could be claimed under any reasonably practical application of the rule that government instrumentalities may not be taxed. In a broad sense, the taxing power of neither state nor national government can be exercised without having some effect on the other and there are many points at which the exercise of the undoubted power of one affects the other, but "the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with a minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax * * * or the appropriate exercise of the functions of the government affected by it." See Metcalf & Eddy v. Mitchell, 269 U. S. 514, 523.

Granted that a statute otherwise valid may be deemed improper when intended as a covert means of directly burdening ownership of securities of the other sovereignty, see Miller v. Milwaukee, 272 U. S. 713, I can discern no such sinister purpose in the present legislation. It was, of course, the intention of the Massachusetts legislature in the amendment of § 30, to deal specifically not alone with federal bonds but with the tax exempt securities of the commonwealth and its municipalities by including them in the measure of the excise tax. The amendment did not aim at securities of the national government or discriminate against them. It was obviously designed to impose on corporations generally, a tax similar to the excise on national banks, measured by net income, recommended by the legislative committee as a means of avoiding a then existing discrimination. The inclusion in the measure of the tax of income from all tax exempt securities tended only to effect this purpose, a similar computation of net income being contemplated for national banks. But in neither case is there anything to suggest that the legislature intended to impose a direct tax on income or do more than to impose an excise tax, measured by income, including that upon federal bonds, which this court has declared it may do. Its purpose was to prevent the evasion by corporations of payment of the tax which the commonwealth had fixed as the price of the privilege of doing business within it in corporate form, by any course of investment of their funds in tax exempt securities, state or national. As this seems to me to be a permissible purpose both on principle and by authority, I think the judgment below should be affirmed.[7]

Mr. Justice Holmes and Mr. Justice Brandeis concur in this opinion.

METCALF & EDDY v. MITCHELL.

1926. Supreme Court of the United States. 269 U. S. 514.

Mr. Justice Stone delivered the opinion of the court.

Metcalf & Eddy, the plaintiffs below, were consulting engineers who, either individually or as co-partners, were professionally employed to advise states or subdivisions of states with reference to proposed water supply and sewage disposal systems. During 1917 the fees received by them for these services were paid over to the firm and became a part of its gross income. Upon this portion of their net income they paid, under protest, the tax assessed on the net income of co-partnerships under the War Revenue Act of 1917 (Act of October 3, 1917, c. 63, § 209, 40 Stat. 300, 307). They then brought suit in the United States District Court for Massachusetts to recover the tax paid on the items in question, on the ground that they were expressly exempted from the tax by the Act itself, and on the further ground that Congress had no power under the Constitution to tax the income in question. * * *

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[7] See Thomas Reed Powell, The Macallen Case—and Before (1930) 8 Nat. Income Tax Magazine 47; The Macallen Case—and Beyond, ibid, 91.

All of the items of income were received by the taxpayers as compensation for their services as consulting engineers under contracts with states or municipalities, or water or sewage districts created by state statute. In each case the service was rendered in connection with a particular project for water supply or sewage disposal, and the compensation was paid in some instances on an annual basis, in others on a monthly or daily basis, and in still others on the basis of a gross sum for the whole service.

The War Revenue Act provided for the assessment of a tax on net income; but § 201(a) (40 Stat. at 303) contains a provision for exemption from the tax as follows:

"This title shall apply to all trades or businesses of whatever description, whether continuously carried on or not, except—

"(a) In the case of officers and employees under the United States, or any State, Territory, or the District of Columbia, or any local subdivision thereof, the compensation or fees received by them as such officers or employees * * *."

We think it clear that neither of the plaintiffs in error occupied any official position in any of the undertakings to which their writ of error in No. 183 relates. They took no oath of office; they were free to accept any other concurrent employment; none of their engagements was for work of a permanent or continuous character; some were of brief duration and some from year to year, others for the duration of the particular work undertaken. Their duties were prescribed by their contracts and it does not appear to what extent, if at all, they were defined or prescribed by statute. We therefore conclude that plaintiffs in error have failed to sustain the burden cast upon them of establishing that they were officers of a state or a subdivision of a state within the exception of § 201(a). * * *

Nor do the facts stated in the bill of exceptions establish that the plaintiffs were "employees" within the meaning of the statute. So far as appears, they were in the position of independent contractors. The record does not reveal to what extent, if at all, their services were subject to the direction or control of the public boards or officers engaging them. In each instance the performance of their contract involved the use of judgment and discretion on their part and they were required to use their best professional skill to bring about the desired result. This permitted to them liberty of action which excludes the idea of that control or right of control by the employer which characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor. Chicago, Rock Island & Pacific Ry. Co. v. Bond, 240 U. S. 449, 456; Standard Oil Co. v. Anderson, 212 U. S. 215, 227; and see Casement v. Brown, 148 U. S. 615; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 523.

We pass to the more difficult question whether Congress had the constitutional power to impose the tax in question, and this must be answered by ascertaining whether its effect is such as to bring it within the purview of those decisions holding that the very nature of our constitutional system of dual sovereign governments is such as impliedly to prohibit the federal government from taxing the instrumentalities of a state government, and in a similar manner to limit the power of the states to tax the instrumentalities of the federal government. See, as to federal taxation on state instrumentalities, Collector v. Day, 11 Wall. 113; United States v. Railroad Co., 17 Wall. 322; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 585, 586; Ambrosini v. United States, 187 U. S. 1; Flint v. Stone Tracy Co., 220 U. S. 107; see cases holding that the Sixteenth Amendment did not extend the taxing power to any new class of subjects, Brushaber v. Union Pacific R. R. Co., 240 U. S. 1; Peck & Co. v. Lowe, 247 U. S. 165, 172; Eisner v. Macomber, 252 U. S. 189; Evans v. Gore, 253 U. S. 245, 259. And, as to state taxation on federal instrumentalities, see McCulloch v. Maryland, 4 Wheat. 316; Dobbins v. Commissioners of Erie County, 16 Pet. 435; The Banks v. The Mayor, 7 Wall. 16; Weston v. The City Council of Charleston, 2 Pet. 449, 467; Farmers Bank v. Minnesota, 232 U. S. 516; Choctaw & Gulf R. R. v. Harrison, 235 U. S. 292; Indian Oil Co. v. Oklahoma, 240 U. S. 522; Gillespie v. Oklahoma, 257 U. S. 501.

Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other. Thus the employment of officers who are agents to administer its laws (Collector v. Day; Dobbins v. Commissioners of Erie County, supra), its obligations sold to raise public funds (Weston v. The City Council of Charleston, supra; Pollock v. Farmers' Loan & Trust Co., supra), its investments of public funds in the securities of private corporations, for public purposes (United States v. Railroad Co., supra), surety bonds exacted by it in the exercise of its police power (Ambrosini v. United

States, supra), are all so intimately connected with the necessary functions of government, as to fall within the established exemption; and when the instrumentality is of that character, the immunity extends not only to the instrumentality itself but to income derived from it (Pollock v. Farmers' Loan & Trust Co.; Gillespie v. Oklahoma, supra,) and forbids an occupation tax imposed on its use. Choctaw & Gulf R. R. Co. v. Harrison, supra; and see Dobbins v. Commissioners of Erie County, supra.

When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. Thomson v. Pacific Railroad, 9 Wall. 579; Railroad Co. v. Peniston, 18 Wall. 5; Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375; Gromer v. Standard Dredging Co., 224 U. S. 362, 371; Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319; Choctaw, O. & G. R. R. Co. v. Mackey, 256 U. S. 531.

As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other. McCulloch v. Maryland, supra; Collector v. Day; Dobbins v. Commissioners of Erie County, supra.

In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other. The burden of federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the states, and vice versa. Taxation by either the state or the federal government affects in some measure the cost of operation of the other.

But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax (South Carolina v. United States, 199 U. S. 437, 461; Flint v. Stone Tracy

Co., supra, at 172,) or the appropriate exercise of the functions of the government affected by it. Railroad Co. v. Peniston, supra, 31.

While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power.

It is on this principle that, as we have seen, any taxation by one government of the salary of an officer of the other, or the public securities of the other, or an agency created and controlled by the other, exclusively to enable it to perform a governmental function, (Gillespie v. Oklahoma, supra,) is prohibited. But here the tax is imposed on the income of one who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. The tax is imposed without discrimination upon income whether derived from services rendered to the state or services rendered to private individuals. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agency in any substantial way. Railroad Co. v. Peniston; Gromer v. Standard Dredging Co.; Baltimore Shipbuilding Co. v. Baltimore; Fidelity & Deposit Co. v. Pennsylvania; Choctaw, O. & G. R. R. Co. v. Mackey, supra.

As was said by this Court in Baltimore Shipbuilding Co. v. Baltimore, supra, in holding that a state might tax the interest of a corporation in a dry dock which the United States had the right to use under a contract entered into with the corporation:

"It seems to us extravagant to say that an independent private corporation for gain created by a state, is exempt from state taxation either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time." (p. 382.)

And as was said in Fidelity & Deposit Co. v. Pennsylvania, supra, in holding valid a state tax on premiums collected by bonding insurance companies on surety bonds required of United States officials:

"But mere contracts between private corporations and the United States do not necessarily render the former essential government agencies and confer freedom from state control." (p. 323.)

These statements we deem to be equally applicable to private citizens engaged in the general practice of a profession or the conduct of a business in the course of which they enter into contracts with government from which they derive a profit. We do not suggest that there may not be interferences with such a contract relationship by means other than taxation which are prohibited. Railroad Co. v. Peniston, supra, at p. 36, recognizes that there may. Nor are we to be understood as laying down any rule that taxation might not affect agencies of this character in such a manner as directly to interfere with the functions of government and thus be held to be void. See Railroad v. Peniston, supra, p. 36; Farmers Bank v. Minnesota, supra, p. 522; Choctaw & Gulf Railway Co. v. Harrison, supra, p. 272.

But we do decide that one who is not an officer or employee of a state, does not establish exemption from federal income tax merely by showing that his income was received as compensation for service rendered under a contract with the state; and when we take the next step necessary to a complete disposition of the question, and inquire into the effect of the particular tax, on the functioning of the state government, we do not find that it impairs in any substantial manner the ability of plaintiffs in error to discharge their obligations to the state or the ability of a state or its subdivisions to procure the services of private individuals to aid them in their undertakings. Cf. Central Pacific Railroad v. California, 162 U. S. 91, 126. We therefore conclude that the tax in No. 183 was properly assessed.

Judgment affirmed.

PANHANDLE OIL CO. v. MISSISSIPPI.

1928. Supreme Court of the United States. 277 U. S. 218.

Mr. Justice Butler delivered the opinion of the court.

Chapter 116 of the Laws of Mississippi of 1922 provided that "any person engaged in the business of distributing gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of 1c [one cent] per gallon upon the sale of gasoline * * *," except that sold in interstate commerce or purchased outside the state and brought in by the consumer for his own use. Chapter 115, Laws of 1924, increased the tax to three cents and c. 119, Laws of 1926, made it four cents per gallon. Since some time in 1925 petitioner has been engaged in that business. The state sued to recover taxes claimed on account of sales made by petitioner to the United States for the use of its Coast Guard Fleet in service in the Gulf of Mexico and its Veterans' Hospital at Gulfport. Some of the sales were made while the Act of 1924 was in force and some after the rate had been increased by the Act of 1926. Accordingly the demand was for three cents a gallon on some and four cents on the rest. Petitioner defended on the ground that these statutes, if construed to impose taxes on such sales, are repugnant to the federal Constitution. The court of first instance sustained that contention and the state appealed. The Supreme Court held the exaction a valid privilege tax measured by the number of gallons sold; that it was not a tax upon instrumentalities of the federal government and that the United States was not entitled to buy such gasoline without payment of the taxes charged dealers. 147 Miss. 663.

The United States is empowered by the Constitution to maintain and operate the fleet and hospital. Art. I, § 8. That authorization and laws enacted pursuant thereto are supreme (Art. VI); and, in case of conflict, they control state enactments. The states may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions. McCulloch v. Maryland, 4 Wheat. 316, 425, et seq. Dobbins v. The Commissioners of Erie County, 16 Pet. 435, 448. Ohio v. Thomas, 173 U. S. 276. Choctaw & Gulf R. R. v. Harrison, 235 U. S. 292. Indian Oil Co. v. Oklahoma, 240 U. S. 522. Johnson v. Maryland, 254 U. S. 51. Clallam County v. United States, 263 U. S. 341, 344. Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136. New Brunswick v. United States, 276 U. S. 547. The strictness of that rule was emphasized in Gillespie v. Oklahoma, 257 U. S. 501, 505. The right of the United States to make such purchases is derived from the Constitution. The petitioner's right to make sales to the United States was not given by the state and does not depend on state laws; it results from the authority of the national government under the Constitution to choose its own means and sources of supply. While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes.

The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales to the government. Wagner v. City of Covington, 251 U. S. 95, 102. A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital. McCulloch v. Maryland, supra, 436. Gillespie v. Oklahoma, supra, 505. Jaybird Mining Co. v. Weir, 271 U. S. 609, 613. To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. Telegraph Co. v. Texas, 105 U. S. 460. Frick v. Pennsylvania, 268 U. S. 473, 494. And that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the state.

The exactions demanded from petitioner infringe its right to have the constitutional independence of the United States in respect of such purchases remain untrammeled. Osborne v. United States Bank, 9 Wheat. 738, 867. Telegraph Co. v. Texas, supra. Cf. Terrace v. Thompson, 263 U. S. 197, 216. Petitioner is not liable for the taxes claimed.

Judgment reversed.[8]

Mr. Justice Holmes. * * * It seems to me that the state court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the states had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. But this court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this court sits. The power to fix rates is the power to destroy if unlimited, but this court while it endeavors to prevent confiscation does not prevent the fixing of rates. A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one. Hatch v. Reardon, 204 U. S. 152, 162.

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[8] Compare Long v. Rockwood (1928) 277 U. S. 142, 72 L. ed. 824, holding that a state could not require a resident to count as a part of his taxable income, what he received as royalties on inventor's patents granted by the United States. Holmes, J., dissenting (Brandeis, Sutherland and Stone, JJ., agreeing with him) said:

"The reasoning of the court is simple. If the state 'cannot tax the patent, it cannot tax the royalties received from its use.' * * * Why then cannot a state tax a patent by a tax that in no way discriminates against it? Obviously it is not true that patents are instrumentalities of the Government. They are used by the patentees for their private advantage alone. If the Government uses them it must pay like other people. Richmond Screw Anchor Co. v. United States, 275 U. S. 331. * * * National banks really are instrumentalities of the Government and directly concern the national credit. Indians are wards of the nation. Interstate commerce is left expressly to regulation by Congress and the states can intermeddle only by its consent. In this case the advantages expected by the Government are mainly the benefits to the public when the patent has expired and secondarily the encouragement of invention, Pennock v. Dialogue, 2 Peters, 1, 19. The most that can be said is that a tax is a discouragement so far as it goes and to that extent in its immediate operation runs counter to the Government intent. But patents would be valueless to their owner without the organized societies constituted by the states, and the question is why patents should not contribute as other property does to maintaining that without which they would be of little use." Mr. Justice Holmes also referred to the reasons stated in his dissenting opinion in Panhandle Oil Co. v. Mississippi, which was decided on the same day.

To come down more closely to the question before us, when the Government comes into a state to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the state and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else. The cost of maintaining the state that makes the business possible is just as necessary an element in the cost of production as labor or coal. * * * The question of interference with Government, I repeat, is one of reasonableness and degree and it seems to me that the interference in this case is too remote. Metcalf & Eddy v. Mitchell, 269 U. S. 514.

Mr. Justice Brandeis and Mr. Justice Stone agree with this opinion. [Mr. Justice McReynolds also delivered a dissenting opinion.]

BONAPARTE v. TAX COURT.

1881. Supreme Court of the United States. 104 U. S. 592.

Error to the Court of Appeals of the State of Maryland.

[Mrs. Elizabeth Patterson, a resident of Baltimore, Md., returned in accordance with the law of that state to the proper board of assessors, the following property: New York state, city and county "stocks," and Pennsylvania and Ohio state "stocks" and claimed their exemption from taxation because they were of a public character and * * * were exempt from taxation by the laws of the states respectively authorizing their issue. They were of the character known as "registered"; i. e., transferable only on the public record books of the states and municipalities issuing them, and the interest was paid only at places provided by the laws of those states and beyond the boundaries of Maryland. Her petition to have these stocks stricken from the lists was allowed by the Baltimore City Court but its decision was reversed by the Maryland Court of Appeals, whereupon she sued out this writ of error.]

Mr. Chief Justice Waite delivered the opinion of the court.

The question we are asked to decide in this case is whether the registered public debt of one state, exempt from taxation by the debtor state, or actually taxed there, is taxable by another state when owned by a resident of the latter state. We know of no provision of the Constitution of the United States which prohibits such taxation. It is conceded that no obligation of the contract of the debtor state is impaired. The only agreement as to taxation was that the debt should not be taxed by the state which created it.

It is insisted, however, that the immunity asked for arises from Art. IV, Sec. 1, of the Constitution, which provides that full faith and credit shall be given in each state to the public acts of every other state. We are unable to give such an effect to this provision. No state can legislate except with reference to its own jurisdiction. One state cannot exempt property from taxation in another. Each state is independent of all the others in this particular. We are referred to no statute of the debtor state which attempts to separate the situs of the debt from the person of the owner, even if that is within the scope of the legislative power of the state. The debt was registered; but that did not prevent it from following the person of its owner. The debt still remained a chose in action, with all the incidents which pertain to that species of property. It was "movable" like other debts, and had none of the attributes of "immovability." The owner may be compelled to go to the debtor state to get what is owing to him; but that does not affect his citizenship or his domicile. The debtor state is in no respect his sovereign, neither has it any of the attributes of sovereignty as to the debt it owes, except such as belong to it as a debtor. All the obligations which rest on the holder of the debt as a resident of the state in which he dwells still remain, and as a member of society he must contribute his just share towards supporting the government whose protection he claims and to whose control he has submitted himself.

It is true, if a state could protect its securities from taxation everywhere, it might succeed in borrowing money at reduced interest; but, inasmuch as it cannot secure such exemption outside of its own jurisdiction, it is compelled to go into the market as a borrower, subject to the same disabilities in this particular as individuals. While the Constitution of the United States might have been so framed as to afford relief against such a disability, it has not been, and the states are left free to extend the comity which is sought, or not, as they please.

Taxation of the debt within the debtor state does not change the legal situs of the debt for any other purpose than that of the tax which is imposed. Neither does exemption from taxation.

As the only federal question involved was decided right in the court below, we cannot look into the other errors which have been assigned. Murdock v. City of Memphis, 20 Wall. 590.

Judgment affirmed.[9]

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[9] On the subject-matter of this section, see State Taxation of Federal Instrumentalities (1930) 30 Col. L. Rev. 92-103.

Section 4.—Jurisdiction to Tax—Persons and Property.

HAAVIK v. ALASKA PACKERS ASSN.

1924. Supreme Court of the United States. 263 U. S. 510.

Appeal from a District Court of the United States. MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Appellant challenges the validity of the Act of the Alaska Legislature approved May 1, 1919 (c. 29, Session Laws 1919), which imposes upon each male person, with certain exceptions, within the territory or the waters thereof an annual poll tax of five dollars to be used for school purposes; and also that portion of the Act of the same Legislature approved May 5, 1921 (c. 31, Session Laws 1921), which imposes an annual license tax of five dollars upon every nonresident fisherman—the term "to include all persons employed on a boat engaged in fishing."

Congress established an organized government for Alaska by the Act of August 24, 1912, c. 387, 37 Stat. 512. It declares that "the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." It also created a Legislature with power and authority, which "shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," subject to specified restrictions. One of them is this—"nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents."

While residing in California appellant was employed by appellee corporation, owner and operator, to serve as seaman and fisherman upon the sailing vessel, Star of Finland. He sailed upon her to Alaska and served with her there while she engaged in fishing, from the middle of May, 1921, until the middle of September. In compliance with the above-mentioned statutes, appellee paid the taxes which they imposed upon him and, on final settlement, charged the same against his wages. By this proceeding he seeks to recover the amount so deducted. Without opinion the court below sustained the validity of the taxes. Both statutes have been considered and upheld by the Circuit Court of Appeals for the Ninth Circuit. Alaska Packers' Association v. Hedenskoy, 267 Fed. 154; Northern Commercial Co. v. Territory of Alaska, 289 Fed. 786.

Plainly, we think, the Territorial Legislature had authority under the terms of the Organic Act to impose both the head and the license tax unless, for want of power, Congress itself could not have laid them by direct action. Talbott v. Silver Bow County, 139 U. S. 438, 448; Binns v. United States, 194 U. S. 486, 491; Alaska Pacific

Fisheries v. United States, 248 U. S. 78, 87; Territory of Alaska v. Troy, 258 U. S. 101.

Appellant went to the Territory for the purpose of engaging in the business of fishing and remained there for at least four months. He was not merely passing through—not a mere sightseer or tourist—but for a considerable period while so employed enjoyed the protection and was within the jurisdiction of the local government. To require him to contribute something toward its support did not deprive him of property without due process of law within the Fifth Amendment. Such cases as Dewey v. Des Moines, 173 U. S. 193, and Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 202, relied upon to support the contrary view, are not controlling.

The tax was upon an individual actually within the Territory; there was no attempt to reach something in a mere state of transit or beyond the borders. Some general rules touching the taxation of property were pointed out in Brown v. Houston, 114 U. S. 622, 632, 633, and Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18. No more stringent ones should be applied when poll taxes are questioned. Unless restrained by constitutional provision, the sovereign has power to tax all persons and property actually within its jurisdiction and enjoying the benefit and protection of its laws. Cooley on Taxation, 3d ed., p. 22.

We are not here concerned with taxation by a state. The license tax cannot be said to conflict with § 2, Art. IV, of the Constitution—"the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." It applies only to nonresident fishermen; citizens of every state are treated alike. Only residents of the Territory are preferred. This is not wholly arbitrary or unreasonable, and we find nothing in the Constitution which prohibits Congress from favoring those who have acquired a local residence and upon whose efforts the future development of the Territory must largely depend. See Alaska Pacific Fisheries v. United States, supra, and Alaska Fish Co. v. Smith, 255 U. S. 44, 47, 48.

None of the points relied upon by appellant is well taken and the decree below must be

Affirmed.[1]

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[1] Kuntz v. Davidson County (1880) 6 Lea (Tenn.) 65 (holding that a resident alien may be subjected to a nondiscriminatory state poll tax): "The right to tax an individual results from the general protection afforded to himself and property and depends on residence, not citizenship."

DEWEY v. DES MOINES.

1899. Supreme Court of the United States. 173 U. S. 193.

Error to the Supreme Court of Iowa.

The petition in this case was filed by the plaintiff in error to set aside certain assessments upon his lots in Des Moines, in the State of Iowa, which had been imposed thereon for the purpose of paying for the paving of the street upon which the lots abutted, and to obtain a judgment enjoining proceedings towards their sale, and adjudging that there was no personal liability to pay the excess of the assessment above the amount realized upon the sale of the lots.

The petition alleged that the petitioner was at all times during the proceedings mentioned a resident of Chicago, in the State of Illinois, and that he had no actual notice of any of the proceedings looking towards the paving of the street upon which his lots abutted; that the street was paved under the direction of the common council, which decided upon its necessity, and the expense was, by the provisions of the Iowa statute, assessed upon the abutting property, and the lot owner made personally liable for its payment; that the expense of the improvement was greater than the value of the lots assessed, and the common council knew it would be greater when the paving was ordered. * * *

Upon the trial the district court of Polk County gave judgment dismissing the petition with costs, and in favor of the contractor on his counterclaim, foreclosing the lien of the latter and ordering the sale of the lots, and the judgment also provided for the issue of a personal or general execution against the plaintiff in error to collect any balance remaining unpaid after sale of the lots. * * *

The Supreme Court affirmed the judgment of the District Court, and the plaintiff brought the case here by writ of error.

Mr. Justice Peckham, after stating the facts, delivered the opinion of the court. * * *

It is asserted in the petition that the defendant Dillworth, the treasurer of Holt County, is attempting to enforce the assessment levied by the common council, and that he claims plaintiff in error is personally liable for the taxes and interest, and will enforce payment thereof unless restrained, and that plaintiff's personal property is liable to be illegally seized for the payment of the tax. These allegations are substantially admitted by the answers of the defendants, except as to the illegality of the possible seizure of plaintiff's personal property. By filing the counterclaim the contractor makes a direct attempt to enforce, not only the lien upon the lots, but the personal liability of the lot owner. Thus a nonresident, simply because he was the owner of property on a street in a city in the State of Iowa, finds himself by the provisions of the state statute, and without the service of any process upon him, laid under a personal obligation to pay a tax assessed by the common council, or by the board of public works and city engineer under the statute, upon his property abutting upon the street, for the purpose of paying the expenses incurred in paving the street, which expenses are greater than the benefit the lots have received by virtue of the improvement. The plaintiff, prior to the imposition of that assessment, had never submitted himself to the jurisdiction of the State of Iowa, and the only jurisdiction that state had in the assessment proceedings was over the real property belonging to him and abutting on the street to be improved. An assessment upon lots, for a local improvement, is in the nature of a judgment.

It is said that the statute (Code of Iowa, sec. 478) provides for the personal liability of the owner of lots in a city in the State of Iowa, to pay the whole tax or assessment levied to pay the cost of a local improvement, and that the same statute provides that the assessment shall also be a lien upon the respective lots from the time of the assessment. It is also said that the statute has been held to be valid by the Iowa Supreme Court. This seems to be true. Burlington v. Quick, 47 Iowa, 222, 226; Farwell v. Des Moines Brick Manufacturing Co., 97 Iowa, 286. The same thing is also held in the opinion of the state court delivered in the case now before us.

In this case no question arises with regard to the validity of a personal judgment like the one herein against a resident of the State of Iowa, and we therefore express no opinion upon that subject. This plaintiff was at all times a nonresident of that state, and we think that a statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lot owner, who is a nonresident of the state, a personal liability to pay such assessment, is a statute which the state has no power to enact, and which cannot therefore furnish any foundation for a personal claim against such nonresident. There is no course of reasoning as to the character of an assessment upon lots for a local improvement by which it can be shown that any jurisdiction to collect the assessment personally from a nonresident can exist. The state may provide for the sale of the property upon which the assessment is laid, but it cannot under any guise or pretence proceed farther and impose a personal liability upon a nonresident to pay the assessment or any part of it. To enforce an assessment of such a nature against a nonresident, so far as his personal liability is concerned, would amount to the taking of property without due process of law, and would be a violation of the federal Constitution.

In this proceeding of the lot owner to have the assessment set aside and the statutory liability of plaintiff adjudged invalid the court was not justified in dismissing the petition and giving the contractor, not only judgment on his counterclaim foreclosing his lien, but also inserting in that judgment a provision for a personal liability against the plaintiff and for a general execution against him. Such a provision against a nonresident, although a litigant in the courts of the state, was not only erroneous but it was so far erroneous as to constitute, if enforced, a violation of the federal Constitution for the reason already mentioned. By resorting to the state court to obtain relief from the assessment and from any personal liability provided for by the statute, the plaintiff did not thereby in any manner consent, or render himself liable, to a judgment against him providing for any personal liability. Nor did the counterclaim made by the defendant contractor give any such authority.

The principle which renders void a statute providing for the personal liability of a nonresident to pay a tax of this nature is the same which prevents a state from taking jurisdiction through its courts, by virtue of any statute, over a nonresident not served with process within the state, to enforce a mere personal liability, and where no property of the nonresident has been seized or brought under the control of the court. This principle has been frequently decided in this court. One of the leading cases is Pennoyer v. Neff, 95 U. S. 714, and many other cases therein cited. Mexican Central Railway v. Pinkney, 149 U. S. 194, 209.

The lot owner never voluntarily or otherwise appeared in any of the proceedings leading up to the levying of the assessment. He gave no consent which amounted to an acknowledgment of the jurisdiction of the city or common council over his person.

A judgment without personal service against a nonresident is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a nonresident further than respects the property so taken. This is as true in the case of an assessment against a nonresident of such a nature as this one as in the case of a more formal judgment.

The jurisdiction to tax exists only in regard to persons and property or upon the business done within the state, and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a nonresident personally liable to pay a tax of the nature of the one in question. All subjects over which the sovereign power of the state extends are objects of taxation. Cooley on Taxation, 1st ed. pp. 3, 4; Burroughs on Taxation, sec. 6. The power of the state to tax extends to all objects within the sovereignty of the state. (Per Mr. Justice Clifford, in Hamilton Company v. Massachusetts, 6 Wall. 632, at 638.) The power to tax is however limited to persons, property and business within the state, and it cannot reach the person of a nonresident. State Tax on Foreign-Held Bonds, 15 Wall. 300, 319. In Cooley on Taxation, 1st ed. p. 121, it is said that "a state can no more subject to its power a single person or a single article of property whose residence or legal situs is in another state, than it can subject all the citizens or all the property of such other state to its power." These are elementary propositions, but they are referred to only for the purpose of pointing out that a statute imposing a personal liability upon a nonresident to pay such an assessment as this oversteps the sovereign power of a state.

In this case the contractor, by filing his counterclaim herein, has commenced the enforcement of an assessment and a personal liability imposed by virtue of just such a statute, and the judgment under review gives him the right to do so. The lot owner is called upon to make such defence as he can to the claim of personal liability or else be forever barred from setting it up. He does claim that as a nonresident he did not have such notice, and the state or city did not obtain such jurisdiction over him, with regard to the original assessment as would authorize the establishment of any personal liability on his part to pay such assessment.

The contractor nevertheless has obtained a judgment, not alone for a foreclosure of his lien, but also for the personal liability of the lot owner, and unless he can in this proceeding have the provision in the judgment, for a personal liability, stricken out, the lot owner cannot thereafter resist it, even when the lots fail (if they should fail) to bring enough on their sale to satisfy the judgment.

The case of Davidson v. New Orleans, 96 U. S. 97, has been cited as authority for the proposition that the rendering of a personal judgment for the amount of an assessment for a local improvement is a matter in which the state authorities cannot be controlled by the federal Constitution. It does not appear in that case that the complaining party, in regard to the state statute, was a nonresident of the state, but on the contrary it would seem that she was a resident thereof. That fact is a most material one, and renders the case so unlike the one at bar as to make it unnecessary to further refer to it.

The statute, upon which the right to enter this personal judgment depends, being as to the nonresident lot owner an illegal enactment, it follows that the judgment should and must be amended by striking out the provision for such personal liability. For that purpose the judgment is

Reversed.

COOK v. TAIT.

1924. Supreme Court of the United States. 265 U. S. 47.
[Printed ante, p. 379.]

UNION REFRIGERATOR TRANSIT CO. v. KENTUCKY.

1905. Supreme Court of the United States. 199 U. S. 194.

[The Union Transit Company, a Kentucky corporation, was the owner of 2,000 cars which it rented to shippers, who took possession of them at Milwaukee, Wis., and used them for carriage of freight on railroads in the United States, Canada and Mexico, the company being paid by the railroads in proportion to the mileage the cars were used over their lines. A Kentucky revenue agent brought suit in a Kentucky court to recover state and local property taxes on the company's cars for the years 1897 to 1900. The trial court found that there was an average number of the company's cars used in Kentucky during each of the tax years, varying from 28 for 1897 to 67 for 1900, and held that such numbers of cars only could be taxed by Kentucky. The Court of Appeals of Kentucky reversed this judgment, holding that the entire 2,000 cars were taxable by Kentucky, and the company took this writ of error.]

MR. JUSTICE BROWN delivered the opinion of the court.

In this case the question is directly presented whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property, permanently located in other states, and employed there in the prosecution of its business. Such taxation is charged to be a violation of the due process of law clause of the Fourteenth Amendment.

Section 4020 of the Kentucky statutes, under which this assessment was made, provides that "All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, * * * shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

That the property taxed is within this description is beyond controversy. The constitutionality of the section was attacked not only upon the ground that it denied to the Transit Company due process of law, but also the equal protection of the laws, in the fact that railroad companies were only taxed upon the value of their rolling stock used within the state which was determined by the proportion which the number of miles of the railroad in the state bears to the whole number of miles operated by the company.

The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. Railroad Company v. Jackson, 7 Wall. 262; State Tax on Foreign-held Bonds, 15 Wall. 300; Tappan v. Merchants' National Bank, 19 Wall. 490, 499; Delaware &c. R. R. Co. v. Pennsylvania, 198 U. S. 341, 358. In Chicago &c. R. R. Co. v. Chicago, 166 U. S. 226, it was held, after full consideration, that the taking of private property without compensation was a denial of due process within the Fourteenth Amendment. See also Davidson v. New Orleans, 96 U. S. 97, 102; Missouri Pacific Railway v. Nebraska, 164 U. S. 403, 417; Mount Hope Cemetery v. Boston, 158 Mass. 509, 519.

Most modern legislation upon this subject has been directed (1) to the requirement that every citizen shall disclose the amount of his property subject to taxation and shall contribute in proportion to such amount; and (2) to the voidance of double taxation. As said by Adam Smith in his "Wealth of Nations," Book V., Ch. 2, Pt. 2, "the subjects of every State ought to contribute towards the support of the government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the State. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interest in the estate. In the observation or neglect of this maxim consists what is called equality or inequality of taxation."

But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or of a road tax, though he never use the road. In other words a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot. Kelly v. Pittsburgh, 104 U. S. 78; Amesbury Nail Factory Co. v. Weed, 17 Mass. 53; Thomas v. Gay, 169 U. S. 264; Louisville &c. R. R. Co. v. Barber Asphalt Co., 197 U. S. 430. Subject to these individual exceptions, the rule is that in classifying property for taxation some benefit to the property taxed is a controlling consideration, and a plain abuse of this power will sometimes justify a judicial interference. Norwood v. Baker, 172 U. S. 269. It is often said protection and payment of taxes are correlative obligations.

It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state, receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land which, to be taxable, must be within the limits of the state. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another state, much less where such action has been defended by any court. It is said by this court in the Foreign-held Bond Case, 15 Wall. 300, 319, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a state is not a subject upon which her taxing power can be legitimately exercised.

The argument against the taxability of land within the jurisdiction of another state applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing state, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the state with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived. As we said in Louisville &c. Ferry Co. v. Kentucky, 188 U. S. 385, 396: "While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government." See also

McCulloch v. Maryland, 4 Wheat. 316, 429; Hays v. Pacific Mail S. S. Co., 17 How. 596, 599; St. Louis v. Ferry Co., 11 Wall. 423, 429, 431; Morgan v. Parham, 16 Wall. 471, 476.

Respecting this, there is an obvious distinction between the tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs, except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a state other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim mobilia sequuntur personam, and to hold that the property may be taxed at the domicil of the owner as the real situs of the debt, and also, more particularly in the case of mortgages, in the state where the property is retained. Such has been the repeated rulings of this court. Tappan v. Merchants' National Bank, 19 Wall. 490; Kirtland v. Hotchkiss, 100 U. S. 491; Bonaparte v. Tax Court, 104 U. S. 592; Sturgis v. Carter, 114 U. S. 511; Kidd v. Alabama, 188 U. S. 730; Blackstone v. Miller, 188 U. S. 189.

If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the state of the domicil or the situs. Of course, we do not enter into a consideration of the question, so much discussed by political economists, of the double taxation involved in taxing the property from which these securities arise, and also the burdens upon such property, such as mortgages, shares of stock and the like—the securities themselves.

The arguments in favor of the taxation of intangible property at the domicil of the owner have no application to tangible property. The fact that such property is visible, easily found and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its situs, that of late there is a general consensus of opinion that it is taxable in the state where it is permanently located and employed, and where it receives its entire protection, irrespective of the domicil of the owner. We have, ourselves, held in a number of cases that such property permanently located in a state other than that of its owner is taxable there. Brown v. Houston, 114 U. S. 622; Coe v. Errol, 116 U. S. 517; Pullman's Car Co. v. Pennsylvania, 141 U. S. 18; Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530; Railroad Company v. Peniston, 18 Wall. 5; American Refrigerator Transit Company v. Hall, 174 U. S. 70; Pittsburgh Coal Company v. Bates, 156 U. S. 577; Old Dominion Steamship Company v. Virginia, 198 U. S. 299. We have also held that, if a corporation be engaged in running railroad cars into, through, and out of the state, and having at all times a large number of cars within the state, it may be taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the state bears to the whole number of miles in all the states over which its cars are run. Pullman's Car Co. v. Pennsylvania, 141 U. S. 18.

There are doubtless cases in the state reports announcing the principle that the ancient maxim of mobilia sequuntur personam still applies to personal property, and that it may be taxed at the domicil of the owner, but upon examination they all or nearly all relate to intangible property, such as stocks, bonds, notes, and other choses in action. We are cited to none applying this rule to tangible property, and after a careful examination have not been able to find any wherein the question is squarely presented, unless it be that of Wheaton v. Mickel, 63 N. J. Law, 525. * * *

But there are two recent cases in this court which we think completely cover the question under consideration and require the reversal of the judgment of the state court. The first of these is that of the Louisville &c. Ferry Co. v. Kentucky, 188 U. S. 385. That was an action to recover certain taxes imposed upon the corporate franchise of the defendant company, which was organized to establish and maintain a ferry between Kentucky and Indiana. The defendant was also licensed by the state of Indiana. We held that the fact that such franchise had been granted by the commonwealth of Kentucky did not bring within the jurisdiction of Kentucky, for the purpose of taxation, the franchise granted to the same company by Indiana, and which we held to be an incorporeal hereditament, derived from and having its legal situs in that state. It was adjudged that such taxation amounted to a deprivation of property without due process of law, in violation of the Fourteenth Amendment; as much so as if the state taxed the land owned by that company; and that the officers of the state had exceeded their power in taxing the whole franchise without making a deduction for that obtained from Indiana, the two being distinct, "although the enjoyment of both are essential to a complete ferry right for the transportation of persons and property across the river both ways."

The other and more recent case is that of the Delaware &c. Railroad Co. v. Pennsylvania, 198 U. S. 341. * * *

The adoption of a general rule that tangible personal property in other states may be taxed at the domicil of the owner involves possibilities of an extremely serious character. Not only would it authorize the taxation of furniture and other property kept at country houses in other states or even in foreign countries, of stocks of goods and merchandise kept at branch establishments when already taxed at the state of their situs, but of that enormous mass of personal property belonging to railways and other corporations which might be taxed in the state where they are incorporated, though their charters contemplated the construction and operation of roads wholly outside the state, and sometimes across the continent, and when in no other particular they are subject to its laws and entitled to its protection. The propriety of such incorporations, where no business is done within the state, is open to a grave doubt, but it is possible that legislation alone can furnish a remedy.

Our conclusion upon this branch of the case renders it unnecessary to decide the second question, viz: Whether the Transit Company was denied the equal protection of the laws.

It is unnecessary to say that this case does not involve the question of the taxation of intangible personal property, or of inheritance or succession taxes, or of questions arising between different municipalities or taxing districts within the same state, which are controlled by different considerations.

We are of opinion that the cars in question, so far as they were located and employed in other states than Kentucky, were not subject to the taxing power of that commonwealth, and that the judgment of the Court of Appeals must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.[2]

MR. JUSTICE WHITE concurred in the result.

MR. JUSTICE HOLMES: It seems to me that the result reached by the court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment, and as the Chief Justice feels the same difficulty, I think it proper to say that my doubt has not been removed.

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[2] Southern Pacific Co. v. Kentucky (1911) 222 U. S. 63, 56 L. ed. 96: Vessels belonging to the Southern Pacific Company, a Kentucky corporation, were held subject to a property tax levied by Kentucky. They plied only on the ocean between the ports of New York and New Orleans, New York and Galveston, New Orleans and Havana, never going to Kentucky. The rule formulated was that vessels which have "no actual situs elsewhere" are taxable at the domicile of the owner.

Vessels continuously and exclusively plying the waters of a state are taxable there though the owner is domiciled in another state. Old Dominion S. S. Co. v. Virginia (1905) 198 U. S. 299, 49 L. ed. 1059, 3 Ann. Cas. 1100. Vessels engaged in interstate or foreign commerce are not taxable at their ports of call, if the owner does not reside in the state, and this is true even as to a port at which the vessel is refitted and repaired—this restriction being attributed to the commerce clause. Hays v. Pacific Mail S. S. Co. (1855) 17 How. 596, 15 L. ed. 254, and see Ayer & Lord Tie Co. v. Kentucky (1906) 202 U. S. 409, 50 L. ed. 1082, 6 Ann. Cas. 205.

"In United States v. Bennet, 232 U. S. 299, 306, where this court had occasion to explain the restrictive operation of the due process of law clause of the Fourteenth Amendment, as applied to the taxation by one state of property in another, and to distinguish the operation of the like clause of the Fifth Amendment, as applied to the taxation by the United States of a vessel belonging to one of its citizens and located in foreign waters, it was said:

" 'The application to the states of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one state to reach out and tax property in another without violating the Constitution, for where the power of the one ends the authority of the other begins. But this has no application to the Government of the United States so far as its admitted taxing power is con-

ADAMS EXPRESS CO. v. OHIO STATE AUDITOR.

1897. Supreme Court of the United States. 166 U. S. 185.

[The case involved the validity of the assessment for taxation by the State of Ohio of the property in Ohio of the Adams Express Company, for three separate years, the assessment for 1893 being typical. The company was organized under the laws of New York. Its only tangible property in Ohio in 1893 consisted of personalty, chiefly office furniture, horses and wagons, having a value of $53,080 and real estate valued at $25,170. The latter was taxed separately. The board of assessors fixed the company's assessment at $460,033. This was done under a statute which required every express company doing business in the state to state to the board the par value and the market value of all its shares, its gross receipts from business done within the state, and all its real and personal property in the state. The statute further provided: "Said board of appraisers and assessors shall, in the determining the value of the property of said companies in this state to be taxed within the state and assessed as herein provided, be guided by the value of said property as determined by the value of the entire capital stock of said company, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said company, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid." 69 Fed. 550. An affidavit of a member of the board states: "Taking all the information the board had or could secure, the value of the capital stock of the company, its gross receipts within Ohio, the return of the personal property made, and the character thereof, and evidence of undervaluations and omissions therein, the number of officers, the amount of business done, the nature and value of the property and capital required to carry on such business, and other evidence and information, the board, in each instance, ascertained what it considered the fair proportion of the property of the company employed by it in Ohio, and fixed the value of the property of such company situate and taxable therein; being guided, in determining the value of the property, by the value of the entire capital stock, and other evidence and information before the board." 69 Fed. 552.

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cerned. It is coextensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution and therefore embraces all the attributes which appertain to sovereignty in the fullest sense. Indeed the existence of such a wide power is the essential resultant of the limitation restricting the states within their allotted spheres. * * *'" Van Devanter, J., in Frick v. Pennsylvania (1925) 268 U. S. 473, 491, 69 L. ed. 1058, 42 A. L. R. 316.

The company brought a bill in the Circuit Court of the United States to enjoin the board from certifying to the counties the proportion of the gross assessment to be collected in each county. The court dismissed the bill. The dismissal was affirmed by the Circuit Court of Appeals. 69 Fed. 546. On appeal the Supreme Court also affirmed, 165 U. S. 194.[3] The following opinion was delivered in denying a petition for a rehearing.]

MR. JUSTICE BREWER delivered the opinion of the court.

We have had before us at the present term several cases involving the taxation of the property of express companies, some coming from Ohio, some from Indiana, and one from Kentucky; also a case from the latter state involving the taxation of the property of the Henderson Bridge Company. The Ohio and Indiana cases were decided on the 1st of February. (165 U. S. 194.) Petitions for rehearing of those cases have been presented and are now before us for consideration.

The importance of the questions involved, the close division in this court upon them, and the earnestness of counsel for the express companies in their original arguments, as well as in their briefs on this application, lead those of us who concurred in the judgments to add a few observations to what has hitherto been said.

Again and again has this court affirmed the proposition that no state can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce. And it has as often affirmed that such restriction upon the power of a state to interfere with interstate commerce does not in the least degree abridge the right of a state to tax at their full value all the instrumentalities used for such commerce.

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[3] Delivering the opinion of the court upon the first hearing, Fuller, C. J., said: "As to railroad, telegraph and sleeping car companies, engaged in interstate commerce, it has often been held by this court that their property, in the several states through which their lines or business extended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular state, without violating any federal restriction. Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530; Massachusetts v. Western Union Telegraph Co., 141 U. S. 40; Maine v. Grand Trunk Railway, 142 U. S. 217; Pittsburgh, Cincinnati &c. Railway v. Backus, 154 U. S. 421; Cleveland, Cincinnati &c. Railway v. Backus, 154 U. S. 439; Western Union Telegraph Co. v. Taggart, 163 U. S. 1; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18. The valuation was, thus, not confined to the wires, poles and instruments of the telegraph company; or the roadbed, ties, rails and spikes of the railroad company; or the cars of the sleeping car company; but included the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular state, is in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole, Pittsburgh &c. Railway v. Backus, 154 U. S. 421; or taking as the basis of assessment such proportion of the capital stock of a sleeping car company as the number of miles of railroad over which its cars are run in a particular state bears to the whole number of miles traversed by them in that and other states, Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a state bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state, Western Un. Tel. Co. v. Taggart, 163 U. S. 1."

Now the taxes imposed upon express companies by the statutes of the three States of Ohio, Indiana, and Kentucky are certainly not in terms "privilege taxes." They purport to be upon the property of the companies. They are, therefore, not, in form at least, subject to any of the denunciations against privilege taxes which have so often come from this court. The statutes grant no privilege of doing an express business, charge nothing for doing such a business, and contemplate only the assessment and levy of taxes upon the property of the express companies situated within the respective states. And the only really substantial question is whether, properly understood and administered, they subject to the taxing power of the state property not within its territorial limits. The burden of the contention of the express companies is that they have within the limits of the state certain tangible property, such as horses, wagons, etc.; that that tangible property is their only property within the state; that it must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them.

But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. In the complex civilization of today a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the federal Constitution which restrains a state from taxing at its real value such intangible property. Take the simplest illustration: B, a solvent man, purchases from A certain property, and gives to A his promise to pay, say, $100,000 therefor. Such promise may or may not be evidenced by a note or other written instrument. The property conveyed to B may or may not be of the value of $100,000. If there be nothing in the way of fraud or misrepresentation to invalidate that transaction, there exists a legal promise on the part of B to pay to A $100,000. That promise is a part of A's property. It is something of value, something on which he will receive cash, and which he can sell in the markets of the community for cash. It is as certainly property, and property of value, as if it were a building or a steamboat, and is as justly subject to taxation. It matters not in what this intangible property consists—whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which though intangible exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. Now, whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon be the separate pieces of tangible property?

The first question to be considered therefore is whether there is belonging to these express companies intangible property—property differing from the tangible property—a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is something of no value, is to insult the common intelligence of every man. Take the Henderson Bridge Company's property, the validity of the taxation of which is before us in another case.[4] The facts disclosed in that record show that the bridge company owns a bridge over the Ohio, between the city of Henderson in Kentucky and the Indiana shore, and also ten miles of railroad in Indiana; that that tangible property—that is, the bridge and railroad track—was assessed in the States of Indiana and Kentucky at $1,277,695.54, such, therefore, being the adjudged value of the tangible property. Thus the physical property could presumably be reproduced by an expenditure of that sum, and if placed elsewhere on the Ohio River, and without its connections or the business passing over it or the franchises connected with it, might not of itself be worth any more. As mere bridge and tracks, that was its value. If the state's power of taxation is limited to the tangible property, the company should only be taxed in the two states for that sum, but it also appears that it, as a corporation, had issued bonds to the amount of $2,000,000, upon which it was paying interest; that it had a capital stock of $1,000,000, and that the shares of that stock were worth not less than $90 per share in the market. The owners, therefore, of that stock had property which for purposes of income and purposes of sale was worth $2,900,000. What gives this excess of value? Obviously the franchises, the privileges the company possesses—its intangible property.

Now, it is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation. Suppose such a bridge were entirely within the territorial limits of a state, and it appeared that the bridge itself cost only $1,277,000, could be reproduced for that sum, and yet it was so situated with reference to railroad or other connections, so used by the traveling public, that it was worth to the holders of it in the matter of income $2,900,000, could be sold in the markets for that sum, was therefore in the eyes of practical business men of the value of $2,900,000, can there be any doubt of the state's power to assess it at that sum, and to collect taxes from it upon that basis of value? Substance of right demands that whatever be the real value of any property, that value may be accepted by the state for purpose of taxation, and this ought not to be evaded by any mere confusion of words. Suppose an express company is incorporated to transact business within the limits of a state, and does business only within such limits, and for the purpose of transacting that business purchases and holds a few thousands of dollars' worth of horses and wagons, and yet it so meets the wants of the people dwelling in that state, so uses the tangible property which it possesses, so transacts business therein that its stock becomes in the markets of the state of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other, while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation.

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[4] Henderson Bridge Co. v. Kentucky (1897) 166 U. S. 150, 41 L. ed. 953.

A distinction must be noticed between the construction of a state law and the power of a state. If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But if the state comprehends all property in its scheme of taxation, then the good will of an organized and established industry must be recognized as a thing of value. The capital stock of a corporation and the shares in a joint stock company represent not only the tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges, and good will of the concern.

Now, the same reality of the value of its intangible property exists when a company does not confine its work to the limits of a single state. Take, for instance, the Adams Express Company. According to the return filed by it with the auditor of the State of Ohio, as shown in the records of these cases, its number of shares was 120,000, the market value of each $140 to $150. Taking the smaller sum, gives the value of the company's property taken as an entirety as $16,800,000. In other words, it is worth that for the purposes of income to the holders of the stock and for purposes of sale in the markets of the land. But in the same return it shows that the value of its real estate in Ohio was only $25,170; of real estate owned outside of Ohio, $3,005,157.52; or a total of $3,030,327.52; the value of its personal property in Ohio, $42,065; of personal property outside of Ohio, $1,117,426.05; or a total of $1,159,491.05, making a total valuation of its tangible property $4,189,818.57, and upon that basis it insists that taxes shall be levied. But what a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the purposes of income and sale $16,800,000, to be adjudged liable for taxation only upon one fourth of that amount. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale.

It is suggested that the company may have bonds, stocks, or other investments which produce a part of the value of its capital stock, and which have a special situs in other states or are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are, and do not determine rights upon mere possibilities. If half of the property of the Adams Express Company, which by its own showing is worth $16,000,000 and over, is invested in United States bonds, and therefore exempt from taxation, or invested in any way outside the business of the company and so as to be subject to purely local taxation, let that fact be disclosed, and then if the State of Ohio attempts to include within its taxing power such exempted property, or property of a different situs, it will be time enough to consider and determine the rights of the company.[5] That if such facts exist they must be taken into consideration by a state in its proceedings under such tax laws as are here presented has been heretofore recognized and distinctly affirmed by this court. Pittsburgh, Cincinnati, etc. Railway Co. v. Backus, 154 U. S. 421, 443; Western Union Telegraph Co. v. Taggart, 163 U. S. 1, 23; Adams Express Co. v. Ohio, 165 U. S. 194, 227. Presumably all that a corporation has is used in the transaction of its business, and if it has accumulated assets which for any reason affect the question of taxation, it should disclose them. It is called upon to make return of its property, and if its return admits that it is possessed of property of a certain value, and does not disclose anything to show that any portion thereof is not subject to taxation, it cannot complain if the state treats its property as all taxable.

But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different states, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000, and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. Every state within which it is transacting business and where it has its property, more or less, may rightfully say that the $16,000,000 of value which it possesses springs not merely from the original grant of corporate power by the state which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises, and privileges into a single unit of property, and this state contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. That this is true is obvious from the result that would follow if all the states other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continue to own all its tangible property within each of those states, but unable to transact the express business within their limits, that $12,000,000 of value attributable to its intangible property would shrivel to a mere trifle.

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[5] In determining the value of the entire business of a foreign company for the purpose of imputing to its business-property in the state a pro rata of that value, any of the company's property outside the state which is not used in the same business must be deducted. Fargo v. Hart (1904) 193 U. S. 490, 48 L. ed. 761.

It may be true that the principal office of the corporation is in New York, and that for certain purposes the maximum of the common law was *"mobilia personam sequuntur,"* but that maxim was never of universal application, and seldom interfered with the right of taxation. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 22. It would certainly seem a misapplication of the doctrine expressed in that maxim to hold that by merely transferring its principal office across the river to Jersey City the situs of $12,000,000 of intangible property for purposes of taxation was changed from the State of New York to that of New Jersey. * * *

It is said that the views thus expressed open the door to possibilities of gross injustice to these corporations, through the conflicting action of the different states in matters of taxation. That may be so, and the courts may be called upon to relieve against such abuses. But such possibilities do not equal the wrong which sustaining the contention of the appellant would at once do. In the city of New York are located the headquarters of a corporation, whose corporate property is confessedly of the value of $16,000,000—a value which can be realized by its stockholders at any moment they see fit. Its tangible property and its business is scattered through many states, all whose powers are invoked to protect its property from trespass and secure it in the peaceful transaction of its widely dispersed business. Yet because that tangible property is only $4,000,000 we are told that that is the limit of the taxing power of these states. In other words, it asks these states to protect property which to it is of the value of $16,000,000, but is willing to pay taxes only on the basis of a valuation of $4,000,000. The injustice of this speaks for itself.

In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no finespun theories about situs should interfere to enable these large corporations, whose business is carried on through many states, to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires.

The petition for a rehearing is

Denied.

[WHITE, J., with the concurrence of FIELD, HARLAN and BROWN, JJ., dissenting, said in part:]

If the rule contended for by the State of Ohio be true, why would it not apply to a corporation, partnership, or individual engaged in the dry goods business or any other business having branches in various states? Would it not be as proper to say of such agencies, as it is of the agencies of express companies, that there is an intellectual unity of earnings between the main establishment and all such agencies, and therefore a right to assess goods found in an agency with relation to the capital and wealth of the original house and all the other branches situated in other states? Take the case of a merchant carrying on a general commercial business in one state and having connections of confidence and credit with another merchant of great capital in another state. If this rule be true, can it not also be said that such merchant derives advantages in his business from the sum of the capital in other states which may be availed of to extend his credit and his capacity to do business, and that therefore his tangible property must be valued accordingly? Suppose bankers in Boston, Philadelphia, and New York of great wealth, owning stocks and bonds of various kinds, send representatives to New Orleans with a limited sum of money there to commence business. These representatives rent offices and buy office furniture. Is it not absolutely certain that the business of those individuals would be largely out of proportion to the actual capital possessed by them, because of the fact that reflexly and indirectly their business and credit is supported by the home offices? In this situation, the assessor comes for their tax return. He finds noted thereon only a limited sum of money and the value of the office furniture. What is to prevent that official under the rule of supposed metaphysical or intellectual unity between property from saying: "It is true you have but a small tangible capital, and your office furniture is only worth $250, but the value of property is in its use, and as you have various elements of wealth situated in the cities named, I will assess your property because of its use at a million dollars?" Such conduct would be exactly in accord with the power of taxation which it is here claimed the State of Ohio possesses, and which, as I understand it, the court now upholds. To give the illustrations, I submit, is to point to the confusion, injustice, and impossibility of such a rule.

UNION TANK LINE CO. v. WRIGHT.

1919. Supreme Court of the United States. 249 U. S. 275.

Error to the Supreme Court of Georgia.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

This cause requires us to consider the power of a state to lay and collect taxes upon instrumentalities of interstate commerce which move both within and without its jurisdiction.

Union Tank Line—plaintiff in error—an equipment company incorporated in New Jersey which has never carried on business or had an office in Georgia, owns twelve thousand tank cars suitable for transporting oil over railroads and rents them to shippers at agreed rates, based on size and capacity. The roads over which they move also pay therefor stipulated compensation. Under definite contract certain of these cars were furnished to the Standard Oil Company of Kentucky and all of those which came into Georgia were being operated by the Oil Company under such agreement. They were not permanently within that state but passed "in and out." * * *

Defendant in error expressly admitted that the average number of cars in Georgia during 1913 was fifty-seven, the value of each being $830—total $47,310; that the owner had paid into the state treasury as taxes the full amount required on such valuation and during that year had no other property in the state. * * *

[The Comptroller General of Georgia assessed the Tank Line's property in Georgia for 1913 at $291,196. This figure was arrived at by taking that proportion of the total value ($10,518,333.16) of the tank car company's cars and other personal property wherever used or located which the length of railroad lines in Georgia over which the company's cars ran during the year (6,976.5 miles) bore to the length of lines everywhere over which cars of the company ran (251,999 miles). The company sued in a Georgia court to restrain collection of the alleged excess thus assessed. The trial court held this assessment good. On appeal the state supreme court affirmed this judgment, saying:]

"The several code sections embody the statutory scheme for taxing cars of equipment companies whose cars are handled over the railroads in this state. Owing to the nature of the business, it is difficult to ascertain the number of cars of equipment companies that come into this state and designate the identity of each car or its value. The purpose of the statute is to provide a reasonable method for determining the fact that cars come into this state and the values thereof, to the end that the equipment companies allowing their cars to come into this state may bear their just proportion of taxes leviable in this state. The scheme of the statute is what is sometimes called the track-mileage basis of apportionment, or what in a more general way is termed the unit rule. The comptroller-general followed the statute. The unit rule has been upheld by the Supreme Court of the United States, in regard to railroads, telegraph companies, and sleeping-car companies. Kentucky Railroad Tax Cases, 115 U. S. 321; Western Union Telegraph Company v. Massachusetts, 125 U. S. 530; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18. And this principle of average has been approved in regard to refrigerator-cars. American Refrigerator Transit Co. v. Hall, 174 U. S. 70; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149. It has even been held that the unit rule of valuation could properly be applied to the valuation of property of express companies within a certain state, though there was no physical connection with property beyond the state. * * * It seems to us, therefore, that the case falls within the rule laid down by the Supreme Court of the United States, as above mentioned, and that there are no such circumstances as to bring it within the ruling made in Fargo v. Hart, 193 U. S. 490."

A state may not tax property belonging to a foreign corporation which has never come within its borders—to do so under any formula would violate the due process clause of the Fourteenth Amendment. In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the state according to their fair value along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well "the intangible value due to what we have called the organic relation of the property in the state to the whole system." How to appraise them fairly when the tangibles constitute part of a going concern operating in many states often presents grave difficulties; and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisement producing results approximately correct—for example, the mileage basis in case of a telegraph company (Western

Union Telegraph Co. v. Massachusetts), and the average amount of property habitually brought in and carried out by a car company (American Refrigerator Transit Co. v. Hall). But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both. Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530; Marye v. Baltimore & Ohio R. R. Co., 127 U. S. 117; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 26; Adams Express Co. v. Ohio, 165 U. S. 194; S. C. 166 U. S. 185; American Refrigerator Transit Co. v. Hall, 174 U. S. 70; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, Fargo v. Hart, 193 U. S. 490; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453.

In the present case the Comptroller General made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all states. Real values—the essential aim—of property within a state cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto. During a year two or three cars might pass over every mile of railroad in one state while hundreds constantly employed in another moved over lines of less total length. Fifty-seven was the average number of cars within Georgia during 1913 and each had a "true" value of $830. Thus the total there subject to taxation amounted to $47,310—the challenged assessment specified $291,196.

We think plaintiff in error's property was appraised according to an arbitrary method which produced results wholly unreasonable and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce.

Pullman's Palace Car Co. v. Pennsylvania, supra, relied on by defendant in error, contains the following passage which seems to uphold the Georgia rule—"The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that state, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles, in that and other states, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more." But the point therein spoken of was unnecessary to determination of the cause; and so far as the quoted passage sanctions the specified rule for ascertaining values as generally appropriate, just, unobjectionable and productive of conclusive results, it must be regarded as obiter dictum, and we cannot now approve or follow it.

Reference to the original record upon which that case came here will aid in understanding the exact issues presented. Pennsylvania demanded taxes of the Pullman Company, an Illinois corporation, for the years 1870 to 1880, upon such portion of its capital stock as total miles of railroad in Pennsylvania over which its cars moved bore to like total in all states. No statute prescribed the method of valuation; it had been adopted by executive officers. The Court of Common Pleas declared: "On the facts defendant claims that no part of its capital stock is invested in this state. The argument is that its cars are personal property, and, as they are not permanently located in this state, but pass into, through, and out of it, this personal property has no taxable situs in Pennsylvania, and could not be taxed specifically in any given locality; and therefore, it is contended, as the tax on capital stock is a tax on the property in which the capital is invested, the latter cannot be taxed. * * * We hold, therefore, that the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts, and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by defendant in this state bears to the whole number of miles operated by it, without regard to the question where any particular car or cars were used; * * * The defendant is liable to tax on the proportion of its capital stock invested in this state, as represented by the coaches and cars owned and used by it here. * * * Determining the amount of the tax on the principle above stated, it is as follows: Tax for years 1870 to 1880, inclusive, $16,321.89." The Supreme Court affirmed this view, saying: "While the tax on the capital stock of the company 'is a tax on its property and assets,' yet the capital stock of a company and its property and assets are not identical. The coaches of the company are its property. They are operated within this state. They are daily passing from one end of the state to the other. They are used in performing the functions for which the corporation was created. The fact that they also are operated in other states cannot wholly exempt them from taxation here. It reduces the value of property in this state justly subject to taxation here. This was recognized in the court below, and we think the [proportion] preference was fixed according to a just and equitable rule."

In 1870 the Pullman Company's capital stock amounted to three million dollars, in 1880 it had grown to six million; all cars actually owned by the company (leased ones not included) during 1871, numbered 241, and in 1880, 472, their total value being $4,334,000, and $8,588,000 respectively; one hundred cars were operated within Pennsylvania during each of the eleven years; total miles of track everywhere passed over by the company cars during 1880 amounted to 57,099, within Pennsylvania 5,127, and these figures adequately represent the proportion for other years: total tax held due for the eleven years amounted to $16,321.89. While the record does not disclose the precise valuations upon which taxes were computed, enough does appear to show that they were far below (perhaps not one-third) the actual worth of a hundred cars.

The company demanded complete exemption upon the ground that its cars were moving in interstate commerce and had no taxable situs in Pennsylvania. The appraisement was not challenged as excessive; if the property was taxable in Pennsylvania the rule adopted may have been decidedly favorable to the owner and the assessment a moderate one. Having failed to challenge amount of the assessment, the company could not well complain of the rule under which this was fixed. In such circumstances reasonableness of the rule was not really in question and what was said of it cannot control here where the very point is presented for decision. Cohens v. Virginia, 6 Wheat. 264, 399; McCormick Machine Co. v. Aultman, 169 U. S. 606, 611. See also Adams Express Co. v. Ohio, supra.

In other opinions of this court cited below to support the conclusion there reached we upheld the power of a state to tax property actually within its jurisdiction upon a fair valuation considered as part of a going concern—they give no sanction to arbitrary and inflated valuations. Taxes must follow realities, not mere deductions from inadequate or irrelevant data.

In Fargo v. Hart, supra, we condemned an assessment ostensibly proportioned to mileage where property without the state and unnecessary to the Express Company's actual business had been included; and we pointed out that under no formula can a state tax things wholly beyond its jurisdiction.

The same considerations which establish invalidity of the assessment of plaintiff in error's property for 1913 apply to like ones made by the Comptroller General for all other years in question.

Judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.[6]

MR. JUSTICE DAY, in view of the undisputed facts of this case, concurs in the result.

[MR. JUSTICE PITNEY, with whom were MR. JUSTICE BRANDEIS and MR. JUSTICE CLARK, delivered a dissenting opinion.]

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[6] See also Wallace v. Hines (1920) 253 U. S. 66, 64 L. ed. 782; Southern R. Co. v. Kentucky (1927) 274 U. S. 76, 71 L. ed. 934.

NEW YORK CENTRAL & HUDSON RIVER R. CO. v. MILLER.

1906. Supreme Court of the United States. 202 U. S. 584.

MR. JUSTICE HOLMES delivered the opinion of the court.

These cases arise upon writs of certiorari, issued under the state law and addressed to the state comptroller for the time being, to revise taxes imposed upon the relator for the years 1900, 1901, 1902, 1903 and 1904 respectively. The tax was levied under New York Laws of 1896, c. 908, § 182, which, so far as material, is as follows: "Franchise Tax on Corporations.—Every corporation * * * incorporated * * * under * * * law in this state, shall pay to the state treasurer annually, an annual tax to be computed upon the basis of the amount of its capital stock employed within this state and upon each dollar of such amount," at a certain rate, if the dividends amount to six per cent or more upon the par value of such capital stock. "If such dividend or dividends amount to less than six per centum on the par value of the capital stock [as was the case with the relator], the tax shall be at the rate of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within this state bears to the entire capital of the corporation." It is provided further by the same section that every foreign corporation, etc., "shall pay a like tax for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital employed by it within this state."

The relator is a New York corporation owning or hiring lines without as well as within the state, having arrangements with other carriers for through transportation, routing and rating, and sending its cars to points without as well as within the state, and over other lines as well as its own. The cars often are out of the relator's possession for some time, and may be transferred to many roads successively, and even may be used by other roads for their own independent business, before they return to the relator or the state. In short, by the familiar course of railroad business a considerable proportion of the relator's cars constantly is out of the state, and on this ground the relator contended that that proportion should be deducted from its entire capital, in order to find the capital stock employed within the state. This contention the comptroller disallowed. * * *

On rehearing of No. 81 and with it No. 82, before the comptroller, now Miller, no evidence was offered to prove that any of the relator's cars or engines were used continuously and exclusively outside of the state during the whole tax year. In the later cases it was admitted that no substantial amount of the equipment was so used during the similar period. * * *

We are not curious to inquire exactly what kind of a tax this is to be called. If it can be sustained by the name given to it by the local courts it must be sustained by us. It is called a franchise tax in the act, but it is a franchise tax measured by property. A tax very like the present was treated as a tax on the property of the corporation in Delaware, Lackawanna & Western R. R. v. Pennsylvania, 198 U. S. 341, 353. This seems to be regarded as such a tax by the Court of Appeals in this case. See People v. Morgan, 178 N. Y. 433, 439. If it is a tax on any franchise which the State of New York gave, and the same state could take away, it stands at least no worse. The relator's argument assumes that it must be regarded as a tax of a particular kind, in order to invalidate it, although it might be valid if regarded as the state court regards it.

Suppose, then, that the State of New York had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of the state. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 201, 211; Delaware, Lackawanna & Western R. R. v. Pennsylvania, 198 U. S. 341; Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U. S. 385. But it has not been decided, and it could not be decided, that a state may not tax its own corporations for all their property within the state during the tax year, even if every item of that property should be taken successively into another state for a day, a week, or six months, and then brought back. Using the language of domicil, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts. Ayer & Lord Tie Co. v. Kentucky, May 21, 1906, 202 U. S. 409. See also Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 208, 209.

It was suggested that this case is but the complement of Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, and that as there a tax upon a foreign corporation was sustained, levied on such proportion of its capital stock as the miles of track over which its cars were run within the state bore to the whole number of miles over which its cars were run, so here in the domicil of such a corporation there should be an exemption corresponding to the tax held to be lawfully levied elsewhere. But in that case it was found that the "cars used in this state have, during all the time for which tax is charged, been running into, through and out of the state." The same cars were continuously receiving the protection of the state and, therefore, it was just that the state should tax a proportion of them. Whether if the same amount of protection had been received in respect of constantly changing cars the same principle would have applied was not decided, and it is not necessary to decide now. In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other state as to be taxable there. The absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home.

Judgments affirmed.

SAVINGS & LOAN SOCIETY v. MULTNOMAH COUNTY.

1898. Supreme Court of the United States. 169 U. S. 421.

Appeal from the Circuit Court of the United States.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a bill in equity, filed in the Circuit Court of the United States for the District of Oregon, by the Savings and Loan Society, a corporation and citizen of the State of California, against Multnomah County, a public corporation in the State of Oregon, and one Kelly, the sheriff and ex officio the tax collector of that county, and a citizen of that state, showing that in 1891 and 1892 various persons, all citizens of Oregon, severally made their promissory notes to secure the payment of various sums of money, with interest, to the plaintiff at its office in the city of San Francisco and State of California, amounting in all to the sum of $531,000; and, to further secure the same debts, executed to the plaintiff mortgages of divers parcels of land owned by them in Multnomah County; that the mortgages were duly recorded in the office of the recorder of conveyances of that county; that the notes and mortgages were immediately delivered to the plaintiff, and had ever since been without the State of Oregon, and in the possession of the plaintiff at San Francisco; that afterwards, in accordance with the statute of Oregon of October 26, 1882, taxes were imposed upon all the taxable property in Multnomah County, including the debts and mortgages aforesaid; that, the taxes upon these debts and mortgages not having been paid, a list thereof was placed in the hands of the sheriff, with a warrant directing him to collect the same as upon execution, and he advertised for sale all the debts and mortgages aforesaid; and that the statute was in violation of the Fourteenth Amendment of the Constitution of the United States, as depriving the plaintiff of its property without due process of law, and denying to it the equal protection of the laws. The bill prayed for an injunction against the sale; and for a decree declaring that the statute was contrary to the provisions of the Constitution of the United states and therefore of no effect, and that all the proceedings before set out were null and void; and for further relief.

The defendants demurred generally; and the court sustained the demurrer, and dismissed the bill. 60 Fed. Rep. 31. The plaintiff appealed to this court. * * *

Taking all the provisions of the statute into consideration, its clear intent and effect are as follows: The personal obligation of the mortgagor to the mortgagee is not taxed at all. The mortgage and the debt secured thereby are taxed, as real estate, to the mortgagee, not beyond their real cash value, and only so far as they represent an interest in the real estate mortgaged. The debt is not taxed separately, but only together with the mortgage; and is considered as indebtedness within the state for no other purpose than to enable the mortgagor to deduct the amount thereof from the assessment upon him, in the same manner as other indebtedness within the state is deducted. And the mortgagee, as well as the mortgagor, is entitled to have deducted from his own assessment the amount of his indebtedness within the state.

The result is that nothing is taxed but the real estate mortgaged, the interest of the mortgagee therein being taxed to him, and the rest to the mortgagor. There is no double taxation. Nor is any such discrimination made between mortgagors and mortgagees, or between resident and non-resident mortgagees, as to deny to the latter the equal protection of the laws.

No question between the mortgagee and the mortgagor, arising out of the contract between them, in regard to the payment of taxes, or otherwise, is presented or can be decided upon this record.

The case, then, reduces itself to the question whether this tax act, as applied to mortgages owned by citizens of other states and in their possession outside of the State of Oregon, deprives them of their property without due process of law.

By the law of Oregon, indeed, as of some other states of the Union a mortgage of real property does not convey the legal title to the mortgagee, but creates only a lien or incumbrance as security for the mortgage debt; and the right of possession, as well as the legal title, remains in the mortgagor, both before and after condition broken, until foreclosure. 1872, § 323; Hill's Code, § 326.

* * *

Notwithstanding this, it has been held, both by the Supreme Court of the State, and by the Circuit Court of the United States for the District of Oregon, that the state has the power to tax mortgages, though owned and held by citizens and residents of other states, of lands in Oregon. Mumford v. Sewell, 11 Oregon, 67; Dundee Mortgage Co. v. School District, 10 Sawyer, 52; Crawford v. Linn County, 11 Oregon, 482; Dundee Mortgage Co. v. Parrish, 11 Sawyer, 92; Poppleton v. Yamhill County, 18 Oregon, 377, 383; Savings & Loan Society v. Multnomah County, 60 Fed. Rep. 31.

In Mumford v. Sewell, Judge Waldo, delivering the opinion of the court, said: "All subjects, things as well as persons, over which the power of the state extends, may be taxed." "A mortgage, as such, is incorporeal property. It may be the subject of taxation." "Concede that the debt accompanies the respondent's person and is without the jurisdiction of the state. But the security she holds is Oregon security. It cannot be enforced in any other jurisdiction. It is local in Oregon absolutely as the land which it binds." "Since the power of the state over the mortgage is as exclusive and complete as over the land mortgaged, the mortgage is subject to taxation by the state, unless there is constitutional limitation to the contrary." 11 Oregon, 68, 69. * * *

The authority of every state to tax all property, real and personal, within its jurisdiction, is unquestionable. McCulloch v. Maryland, 4 Wheat. 316, 429. Personal property, as this court has declared again and again, may be taxed, either at the domicil of its owner, or at the place where the property is situated, even if the owner is neither a citizen nor a resident of the state which imposes the tax. Tappan v. Merchants' Bank, 19 Wall. 490, 499; State Railroad Tax cases, 92 U. S. 575, 607; Coe v. Errol, 116 U. S. 517, 524; Pullman's Car Co. v. Pennsylvania, 141 U. S. 18, 22, 27. The state may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this, either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purposes of taxation, either treat the mortgage debt as personal property, to be taxed, like other choses in action, to the creditor at his domicil; or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property, at its situs. Firemen's Ins. Co. v. Commonwealth, 137 Mass. 80, 81; State v. Runyon, 12 Vroom (41 N. J. Law), 98, 105; Darcy v. Darcy, 22 Vroom (51 N. J. Law), 140, 145; People v. Smith, 88 N. Y. 576, 585; Common Council v. Assessors, 91 Michigan, 78, 92.

The plaintiff much relied on the opinion delivered by Mr. Justice Field in Cleveland, Painesville & Ashtabula Railroad v. Pennsylvania, reported under the name of Case of the State Tax on Foreign-held Bonds, 15 Wall. 300, 323. It becomes important therefore to notice exactly what was there decided. In that case, a railroad company, incorporated both in Ohio and in Pennsylvania, had issued bonds secured by a mortgage of its entire road in both states; and the tax imposed by the State of Pennsylvania, which was held by a majority of this court to be invalid, was a tax upon the interest due to the bondholders upon the bonds, and was not a tax upon the railroad, or upon the mortgage thereof, or upon the bondholders solely by reason of their interest in that mortgage. The remarks in the opinion, supported by quotations from opinions of the Supreme Court of Pennsylvania, that a mortgage, being a mere security for the debt, confers upon the holder of the mortgage no interest in the land, and when held by a non-resident is as much beyond the jurisdiction of the state as the person of the owner, went beyond what was required for the decision of the case, and cannot be reconciled with other decisions of this court and of the Supreme Court of Pennsylvania.[7] * * *

In Kirtland v. Hotchkiss, 42 Conn. 426, affirmed by this court in 100 U. S. 491, the point adjudged was that debts to persons residing in one state, secured by mortgage of land in another state, might, for the purposes of taxation, be regarded as situated at the domicil of the creditor. But the question, whether the mortgage could be taxed there only, was not involved in the case, and was not decided, either by the Supreme Court of Connecticut or by this court. * * *

The statute of Oregon, the constitutionality of which is now drawn in question, expressly forbids any taxation of the promissory note, or other instrument of writing, which is the evidence of the debt secured by the mortgage; and, with equal distinctness, provides for the taxation, as real estate, of the mortgage interest in the land. Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, it appears to us to be clear upon principle, and in accordance with the weight of authority, that this interest, like any other interest legal or equitable, may be taxed to its owner (whether resident or non-resident) in the state where the land is situated, without contravening any provision of the Constitution of the United States.

Decree affirmed.[8]

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissented.

MR. JUSTICE MCKENNA, not having been a member of the court when this case was argued, took no part in the decision.

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[7] "We rest upon the oft-cited passage from the notable opinion of Mr. Justice Field in State Tax on Foreign-held Bonds, 15 Wall. pp. 320, 324: 'To call debts property of the debtors is simply to misuse terms. * * * Their debts can have no locality separate from the parties to whom they are due. * * * But other personal property, consisting of bonds, mortgages, and debts generally, has no situs independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners.' Counsel for the appellants treat this case as a practically overruled case. They find in one opinion a statement that this case has been cut down to its true basis by subsequent opinions. We think the opinion in its main theme is as sound authority as when written and that it has always been regarded by the courts as a leading case. The constant citation of this case by its own court, as well as this language from Mr. Justice Peckham's opinion in Buck v. Beach, 206 U. S. 392, 408, 27 Sup. Ct. 712, confirms our opinion of its present authority: 'Although the language of the opinion in the case of State Tax on Foreign-held Bonds, supra, has been somewhat restricted so far as regards the character of the interest of the mortgagee in the land mortgaged, Savings & Loan Society v. Multnomah County, 169 U. S. 421, 428, 18 Sup. Ct. 392, the principle upon which the case itself was decided has not been otherwise shaken by the later cases.' " Wheeler, C. J., in Lockwood v. Blodgett (1927) 106 Conn. 525, 535-536, 138 Atl. 520.

[8] Compare taxation of a nonresident's leasehold interest in land by the state in which the land lies. (1930) 43 Harv. L. Rev. 505.

No provision of the Constitution of the United States, it is said, is violated by

CORRY v. BALTIMORE.

1905. Supreme Court of the United States. 196 U. S. 466.

The New York and Baltimore Transportation Line was chartered in 1847 by the general assembly of Maryland, and it still exists by virtue of an extension in 1876 of its charter. At all times the corporation has maintained its principal office in the city of Baltimore.

James C. Corry, a resident and citizen of Pennsylvania, acquired one hundred and fifty shares of the stock of the transportation line, having a face value of twenty dollars per share.

The one hundred and fifty shares standing in Corry's name, as stated, were assessed for the years 1899 and 1900 for state and the municipal taxes of the city of Baltimore, the total taxes being $43.27 for the year 1899 and $36.49 for the year 1900. Conformably to the laws of Maryland, payment of said taxes was demanded of the transportation company. To restrain compliance with this demand Corry commenced the present suit, making defendants to the bill of complaint the mayor and council of Baltimore, the treasurer of the city, the treasurer of the state, and the transportation company. The relief prayed was based on averments that the laws of Maryland under which the taxes were levied were repugnant to the state and federal Constitutions, upon grounds specified in the bill. A decree was entered sustaining general demurrers, interposed by the various defendants, and dismissing the bill. This was affirmed by the Court of Appeals of Maryland. 96 Maryland, 310.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court. * * *

In case of stock in Maryland corporations owned by nonresidents the [Maryland] statutes declare that the situs of such stock, for the purpose of taxation, shall be at the principal office of the corporation in Maryland, and such shares are there assessed at their value to the owners. The statutes undoubtedly impose upon a Maryland corporation the duty of paying for and on account of the owners the taxes assessed in respect of the shares, and compel such payment without reference to the dividends, giving to the corporation a lien upon the shares of stock, and entitling the corporation, when it pays the taxes, to proceed by a personal action to recover the amount paid. * * *

The Maryland decisions have also settled that the tax is on the stockholder personally because of his ownership of the stock, and

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a state which taxes to a mortgagor the full value of the land without allowing deduction of the mortgage debt. Paddell v. New York (1908) 211 U. S. 446, 53 L. ed. 275, 15 Ann. Cas. 187.

is not on the stock in rem or on the corporation. The Maryland doctrine on the subject is shown by the opinion of the Court of Appeals of Maryland in United States Electric Power & Light Company v. State, 79 Maryland, 63, where the court said (p. 70):

> "But the tax is not a tax upon the stock or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the state for the collection of the state tax. It is not material what assets or other property make up the value of the shares. Those shares are property, and under existing laws are taxable property. They belong to the stockholders respectively and individually, and when for the sake of convenience in collecting the tax thereon, the corporation pays the state tax upon these shares into the state treasury, it pays the tax not upon the company's own property, nor for the company, but upon the property of each stockholder and for each stockholder respectively, by whom the company is entitled to be reimbursed. Hence when the owner of the shares is taxed on account of his ownership and the tax is paid for him by the company, the tax is not levied upon or collected from the corporation at all." * * *

Substantially similar laws for the taxing of stock in Maryland corporations were in force in Maryland at the time of the incorporation of the transportation company, and have been in force ever since. * * *

The first proposition is that, as the authority of the State of Maryland to tax is limited by the effect of the Fourteenth Amendment to the Constitution of the United States to persons and property within the jurisdiction of the state, and as the tax in question was not in rem against the stock but was in personam against the owner, the power attempted to be exercised as it imposed a personal liability was wanting in due process of law.

The Court of Appeals of Maryland disposed of this contention by deciding that it was in the power of the State of Maryland to fix for the purposes of taxation the situs of stock in domestic corporations held by a nonresident. It also held that, as such corporations were created by the state and were subject to its regulating authority, it was within its power to impose, as a condition to the right to acquire stock in such corporations, the duty of paying the taxes assessed on the stock, and, moreover, that the state might compel the corporation to pay such taxes on behalf of the stockholder, and confer upon the corporation a right of action to obtain reimbursement from a stockholder when the payment was made. The court, in its opinion in this case, did not expressly elaborate the foregoing considerations, but contented itself by referring to previous decisions by it made. Among the cases so referred to was the case of American Coal Company v. Alleghany County Comrs., 59 Maryland, 185, 193, where it was said:

"The appellant is a Maryland corporation, deriving its existence, and all its powers and franchises, from this state. And such being the case, it is settled, that the sovereign power of taxation extends to everything which exists by the authority of the state, or which is introduced by its permission, except where such power is expressly or by necessary implication excluded. The separate shares of the capital stock of the corporation are authorized to be issued by the charter derived from the state, and are subject to its control in respect to the right of taxation; and every person taking such shares, whether resident or nonresident of the state, must take them subject to such state power and jurisdiction over them. Hence the state may give the share of stock, held by individual stockholders, a special or particular situs for purposes of taxation, and may provide special modes for the collection of the tax levied thereon."

That it was rightly determined that it was within the power of the state to fix, for the purposes of taxation, the situs of stock in a domestic corporation, whether held by residents or nonresidents, is so conclusively settled by the prior adjudications of this court that the subject is not open for discussion. Indeed, it was conceded in the argument at bar that no question was made on this subject. The whole contention is that, albeit the situs of the stock was in the State of Maryland for the purposes of taxation, it was nevertheless beyond the power of the state to personally tax the nonresident owner for and on account of the ownership of the stock, and to compel the corporation to pay and confer upon it the right to proceed by a personal action against the stockholder in case the corporation did pay. Reiterated in various forms of expression, the argument is this, that as the situs of the stock within the state was the sole source of the jurisdiction of the state to tax, the taxation must be confined to an assessment in rem against the stock, with a remedy for enforcement confined to the sale of the thing taxed, and hence without the right to compel the corporation to pay or to give it, when it did pay, a personal action against the owner.

But these contentions are also in effect long since foreclosed by decisions of this court. National Bank v. Commonwealth, 9 Wall. 353; Tappan v. Merchants' National Bank, 19 Wall. 490. In National Bank v. Commonwealth (pp. 361, 362), it was said:

"If the state cannot require of the bank to pay the tax on the shares of its stock it must be because the Constitution of the United States, or some act of Congress, forbids it.

"If the State of Kentucky had a claim against a stockholder of the bank who was a nonresident of the state, it could undoubtedly collect the claim by legal proceeding, in which the bank could be attached or garnished, and made to pay the debt out of the means of its shareholder under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the state on the bank shares." * * *

But it is insisted that these rulings concerned taxation by the states of the shares of stock in national banks under the provisions of the national banking act, and are therefore not applicable.

* * *

In substance, the contention is that the conceded principle has no application to taxation by a state of shares of stock in a corporation created by it, because by the Constitution of the United States the states are limited as to taxation to persons and things within their jurisdiction, and may not, therefore, impose upon a nonresident, by reason of his property within the state, a personal obligation to pay a tax. By the operation, therefore, of the Constitution of the United States it is argued the states are restrained from affixing, as a condition to the ownership of stock in their domestic corporations by nonresidents, a personal liability for taxes upon such stock, since the right of the nonresident to own property in the respective states is protected by the Constitution of the United States, and may not be impaired by subjecting such ownership to a personal liability for taxation. But the contention takes for granted the very issue involved. The principle upheld by the rulings of this court to which we have referred, concerning the taxation by the states of stock in national banks, is that the sovereignty which creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock therein, and that a regulation establishing the situs of stock for the purpose of taxation, and compelling the corporation to pay the tax on behalf of the shareholder, is not unreasonable regulation. Applying this principle, it follows that a regulation of that character, prescribed by a state, in creating a corporation is not an exercise of the taxing power of the state over persons and things not subject to its jurisdiction. And we think, moreover, that the authority so possessed by the state carries with it the power to endow the corporation with a right of recovery against the stockholder for the tax which it may have paid on his behalf. Certainly, the exercise of such a power is no broader than the well-recognized right of a state to affix to the holding of stock in a domestic corporation a liability on a nonresident as well as a resident stockholder in personam in favor of the ordinary creditors of the corporation. Flash v. Conn, 109 U. S. 371; Whitman v. Oxford National Bank, 176 U. S. 559; Nashua Savings Bank v. Anglo-American L. M. & A. Co., 189 U. S. 221, 230, and cases cited; Platt v. Wilmot, 193 U. S. 602, 612.

Whilst it is true that the liability of the nonresident stockholder in the case before us, as enforced by the laws of Maryland, was not directly expressed in the charter of the corporation, it nevertheless existed in the general laws of the state at the time the corporation was created, and, be this as it may, certainly existed at the time of the extension of the charter. This is particularly the case, since the constitution of Maryland, for many years prior to the extension of the charter of the transportation company, contained the reserved right to alter, amend and repeal. From all the foregoing it resulted that the provisions of the general laws and of the constitution of Maryland were as much a part of the charter as if expressly embodied therein. Nor can this conclusion be escaped by the contention that, as the provisions of the statute imposing on nonresident stockholders in domestic corporations a liability for taxes on their stock violated the Constitution of the United States, therefore such unconstitutional requirements cannot be treated as having been incorporated in the charter, for this argument amounts only to reasserting the erroneous proposition which we have already passed upon.

Having disposed of the first proposition we come to consider the second, which is that the legislation of the State of Maryland is repugnant to the Constitution of the United States, because of the omission to directly require the giving of notice to the nonresident stockholder of assessments on his stock and opportunity for contest by him as to the correctness of the valuation fixed by the taxing officers. The highest court of the State of Maryland has construed the statutory provisions in question as in legal effect constituting the corporation the agent of the stockholders to receive notice and to represent them in proceedings for the correction of an assessment. [This was held to satisfy the requirements of due process in the procedure of assessment.]

Affirmed.[9]

HAWLEY v. MALDEN.

1914. Supreme Court of the United States. 232 U. S. 1.

Error to the Superior Court of Massachusetts.

Mr. Justice Hughes delivered the opinion of the court.

The plaintiff in error, a resident of the city of Malden, brought this action to recover the amount of certain taxes which he had paid under protest. The taxes were assessed upon shares which he held in foreign corporations most of which did no business and had no property within the State of Massachusetts. It was alleged that the levy and collection were in violation of the due process and equal protection clauses of the Fourteenth Amendment. Demurrer to the declaration was sustained by the Superior Court and the case was reported to the Supreme Judicial Court of the Commonwealth which directed judgment for the defendant. 204 Mass. 138.

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[9] Many state courts have held shares of nonresidents taxable by the state of incorporation without reference to the time at which the state adopted such taxes. See cases collected in L. R. A. 1915C, 944.

In Koochiching Co. v. Mitchell (1919) 186 Iowa 1216, 173 N. W. 151, following the reasoning of the principal case, the shareholders were held taxable though all the corporation's capital was invested outside of the state, it did no business in the state, and all of the shareholders were nonresidents.

It is conceded that the objection that the statute authorizing the tax [Rev. Laws (Mass.), c. 12, §§ 2, 4, 23] denies to the plaintiff in error the equal protection of the laws is not well taken; but it is contended that the shares were not within the jurisdiction of the state and hence that the enforcement of the tax constitutes an unconstitutional deprivation of property.

The power thus challenged, as the state court points out, has been continuously exercised by the State of Massachusetts for more than three-quarters of a century. Substantially the same statutory provision, derived from an earlier enactment, is found in Rev. Stats. (Mass.), c. 7, § 4, and its constitutionality has been sustained by repeated state decisions [citing cases]. And other states through a long period of years have asserted a similar authority [citing decisions in many states]. It is well settled that the property of the shareholders in their respective shares is distinct from the corporate property, franchises and capital stock, and may be separately taxed (Van Allen v. Assessors, 3 Wall. 573, 584; Farrington v. Tennessee, 95 U. S. 679, 687; Tennessee v. Whitworth, 117 U. S. 129, 136, 137; New Orleans v. Houston, 119 U. S. 265, 277); and the rulings in the state cases which we have cited proceed upon the view that shares are personal property and, having no situs elsewhere, are taxable by the state of the owner's domicile, whether the corporations be foreign or domestic.

It is said that the question of the constitutional validity of such taxation has not hitherto been raised definitely in this court and has not been directly passed upon. There is no doubt, however, that the existence of the state authority has invariably been assumed. * * *

To support the contention that this familiar state action, hitherto assumed to be valid, is fundamentally violative of the federal Constitution, the plaintiff in error invokes the doctrine that a state has no right to tax the property of its citizens when it is permanently located in another jurisdiction. Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U. S. 385; Del., Lack. & West. R. R. Co. v. Pennsylvania, 198 U. S. 341; Union Transit Co. v. Kentucky, 199 U. S. 194. But these decisions did not involve the question of the taxation of intangible personal property (Union Transit Co. v. Kentucky, 199 U. S. p. 211); nor do they apply to tangible personal property which, although physically outside the state of the owner's domicile, has not acquired an actual situs elsewhere. Southern Pacific Co. v. Kentucky, 222 U. S. 63, 68. When we are dealing with the intangible interest of the shareholder, there is manifestly no question of physical situs, so far as this distinct property right is concerned, and the jurisdiction to tax it is not dependent upon the location of the lands and chattels of the corporation.

The argument, necessarily, is that shares are to be deemed to be taxable solely in the state of incorporation. It is urged that these rights rest in franchise and that the principle of the decision in Louisville &c. Ferry Co. v. Kentucky, supra, holding that a ferry franchise granted by Indiana to a Kentucky corporation was not taxable in Kentucky is applicable to shares of stock. But that case went upon the ground that the franchise was an incorporeal hereditament and hence had its legal situs in Indiana, 188 U. S. p. 398. Shares fall within a different category. While the shareholder's rights are those of a member of the corporation entitled to have the corporate enterprise conducted in accordance with its charter, they are still in the nature of contract rights or choses in action. Morawetz on Corporations, § 225. As such, in the absence of legislation prescribing a different rule, they are appropriately related to the person of the owner, and, being held by him at his domicile, constitute property with respect to which he is under obligation to contribute to the support of the government whose protection he enjoys. Kirtland v. Hotchkiss, 100 U. S. 491; Bonaparte v. Tax Court, 104 U. S. 592; Covington v. First National Bank, 198 U. S. 100, 111, 112; Southern Pacific Co. v. Kentucky, supra; Cooley on Taxation (3d ed.), 26.

Undoubtedly, the state in which a corporation is organized may provide, in creating it, for the taxation in that state of all its shares whether owned by residents or non-residents. Corry v. Baltimore, 196 U. S. 466. This is by virtue of the authority of the creating state to determine the basis of organization and the liabilities of shareholders. Id., 476, 477; Hannis Distillery Co. v. Baltimore, 216 U. S. 285, 293, 294. So, by reason of its dominant power to provide for the organization and conduct of national banks, Congress has fixed the places at which alone shares in those institutions may be taxed. Rev. Stat., § 5219. Whether, in the case of corporations organized under state laws, a provision by the state of incorporation fixing the situs of shares for the purpose of taxation, by whomever owned, would exclude the taxation of the shares by other states in which their owners reside is a question which does not arise upon this record and need not be decided. No such provision is here involved, and the present case must be determined by the application of the established principle which has been stated.

The real ground of complaint in this class of cases is not that the shares are taxed in one place rather than in another but that they are taxed at all, when presumably the property and franchises of the corporation which give to the shares their value are also taxed. As to this we may repeat what was said in Kidd v. Alabama, 188 U. S. 730, 732, "No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far."

The judgment is affirmed.[10]

CITIZENS NAT. BANK v. DURR.

1921. Supreme Court of the United States. 257 U. S. 99.

Certiorari to the Supreme Court of Ohio.

MR. JUSTICE PITNEY delivered the opinion of the court. * * *

The essential facts are as follows: Plaintiff holds a membership or seat in the New York Stock Exchange for which he paid $60,000, and which carries valuable privileges and has a market value for the purposes of sale. The Exchange is not a corporation or stock company, but a voluntary association consisting of 1,100 members, governed by its own constitution, by-laws and rules, and holding the beneficial ownership of the entire capital stock of a New York corporation which owns the building in which the business of the Exchange is transacted, with the land upon which it stands, situated in the City of New York, and having a value in excess of $5,000,000. A member has the privilege of transacting a brokerage business in securities listed upon the Exchange, but may personally buy or sell only in the Exchange building. Membership is evidenced merely by a letter from the secretary of the Exchange, notifying the recipient that he has been elected to membership. Admissions to membership are made on the vote of the committee on admissions. Membership may be transferred only upon approval of the transfer by the committee, and the proceeds are applied first to pay charges and claims against the retiring member, arising under the rules of the Exchange, any surplus being paid to him. On the death of a member, his membership is subject to be disposed of by the committee; but his widow and descendants are entitled to certain payments out of a fund known as the "gratuity fund." In the business of brokers in stocks and bonds a differentiation is made between members of the Exchange and nonmembers, in that business is transacted by members on account of other members at a commission materially less than that charged to nonmembers. A firm having as a general partner a member of the Exchange is entitled to have its business transacted at the rates prescribed for members.

That a membership held by a resident of the State of Ohio in the Exchange is a valuable property right, intangible in its nature, but of so substantial a character as to be a proper subject of property taxation, is too plain for discussion. That such a membership, although partaking of the nature of a personal privilege, and assignable only with qualifications, is property within the meaning of the Bankrupt Laws, has repeatedly been held by this court. Hyde v. Woods, 94 U. S. 523-525; Sparhawk v. Yerkes, 142 U. S. 1, 12; Page v. Edmunds, 187 U. S. 596, 601. Whether it is subjected to taxation by the taxing laws of Ohio is a question of state law, answered in the affirmative by the court of last resort of that state, by whose decision upon this point we are controlled. Clement Nat. Bank v. Vermont, 231 U. S. 120.

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[10] Many state court decisions in accord are collected in L. R. A. 1915C, 942.

The chief contention here is based upon the due process of law provision of the Fourteenth Amendment: it being insisted that the privilege of membership in the Exchange is so inseparably connected with specific real estate in New York that its taxable situs must be regarded as not within the jurisdiction of the State of Ohio. Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, is cited. It is very clear, however, as the supreme court held, that the valuable privilege of such membership is not confined to the real estate of the Stock Exchange; that a member has a contractual right to have the association conducted in accordance with its rules and regulations, and incidentally, has the right to deal through other members on certain fixed percentages and methods of division of commissions; that this right to secure the services of other members and to "split commissions" is a valuable right by which plaintiff in Cincinnati may properly hold himself out as a member entitled to the privileges of the Exchange, denied to nonmembers; and that thus he is enabled to conduct from and in his Cincinnati office a lucrative business through other members in New York. The court held, and was warranted in holding, that the membership is personal property, and, being without fixed situs, has a taxable situs at the domicil of the owner. Mobilia sequuntur personam. See Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 205. The asserted analogy to Louisville & J. Ferry Co. v. Kentucky, supra, cannot be accepted. That decision related to a public franchise arising out of legislature grant, held to be an incorporeal hereditament in the nature of real property, and to have no taxable situs outside the granting state. It did not involve the taxation of intangible personal property. See Hawley v. Malden, 232 U. S. 1, 11; Cream of Wheat Co. v. Grand Forks County, 253 U. S. 325, 328.

Nor is plaintiff's case stronger if we assume that the membership privileges exercisable locally in New York enable that state to tax them even as against a resident of Ohio. (See Rogers v. Hennepin County, 240 U. S. 184, 191.)[11] Exemption from double taxation by

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[11] The cited case held that a nonresident's membership in an exchange is taxable by the state in which the exchange is located. Hughes, J., for the court said:

"There is the further contention with respect to the authority of the state to tax the memberships owned by citizens of other states. It is urged that the memberships are intangible rights held by the member at his domicile. But it sufficiently appears from the allegations that the memberships represented rights and privileges which were exercised in transactions at the exchange in the City of Minneapolis, and, we are of the opinion, applying a principle which has had one and the same state is not guaranteed by the Fourteenth Amendment (St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 367, 368); much less is taxation by two states upon identical or closely related property interests falling within the jurisdiction of both forbidden (Kidd v. Alabama, 188 U. S. 730, 732; Hawley v. Malden, 232 U. S. 1, 13; Fidelity & C. Trust Co. v. Louisville, 245 U. S. 54, 58). * * *

Judgment affirmed.

HOLMES, J. The question whether a seat in the New York Stock Exchange is taxable in Ohio consistently with the principles established by this court seems to me more difficult than it does to my brethren. All rights are intangible personal relations between the subject and the object of them created by law. But it is established that it is not enough that the subject, the owner of the right, is within the power of the taxing state. He cannot be taxed for land situated elsewhere, and the same is true of personal property permanently out of the jurisdiction. It does not matter, I take it, whether the interest is legal or equitable, or what the machinery by which it is reached, but the question is whether the object of the right is so local in its foundation and prime meaning that it should stand like an interest in land. If left to myself I should have thought that the foundation and substance of the plaintiff's right was the right of himself and his associates personally to enter the New York Stock Exchange building and to do business there. I should have thought that all the rest was incidental to that, and that that, on its face, was localized in New York. If so, it does not matter whether it is real or personal property, or that it adds to the owner's credit and facilities in Ohio. The same would be true of a great estate in New York land.

As my Brothers VAN DEVANTER and MCREYNOLDS share the same doubts, it has seemed to us proper that they should be expressed.

FIDELITY & COLUMBIA TRUST CO. v. LOUISVILLE.

1917. Supreme Court of the United States. 245 U. S. 54.

Error to the Court of Appeals of Kentucky.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the City of Louisville, Kentucky, to recover annual taxes for the years 1907 and 1908 in respect of per-

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recognition with respect to credits in favor of nonresidents arising from business within the state, and in the case of shares of stock of domestic corporations, that it was competent for the state to fix the situs of the memberships for the purpose of taxation, whether they were held by residents or nonresidents, at the place within the state where the exchange was located."

sonal property omitted from the original assessments to the owner L. P. Ewald in his lifetime. The facts as simplified for the purposes of argument here are that Ewald was domiciled in Louisville but continued to carry on a business in St. Louis, Missouri, where he formerly had lived. Deposits coming in part if not wholly from this business were made and kept in St. Louis banks subject to Ewald's order alone. They were not used in the business and belonged absolutely to him. The question is whether they could be taken into account in determining the amount of his Louisville tax. It would seem that some deposits were represented by certificates of deposit but it was stated at the argument that no point was made of that. See Wheeler v. Sohmer, 233 U. S. 434, 438. We are to take it that all the sums are to be dealt with as ordinary bank accounts. The decision of the state court upheld the tax. 168 Kentucky, 71. 171 Kentucky, 509, 172 Kentucky, 451.

So far as the present decision is concerned we may concede without going into argument that the Missouri deposits could have been taxed in that state, under the decisions of this court. Liverpool & London & Globe Ins. Co. v. Orleans Assessors, 221 U. S. 346, 354. Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395. But liability to taxation in one state does not necessarily exclude liability in another. Kidd v. Alabama, 188 U. S. 730, 732. Hawley v. Malden, 232 U. S. 1, 13. The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the state so chooses, may be measured more or less by reference to the riches of the person taxed. Unless it is declared unlawful by authority we see nothing to hinder the state from taking a man's credits into account. But so far from being declared unlawful, it has been decided by this court that whether a state shall measure the contribution by the value of such credits and choses in action, not exempted by superior authority, is the state's affair, not to be interfered with by the United States, and therefore that a state may tax a man for a debt due from a resident of another state. Kirtland v. Hotchkiss, 100 U. S. 491. See also Tappan v. Merchants' National Bank, 19 Wall. 190. * * *

Judgment affirmed.[12]

White, C. J., dissents.

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[12] Many state court decisions in accord are collected in (1929) 59 A. L. R. 1046 ff.

That the bank credits created in the state by a nonresident's deposits of the proceeds of a business carried on by his agents in the state are subject to property taxes there, see New Orleans v. Stempel (1899) 175 U. S. 309, 44 L. ed. 174; New England Mut. L. Ins. Co. v. Board of Assessors (1908) 121 La. 1068, 47 So. 27, 26 L. R. A. (N. S.) 1120; People ex rel. Burke v. Wells (1906) 184 N. Y. 275, 77 N. E. 19, 12 L. R. A. (N. S.) 905, 121 Am. St. 840.

LIVERPOOL & LONDON & GLOBE INS. CO. v. BOARD OF ASSESSORS FOR THE PARISH OF ORLEANS.

1911. Supreme Court of the United States. 221 U. S. 346.

MR. JUSTICE HUGHES delivered the opinion of the court.

This suit was brought by the Liverpool & London & Globe Insurance Company of New York, a foreign corporation doing business in the State of Louisiana, to cancel an assessment made by the Board of Assessors for the Parish of Orleans for the year 1906.

The assessment itself is not shown by the record, but from the testimony the Supreme Court of the State concluded "that the property intended to be assessed was the amount due plaintiff by its policyholders in this state for premiums on which credit of thirty and sixty days had been extended." Dealing with the case from this standpoint, that court affirmed a judgment dismissing the suit, giving as its reasons "that the said credits are due in this state and have arisen in the course of the business of the plaintiff company done in this state, and are therefore part and parcel of the said business in this state, and as a consequence are taxable here." 122 Louisiana, 98.

The Insurance Company brings this writ of error, insisting that the premium accounts did not constitute property taxable in Louisiana and that in consequence the assessment violated the Fourteenth Amendment to the Constitution of the United States in depriving the Company of its property without due process of law.

The assessment was laid under Act 170 of 1898. Section 1 of this act in defining property subject to taxation includes "all rights, credits, bonds, and securities of all kinds; promissory notes, open accounts, and other obligations * * * and all movable and immovable, corporeal and incorporeal articles or things of value, owned and held and controlled within the State of Louisiana by any person in any capacity whatsoever." Section 7 makes it the duty of the tax assessors to place upon the assessment list all property subject to taxation, and provides as follows:

"Provided further, that in assessing mercantile firms the true intent and purpose of this act shall be held to mean, the placing of such value upon the stock in trade, all cash, whether borrowed or not, money at interest, open accounts, credits, etc., as will represent in their aggregate a fair average of the capital, both cash and credit, employed in the business of the party or parties to be assessed. And this shall apply with equal force to any person or persons representing in this state business interests that may claim a domicile elsewhere, the intent and purpose being that no non-resident, either by himself or through any agent shall transact business here without paying to the state a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations or credits arising from the business done in this state are hereby declared assessable within this state, and at the business domicile of said non-resident, his agent or representative."

In construing this statute, the Supreme Court of Louisiana in Metropolitan Life Insurance Company v. Board of Assessors, 115 Louisiana, 708, said: "There can be no doubt that the seventh section of the act of 1898, * * * announced the policy of the state touching the taxation of credits and bills of exchange representing an amount of the property of nonresidents equivalent or corresponding to said bills or credits which was utilized by them in the prosecution of their business in the State of Louisiana. The evident object of the statute was to do away with the discrimination theretofore existing in favor of nonresidents as against residents, and place them on an equal footing." Again, in General Electric Company v. Board of Assessors, 121 Louisiana, 116, where open accounts arising on the sale of merchandise were the subject of the assessment, the court said: "There can be no serious question but that the legislature has provided that credits due upon open accounts arising out of business done in this state by nonresidents, shall be taxed; * * * The state imposes this tax because of her need of the revenue to be derived from it; she extends to the business the protection of her laws, and seeks to make the business bear its just proportion of the burden of taxation. The situation would be, we repeat, unfortunate,—not to say deplorable—if the state were left no choice between having to forego this needed revenue, or else handicapping with this tax the business of her own citizens and home corporations in their competition with foreigners for the business to be done here." And this decision was followed in the present case.

This court has had repeated occasion to consider the validity of taxes imposed under the Louisiana act. The case of New Orleans v. Stempel, 175 U. S. 309, arose under chapter 106 of the statutes of 1890, but the pertinent features of the act were the same. There it appeared that the assessed credits were evidenced by notes secured by mortgages on real estate in New Orlans; that these notes and mortgages were in that city, in the possession of an agent, who collected the proceeds and the interest as it became due and deposited the same in a bank in New Orleans to the credit of the plaintiff, the guardian of infant owners who like herself were domiciled in the State of New York. The tax was sustained. In Board of Assessors v. Comptoir National, 191 U. S. 388, the question arose under the statute of 1898. In that case, a foreign banking company did business in New Orleans and there made loans through a local agent. The loans were made upon collateral security, the customer drawing his check which was treated as an overdraft and held as a memorandum of the indebtedness. The court decided that the credits so evidenced, created in the Louisiana business, were taxable in that state. In Metropolitan Life Insurance Company v. New Orleans, 205 U. S. 395—also arising under the act of 1898—the validity of a similar tax was upheld. That case was one of loans made through the local agent of the Insurance Company, a New York corporation doing business in Louisiana, to its policy holders upon the security of their policies. The course of business was that on the approval of a loan at the home office of the Company, the Company forwarded to the agent a check for the amount, with a note to be signed by the borrower. The agent procured the note to be signed and forwarded both note and policy to the home office. The agent collected and transmitted the interest, and when the notes were paid it was to the agent to whom they were sent to be delivered back to the makers. At all other times the notes and the policies securing them were kept at the home office in New York. In Orleans Parish v. New York Life Insurance Company, 216 U. S. 517, the so-called credit consisted, in fact, of a payment to the policy holder of a portion of the amount for which the Company was bound by its policy. It was found that despite the fact that notes were given there was no personal liability, but simply a deduction in account. As there was no loan, there was no credit to be taxed; and a decree in the Circuit Court restraining the collection of the tax was affirmed.

Here an indebtedness actually existed. This is assumed in the objections to the assessment. The indebtedness had its origin in the course of business transacted by the foreign corporation in Louisiana under the laws of that state. If the Louisiana policy holders had given notes for the premiums, which were to be collected through the local agents, there could be no question as to the validity of the tax. The difference between notes given for loans on policies, and notes given for premiums, could not be regarded as a material one so far as the taxing power of the state is concerned. In both cases, the obligations to pay would represent returns to the corporation upon business conducted within the state; in the one, for the moneys loaned with compensation for their use; in the other, for the contracts of insurance. Nor would the power to tax depend on the presence of the notes within the state. Metropolitan Life Insurance Company v. New Orleans, supra; Bristol v. Washington County, 177 U. S. 133. The notes, in these cases, had been removed to the creditor's home; and, despite this removal, they were attributed to the place of origin. Further, if there had been no notes but the premium accounts had been otherwise evidenced by written instruments, they would have been equally taxable. The "checks" in Board of Assessors v. Comptoir National, supra, were only memoranda of indebtedness or vouchers. "While called 'checks,' and so referred to in the record and by the parties in their dealings, the instrument delivered to the Comptoir, in form an ordinary check as though drawn for payment on presentation from moneys deposited, had no such function. The money was paid to the customer upon the security of the collateral, and the so-called check taken and held as a memorandum of the indebtedness to the Comptoir" (pp. 400, 401).

But it is said that the State of Louisiana had no power to tax the credits here in question because they were not evidenced by written instruments. The contention is thus stated in the petition of the Insurance Company in the state court. "Premiums due on open account to a foreign corporation cannot be taxed. The legislature has not the power to localize an abstract credit away from the domicile of the creditor, the state's power of taxation being limited to persons, property or business within its jurisdiction. The levying of a tax upon incorporeal things, such as abstract credits, not in so-called 'concrete' form and without tangible shape violates the Fourteenth Amendment of the United States Constitution."

The asserted distinction cannot be maintained. When it is said that intangible property, such as credits on open account, have their situs at the creditor's domicile, the metaphor does not aid. Being incorporeal, they can have no actual situs. But they constitute property; as such they must be regarded as taxable, and the question is one of jurisdiction.

The legal fiction, expressed in the maxim mobilia sequuntur personam, yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicile. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor and is of value to the creditor because he may be compelled to pay; and power over the debtor at his domicile is control of the ordinary means of enforcement. Blackstone v. Miller, 188 U. S. 205, 206. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have had jurisdiction to impose the tax. The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the state, and there the rights of the creditor were to be enforced. If locality, in the sense of subjection to a sovereign power, could be attributed to these credits, they could be localized there. If, as property, they could be deemed to be taxable at all, they could be taxed there. * * *

In Kirtland v. Hotchkiss, 100 U. S. 491, it was held that the federal Constitution does not prohibit a state from taxing her own citizens upon bonds belonging to them, although they were made by debtors resident in other states and secured by mortgage on real estate there situated. * * *

But, as we have seen, the jurisdiction of the state of his domicile, over the creditor's person, does not exclude the power of another state in which he transacts his business, to lay a tax upon the credits there accruing to him against resident debtors and thus to enforce contribution for the support of the government under whose protection his affairs are conducted. And that the jurisdiction of the latter state rests upon considerations which are more fundamental than that notes have been given, or that the credits are evidenced in any particular manner, was clearly brought out in the concluding statement of the opinion in the case of the Metropolitan Life Insurance Company, supra. There the court said: "Moreover, neither the fiction that personal property follows the domicile of its owner, nor the doctrine that credits evidenced by bonds or notes may have the situs of the latter, can be allowed to obscure the truth. Blackstone v. Miller, 188 U. S. 189. We are not dealing here merely with a single credit or a series of separate credits, but with a business. The insurance company chose to enter into the business of lending money within the State of Louisiana, and employed a local agent to conduct that business. It was conducted under the laws of the state. The state undertook to tax the capital employed in the business precisely as it taxed the capital of its own citizens in like situation. For the purpose of arriving at the amount of capital actually employed, it caused the credits arising out of the business to be assessed. We think the state had the power to do this, and that the foreigner doing business cannot escape taxation upon his capital by removing temporarily from the state evidences of credits in the form of notes. Under such circumstances, they have a taxable situs in the state of their origin." Equally, then, had the state the power to tax the premium accounts here involved. They were not withdrawn from its constitutional authority, either by reason of the fact that they were payable in consideration of insurance, instead of loans or goods sold, or by the circumstance that the credits were not evidenced by written instruments. They were none the less enforceable credits arising in the local business. * * *

Affirmed.[13]

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[13] "Corporeal personal property is conceded to be taxable at the place where it is actually situated. A credit, which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its situs where it is owned—at the domicil of the creditor. The creditor, however, may give it a business situs elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view to reloaning the money and keeping it invested in a permanent business." Gilfillan, C. J., in Estate of Jefferson (1886) 35 Minn. 215, 220, quoted with approval in Bristol v. Washington County (1900) 177 U. S. 133, 141, 44 L. ed. 701.

In Lockwood v. Blodgett (1927) 106 Conn. 525, 538-539, 138 Atl. 520, Wheeler, C. J., said:

"The taxation of intangibles in a jurisdiction not that of the owner has frequently been sustained upon the 'business situs' theory. * * * The mere presence of the specialty or negotiable paper in the jurisdiction other than that of the owner will not be a factor in determining the right of that jurisdiction to tax the intangible. Nor will the fact that it was in the hands of an agent as custodian, or for the purpose of collecting the interest thereon, give it a business situs there. But if it be in the hands of 'an agent of the owner for the purpose of collection or renewal, with a view to new loans and carrying on such transac-

CREAM OF WHEAT CO. v. COUNTY OF GRAND FORKS.

1920. Supreme Court of the United States. 253 U. S. 325.

Error to the Supreme Court of the State of North Dakota.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

By the statutes of North Dakota, as construed by the Supreme Court of the state, a manufacturing corporation organized under its laws is taxed in the following manner: Its real and personal property within the state is assessed like that of an individual. In addition there is assessed against it an amount equal to the aggregate market value of its outstanding stock less the value of its real and personal property and certain indebtedness. The corporation in submitting its list of property for purposes of taxation is required to enter this additional amount as "bonds and stocks" under item 23 in the prescribed statutory schedule. On this additional amount, as upon the value of its real and personal property, the corporation is taxed at the same rate and in the same manner as individuals are upon their property. The statute does not in terms impose a franchise tax as distinguished, or separated, from a tax on personal property, but the Supreme Court of the state construes the tax upon this additional amount as "in substance or effect, to some degree at least, a tax upon the privilege of being a corporation;" or, in other words, a tax upon the corporate franchise granted it by the state. Individuals are not required to include in their lists of taxable property any share or portion of the capital stock or property of any corporation which such corporation is required to list. Compiled Laws of North Dakota for 1913, §§ 2110, 2103, 2102, 2077. Grand Forks County v. Cream of Wheat Co., 170 N. W. Rep. 863.

The Cream of Wheat Company was incorporated under the laws of North Dakota after the enactment of the tax legislation above described and it maintained throughout the years 1908 to 1914, both inclusive, a public office in the City of Grand Forks in said state for the transaction of its usual and corporate business. Its manufacturing, commercial and financial business was conducted wholly without the state; and it had not at any time during any of those years within the state either any tangible property real or personal or any papers by which intangible property is customarily evidenced. Its property, as distinguished from its franchise, is alleged to have been taxed in states other than North Dakota. In 1914 the officials of North Dakota assessed against the company in the manner prescribed by law for each year from 1908 to 1913, both

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tions as a permanent business,' it will have a business situs while in the hands of the agent for these purposes."

For a searching examination of the cases and of the questions still open as to the exact scope and application of this doctrine, see Thomas Reed Powell, The Business Situs of Credits (1922) 28 W. Va. Law Quart. 89.

inclusive, a tax at the uniform rate on the sum of $50,000, as representing personal property, to wit, "bonds and stocks," which had escaped taxation. They also assessed a similar tax for the then current year. The taxes not being paid, this action was brought in a state court for the amount; and the facts above stated were proved. The trial court entered judgment for the defendant; but its judgment was reversed by the Supreme Court of the state which entered judgment for the county for the full amount of the taxes. The case is here on writ of error under § 237 of the Judicial Code.

The company concedes that the State of North Dakota might constitutionally have imposed a franchise tax upon a corporation organized under its laws even though it had no property within the state. The contentions are that the Supreme Court of North Dakota erred in holding that the tax here in question was a franchise tax; that it was in reality a property tax upon intangible property; that the company's intangible property must be deemed to have been located where its tangible property was; and that in taxing property beyond its limits North Dakota violated rights guaranteed by the Fourteenth Amendment. The view which we take of the matter renders it unnecessary to consider the question whether or not the law under discussion imposed a franchise tax or a property tax. Compare Hamilton Company v. Massachusetts, 6 Wall. 632; Commonwealth v. Hamilton Manufacturing Co., 12 Allen, 298. The view also renders it unnecessary to consider whether the company having been incorporated in North Dakota after the enactment of the law in question is in a position to complain. Compare Interstate Consolidated Street Ry. Co. v. Massachusetts, 207 U. S. 79, 84; International & Great Northern Ry. Co. v. Anderson County, 246 U. S. 424, 433; Corry v. Baltimore, 196 U. S. 466.

The company was confessedly domiciled in North Dakota; for it was incorporated under the laws of that state. As said by Mr. Chief Justice Taney, "It must dwell in the place of its creation, and cannot migrate to another sovereignty." Bank of Augusta v. Earle, 13 Pet. 519, 588. The fact that its property and business were entirely in another state did not make it any the less subject to taxation in the state of its domicile. The limitation imposed by the Fourteenth Amendment is merely that a state may not tax a resident for property which has acquired a permanent situs beyond its boundaries. This is the ground on which the ferry franchise involved in Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U. S. 385 (an incorporeal hereditament partaking of the nature of real property) and the tangible personal property permanently outside the state involved in Delaware, Lackawanna & Western R. R. Co. v. Pennsylvania, 198 U. S. 341, and Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, were held immune from taxation by the states in which the companies were incorporated. The limitation upon the power of taxation does not apply even to tangible personal property without the state of the corporation's domicile if, like a sea-going vessel, the property has no permanent situs anywhere. Southern Pacific Co. v. Kentucky, 222 U. S. 63, 68. Nor has it any application to intangible property, Union Refrigerator Transit Co. v. Kentucky, supra, p. 205; Hawley v. Malden, 232 U. S. 1, 11, even though the property is also taxable in another state by virtue of having acquired a "business situs" there, Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54, 59. As stated in that case: "It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. Flint v. Stone Tracy Co., 220 U. S. 107, 146, 162, et seq. Whichever this tax technically may be, the authorities show that it must be sustained."

Counsel for the company direct our attention to cases like Adams Express Co. v. Ohio, 165 U. S. 194, 227; 166 U. S. 185, which hold that a state may tax a foreign corporation not only on the value of its tangible property within the state but also on that proportion of its entire intangible property which is fairly represented by and must be included, in order to place a just value on the tangible property located and the business transacted there. The conclusion drawn by them is that the situs of the intangible property must be with the tangible; otherwise, they say, we must hold that it is in two places at once and that it may be subjected to double taxation. To this it is sufficient to say that the Fourteenth Amendment does not prohibit double taxation. Coe v. Errol, 116 U. S. 517, 524; Kidd v. Alabama, 188 U. S. 730, 732; Fidelity & Columbia Trust Co. v. Louisville, supra.

Affirmed.

SAFE DEPOSIT & TRUST CO. v. VIRGINIA.

1929. Supreme Court of the United States. 280 U. S. 83.

Appeal from the Special Court of Appeals of Virginia.

Opinion of the court by Mr. Justice McReynolds, announced by the Chief Justice.

May 4th, 1920, Lucius J. Kellam, then domiciled and residing in Accomac County, Virginia, transferred and delivered to the Safe Deposit and Trust Company of Baltimore, Maryland, stocks and bonds of sundry corporations valued at fifty thousand dollars, with power to change the investments, upon the following terms— " * * * to collect the income arising therefrom and after paying such taxes as may be chargeable thereon and its 5% commissions on the gross income, to accumulate the net income for the benefit of the two sons of myself, that is to say, Lucius J. Kellam, Jr., who attained the age of eight years on September 25, 1919, and

Emerson Polk Kellam, who attained the age of five years on February 5, 1920, and when the said Lucius J. Kellam, Jr., arrives at twenty-five years of age, to deliver him one-half of the principal of the estate hereby conveyed and one-half of the said accumulations of income—the other half of the said principal and accumulations of income shall be retained by said Trustee and all income therefrom shall continue to be accumulated until the said Emerson Polk Kellam arrives at twenty-five years of age when he shall become entitled to the said one-half of the principal and accumulations so retained together with all further accumulations thereon. If either of said two sons shall die before receiving his share of said principal and accumulations, then the same shall be paid over and delivered to his children living at his death; and if either shall die before receiving his share without issue, then such share shall be added to the share of the survivor and be held for his use and benefit in the same manner precisely as his original share is held."

The deed made no provision for the event of death of both sons under twenty-five without issue. The donor reserved to himself power of revocation, but without exercising it, died in 1920. Administration on his estate was had in Accomac County, Virginia, and his two sons are domiciled there.

Except as changed by reinvestment, the Trust Company has continued to hold the original securities in Baltimore, Maryland, and has paid the taxes regularly demanded by that city and state on account of them.

An assessment for taxation in Accomac County, Virginia, for the years 1921, 1922, 1923, 1924 and 1925 upon the whole corpus of the trust estate was sustained by the court below—the highest state tribunal to which the matter could be submitted. It declared Sec. 2307, Virginia Code (1919), as amended in 1920, 1922 and 1923, applicable, adequate to support the demand and not in conflict with the Fourteenth Amendment.

Appellant maintains that, so interpreted and applied, the statute lays a tax upon property wholly beyond the jurisdiction of the state and consequently offends the Fourteenth Amendment.

Manifestly, the securities are subject to taxation in Maryland where they are in the actual possession of the Trust Company—holder of the legal title. That they are property within Maryland is not questioned. De Ganay v. Lederer, 250 U. S. 376, 382. Also, nobody within Virginia has present right to their control or possession, or to receive income therefrom, or to cause them to be brought physically within her borders. They have no legal situs for taxation in Virginia unless the legal fiction mobilia sequuntur personam is applicable and controlling. The court below, recognizing this, held the two sons, in conjunction with the administrator of the father's estate—all domiciled in Virginia—really owned the fund and that by reason of the fiction its taxable situs followed them.

We need not make any nice inquiry concerning the ultimate or equitable ownership of the securities or the exact nature of the interest held by the sons. In the disclosed circumstances, we think that is not a matter of controlling importance.

Ordinarily this court recognizes that the fiction of mobilia sequuntur personam may be applied in order to determine the situs of intangible personal property for taxation. Blodgett v. Silberman, 277 U. S. 1. But the general rule must yield to established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if so to do would result in inescapable and patent injustice, whether through double taxation or otherwise. State Board of Assessors v. Comptoir National d'Escompte, 191 U. S. 388, 404; Buck v. Beach, 206 U. S. 392, 408. Liverpool & L. & G. Ins. Co. v. Orleans Assessors, 221 U. S. 346, 354; Maguire v. Trefry, 253 U. S. 12, 17. Here, where the possessor of the legal title holds the securities in Maryland, thus giving them a permanent situs for lawful taxation there, and no person in Virginia has present right to their enjoyment or power to remove them, the fiction must be disregarded. It plainly conflicts with fact; the securities did not and could not follow any person domiciled in Virginia. Their actual situs is in Maryland and can not be changed by the cestuis que trustent.

The power of Virginia to lay a tax upon the fair value of any interest in the securities actually owned by one of her resident citizens is not now presented for consideration. See Maguire v. Trefry, supra.

A statute of a state which undertakes to tax things wholly beyond her jurisdiction or control conflicts with the Fourteenth Amendment. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 204; Buck v. Beach, 206 U. S. 392, 402, 408, 409; Frick v. Pennsylvania, 268 U. S. 473; Wachovia Bank & Trust Co. v. Doughton, 272 U. S. 567, 575.

Tangible personal property permanently located beyond the owner's domicile may not be taxed at the latter place. Union Refrig. Transit Co. v. Kentucky, supra; Frick v. Pennsylvania, supra. Intangible personal property may acquire a taxable situs where permanently located, employed and protected. New Orleans v. Stempel, 175 U. S. 309; Bristol v. Washington County, 177 U. S. 133; State Board of Assessors v. Comptoir National d'Escompte, 191 U. S. 388; Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395; Liverpool & L. & G. Ins. Co. v. Orleans Assessors, 221 U. S. 346.

Here we must decide whether intangibles—stocks, bonds—in the hands of the holder of the legal title with definite taxable situs at its residence, not subject to change by the equitable owner, may be taxed at the latter's domicile in another state. We think not. The reasons which led this court in Union Refrig. Transit Co. v. Kentucky, 199 U. S. 194, and Frick v. Pennsylvania, 268 U. S. 473, to deny application of the maxim mobilia sequuntur personam to tangibles apply to the intangibles in appellant's possession. They have acquired a situs separate from that of the beneficial owners. The adoption of a contrary rule would "involve possibilities of an extremely serious character" by permitting double taxation, both unjust and oppressive. And the fiction of mobilia sequuntur personam "was intended for convenience, and not to be controlling where justice does not demand it."

No opinion of this court seems definitely to rule the exact point now presented. Blackstone v. Miller, 188 U. S. 189, sustained an assessment of tax by New York upon the transfer of credits, declared to have taxable situs within her borders, under the will of a citizen of Illinois. In Wheeler v. Sohmer, 233 U. S. 434, the tax was not laid at the owner's domicile, but by the state wherein the securities were deposited. Bullen v. Wisconsin, 240 U. S. 625, involved an inheritance tax; the creator of the trust resided in Wisconsin at his death and an Illinois Company with legal title then held possession of the property in Chicago; but the creator had retained full power to revoke the trust and regain control. Fidelity & Columbia Tr. Co. v. Louisville, 245 U. S. 54, sustained a tax laid at the domicile of the legal owner. He had full power to control the deposits in St. Louis banks and might have brought the entire fund within Kentucky's jurisdiction. In Blodgett v. Silberman, 277 U. S. 1, the decedent—a resident of Connecticut—had control and present right to all benefits arising from the property. The legal title was not held by another with the duty to retain possession, as in the present cause. Moreover, this court did not there determine that the property had a taxable situs in New York.

Any general statement in the above opinions which may seem to interfere with the conclusion here announced must be limited and confined to the precise situation then under consideration.

It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two states at the same instant and because of this to uphold a double and oppressive assessment.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Concurring opinion of Mr. Justice Stone.

I concur in the result. It is enough to support it that, as stipulated in the record, the Virginia assessment was levied against a trustee domiciled in Maryland upon securities held by it in trust in its exclusive possession and control there, and so is forbidden as an attempt to tax property without the jurisdiction. Brooke v. Norfolk, 277 U. S. 27. But the question whether the Fourteenth Amendment forbids a tax on the beneficiaries, in Virginia, where they are domiciled, measured by their equitable interests, seems to me not to be presented by the record and so, under the settled rule of decision of this court, ought not now to be decided. Burton v. United States, 196 U. S. 283, 296; Blair v. United States, 250 U. S. 273, 279; Flint v. Stone Tracy Co., 220 U. S. 107; Light v. United States, 220 U. S. 523, 538.[14]

No attempt was made by Virginia to tax the equitable interests of the beneficiaries of the trust. That the thing taxed or the measure of the tax is different from the equitable interests of the beneficiaries, as affected by the specified contingencies, sufficiently appears from the fact that the one may well have been of different value than the other. In fact, the securities seem to have been assessed at their full value although the equitable interests of the beneficiaries are less than the whole.

It may be that Virginia, following its own view of the nature of vested and contingent interests, might tax the interests of these beneficiaries as though they were the whole, but it is sufficient for present purposes that it has not assumed to do so. In the face of the present record we are not required to speculate how far a tax, forbidden because assessed upon property beyond the jurisdiction, may be upheld because it may be passed on to the beneficiaries in Virginia and the equitable interests thus reached by indirection.

If the question were here I should not be prepared to go so far as to say that the equitable rights in personam of the beneficiaries of the trust might not have been taxed at the place of their domicile quite as much as a debt secured by a mortgage on land in another jurisdiction, notwithstanding the fact that the land is also taxed at its situs. In neither case, if the threat of double taxation were controlling, which under the decisions it is not, Fidelity & Columbia Tr. Co. v. Louisville, 245 U. S. 54, 58; Cream of Wheat Co. v. Grand Forks Co., 253 U. S. 325, 330; Citizens Nat'l Bank v. Durr, 257 U. S. 99, 109; cf. Swiss Oil Corporation v. Shanks, 273 U. S. 407, 413, would it seem that in any real sense is there double taxation, since the legal interests protected and taxed by the two taxing jurisdictions are different.

MR. JUSTICE BRANDEIS concurs in this opinion.

MR. JUSTICE HOLMES:

The Special Court of Appeals was plainly right in holding that the deed of trust conferred an absolute gift upon the two beneficiaries, perhaps, though I doubt it, subject to be divested upon a condition subsequent. Gray, Perpetuities, 1st ed., § 108. If the beneficiaries could be taxed at all they could be taxed for the whole value of the property, because the whole title was in them, even if liable to be divested at some future time in a not very probable event.

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[14] See State Power to Impose a Property Tax on the Interest of a Beneficiary of a Trust (1930) 30 Col. L. Rev. 539-547; also notes in (1930) 43 Harv. L. Rev. 668-669; (1930) 39 Yale L. J. 589-590.

I am of opinion that on principle they can be taxed. In the first place I do not think that it matters that the owners, residing in Virginia, have only an equitable title. To be sure the trustee having the legal title and possession of the bonds in Maryland may be taxed there. But that does not affect the right of Virginia by reason of anything that I know of in the Constitution of the United States. Bonaparte v. Tax Court, 104 U. S. 592. Kidd v. Alabama, 188 U. S. 730, 732, 733. Hawley v. Malden, 232 U. S. 1, 13. Cream of Wheat Co. v. Grand Forks, 253 U. S. 325, 330. Citizens National Bank v. Durr, 257 U. S. 99, 109. Blodgett v. Silberman, 277 U. S. 1, 10. Compare with the last case Wheeler v. Sohmer, 233 U. S. 434.

I see no other fact to cut down Virginia's power. It is true that the conception of domicil has been applied to tangible personal property and it now is established that a state cannot tax the owner of such property if it is permanently situated in another state. But hitherto the decisions have been confined to tangibles that in a plain and obvious way owed their protection to another power. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 206. It seemed to me going pretty far to discover even that limitation in the Fourteenth Amendment. It opens vistas to extend the restriction to stocks and bonds in a way that I cannot reconcile with Blodgett v. Silberman, 277 U. S. 1. Taxes generally are imposed upon persons, for the general advantages of living within the jurisdiction, not upon property, although generally measured more or less by reference to the riches of the person taxed, on grounds not of fiction but of fact. Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54, 58. Kirtland v. Hotchkiss, 100 U. S. 491, 498. The notion that the property must be within the jurisdiction puts the emphasis on the wrong thing. The owner may be taxed for it although it never has been within the state. Southern Pacific Co. v. Kentucky, 222 U. S. 63. It seems to me going still further astray to rely upon the situs of the debt. A debt is a legal relation between two parties and, if we think of facts, is situated at least as much with the debtor against whom the obligation must be enforced as it is with the creditor. To say that a debt has a situs with the creditor is merely to clothe a foregone conclusion with a fiction. The place of the property is not material except where inability to protect carries with it inability to tax. But that is an exceptional consequence. One state may tax the owner of bonds of another state, although it certainly contributes nothing to their validity. Bonaparte v. Tax Court, 104 U. S. 592. It is admitted that Maryland could tax the trustee in this case although most at least of the securities handed over were beyond the power of Maryland to affect in any substantial way. The equitable owners of the fund were in Virginia and I think they could be taxed for it there. I do not understand that any merely technical question is raised on the naming of the trustee instead of the cestuis que trustent as the party taxed. Nor is there any question of the amount. Throughout the record, by the court and by the trustee, the single issue is stated to be whether the fund can be reached. In the words of the trustee it is: "Has such corpus, so created and held, a taxable situs in Virginia within the sanction of section one of the Fourteenth Amendment to the Constitution of the United States?" I think the judgment should be affirmed.

Section 5.—State Jurisdiction—Succession Taxes.

BLACKSTONE v. MILLER.

Take

1903. Supreme Court of the United States. 188 U. S 189.

Error to the Surrogate's Court of New York.

Mr. Justice Holmes delivered the opinion of the court.

This is a writ of error to the Surrogate's Court of the county of New York. It is brought to review a decree of the court, sustained by the Appellate Division of the Supreme Court, 69 App. Div. 127, and by the Court of Appeals, 171 N. Y. 682, levying a tax on the transfer by will of certain property of Timothy B. Blackstone, the testator, who died domiciled in Illinois. The property consisted of a debt of $10,692.24, due to the deceased by a firm, and of the net sum of $4,843,456.72, held on a deposit account by the United States Trust Company of New York. The objection was taken seasonably upon the record that the transfer of this property could not be taxed in New York consistently with the Constitution of the United States.

The deposit in question represented the proceeds of railroad stock sold to a syndicate and handed to the Trust Company, which, by arrangement with the testator, held the proceeds subject to his order, paying interest in the meantime. Five days' notice of withdrawal was required and if a draft was made upon the company, it gave its check upon one of its banks of deposit. The fund had been held in this way from March 31, 1899, until the testator's death on May 26, 1900. It is probable, of course, that he did not intend to leave the fund there forever and that he was looking out for investments, but he had not found them when he died. The tax is levied under a statute imposing a tax "upon the transfer of any property, real or personal. * * * 2. When the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident of the state at the time of his death." Laws of 1896, c. 908, § 220, amended, Laws of 1897, c. 284; 3 Birdseye's Stat. 3d ed. 1901, p. 3592. The whole succession has been taxed in Illinois, the New York deposit being included in the appraisal of argument

the estate. It is objected to the New York tax that the property was not within the state, and that the courts of New York had no jurisdiction; that if the property was within the state it was only transitorily there, Hays v. Pacific Mail Steamship Co., 17 How. 596, 599, 600, that the tax impairs the obligation of contracts, that it denies full faith and credit to the judgment taxing the inheritance in Illinois, that it deprives the executrix and legatees of privileges and immunities of citizens of the State of New York, and that it is contrary to the Fourteenth Amendment.

In view of the state decisions it must be assumed that the New York statute is intended to reach the transfer of this property if it can be reached. New Orleans v. Stempel, 175 U. S. 309, 316; Morley v. Lake Shore & Michigan Southern Railway Co., 146 U. S. 162, 166. We also must take it to have been found that the property was not in transitu in such a sense as to withdraw it from the power of the state, if otherwise the right to tax the transfer belonged to the state. The property was delayed within the jurisdiction of New York an indefinite time, which had lasted for more than a year, so that this finding at least was justified. Kelley v. Rhoads, 188 U. S. 1, and Diamond Match Co. v. Village of Ontonagon, 188 U. S. 84, present term. Both parties agree with the plain words of the law that the tax is a tax upon the transfer, not upon the deposit, and we need spend no time upon that. Therefore the naked question is whether the state has a right to tax the transfer by will of such deposit.

The answer is somewhat obscured by the superficial fact that New York, like most other states, recognizes the law of the domicil as the law determining the right of universal succession. The domicil, naturally, must control a succession of that kind. Universal succession is the artificial continuance of the person of a deceased by an executor, heir, or the like, so far as succession to rights and obligations is concerned. It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying mobilia sequuntur personam. But being a fiction it is not allowed to obscure the facts, when the facts become important. To a considerable, although more or less varying, extent, the succession determined by the law of the domicil is recognized in other jurisdictions. But it hardly needs illustration to show that the recognition is limited by the policy of the local law. Ancillary administrators pay the local debts before turning over the residue to be distributed, or distributing it themselves, according to the rules of the domicil. The title of the principal administrator, or of a foreign assignee in bankruptcy, another type of universal succession, is admitted in but a limited way or not at all. See Crapo v. Kelly, 16 Wall. 610; Chipman v. Manufacturers' National Bank, 156 Mass. 147, 148, 149.

To come closer to the point, no one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the situs accepts its rules of succession from the law of the domicil, or that by the law of the domicil the chattel is part of a universitas and is taken into account again in the succession tax there. Eidman v. Martinez, 184 U. S. 578, 586, 587, 592. See Mager v. Grima, 8 How. 490, 493; Coe v. Errol, 116 U. S. 517, 524; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 22; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283; New Orleans v. Stempel, 175 U. S. 309; Bristol v. Washington County, 177 U. S. 133; and for state decisions Matter of Estate of Romaine, 127 N. Y. 80; Callahan v. Woodbridge, 171 Mass. 593; Greves v. Shaw, 173 Mass. 205; Allen v. National State Bank, 92 Md. 509.

No doubt this power on the part of two states to tax on different and more or less inconsistent principles, leads to some hardship. It may be regretted, also, that one and the same state should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, mobilia sequuntur personam and domicil governs the whole. But these inconsistencies infringe no rule of constitutional law. Coe v. Errol, 116 U. S. 517, 524; Knowlton v. Moore, 178 U. S. 41.

The question, then, is narrowed to whether a distinction is to be taken between tangible chattels and the deposit in this case. There is no doubt that courts in New York and elsewhere have been loath to recognize a distinction for taxing purposes between what commonly is called money in the bank and actual coin in the pocket. The practical similarity more or less has obliterated the legal difference. Matter of Houdayer, 150 N. Y. 37; New Orleans v. Stempel, 175 U. S. 309, 316; City National Bank v. Charles Baker Co., 180 Mass., 40, 42. In view of these cases, and the decision in the present case, which followed them, a not very successful attempt was made to show that by reason of the facts which we have mentioned, and others, the deposit here was unlike an ordinary deposit in a bank. We shall not stop to discuss this aspect of the case, because we prefer to decide it upon a broader view.

If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York then New York may subject the transfer to a tax. United States v. Perkins, 163 U. S. 625, 628, 629; McCulloch v. Maryland, 4 Wheat. 316, 429. But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. The principle has been recognized by this court with regard to garnishments of a domestic debtor of an absent defendant. Chicago, Rock Island & Pacific Ry. Co. v. Sturm, 174 U. S. 710. See Wyman v. Halstead, 109 U. S. 654. What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we nevertheless are subject to the criminal law, and it affords one of the motives for our conduct. So again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of legislation and extend to debts the rule still applied to slander that actio personalis moritur cum persona, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional considerations on one side, it is plain that the right of the foreign creditor would be gone.

Power over the person of the debtor confers jurisdiction, we repeat. And this being so we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the state at the time of the death. The maxim mobilia sequuntur personam has no more truth in the one case than in the other. When logic and the policy of a state conflict with a fiction due to historical tradition, the fiction must give way.

There is no conflict between our views and the point decided in the case reported under the name of State Tax on Foreign Held Bonds, 15 Wall. 300. The taxation in that case was on the interest on bonds held out of the state. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. Bacon v. Hooker, 177 Mass. 335, 337. Therefore, considering only the place of the property, it was held that bonds held out of the state could not be reached. The decision has been cut down to its precise point by later cases. Savings & Loan Society v. Multnomah County, 169 U. S. 421, 428; New Orleans v. Stempel, 175 U. S. 309, 319, 320.

In the case at bar the law imposing the tax was in force before the deposit was made, and did not impair the obligation of the contract, if a tax otherwise lawful ever can be said to have that effect. Pinney v. Nelson, 183 U. S. 144, 147. The fact that two states, dealing each with its own law of succession, both of which the plaintiff in error has to invoke for her rights, have taxed the right which they respectively confer, gives no cause for complaint on constitutional grounds. Coe v. Errol, 116 U. S. 517, 524; Knowlton v. Moore, 178 U. S. 53. The universal succession is taxed in one state, the singular succession is taxed in another. The plaintiff has to make out her right under both in order to get the money. See Adams

v. Batchelder, 73 Mass. 258. The same considerations answer the argument that due faith and credit are not given to the judgment in Illinois. The tax does not deprive the plaintiff in error of any of the privileges and immunities of the citizens of New York. It is no such deprivation that if she had lived in New York the tax on the transfer of the deposit would have been part of the tax on the inheritance as a whole. See Mager v. Grima, 8 How. 490; Brown v. Houston, 114 U. S. 622, 635; Wallace v. Myers, 38 Fed. Rep. 184. It does not violate the Fourteenth Amendment. See Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283. Matters of state procedure and the correctness of the New York decree or judgment, apart from specific constitutional objections, are not open here. As we have said, the question whether the property was to be regarded as in transitu, if material, must be regarded as found against the plaintiff in error.

Decree affirmed.

MR. JUSTICE WHITE dissents.

WHEELER v. SOHMER, COMPTROLLER OF THE STATE OF NEW YORK.

1914. Supreme Court of the United States. 233 U. S. 434.

Error to the Surrogate's Court of New York County, New York.

MR. JUSTICE HOLMES delivered the judgment of the court.

This proceeding began with a petition by an executor, acting under ancillary letters, for the appointment of an appraiser to determine the amount, if any, of the transfer tax due from the estate of the deceased testator, Charles C. Tiffany. Tiffany was not a resident of New York at the time of his death but left in a safe deposit box in New York four promissory notes made by Pottinger, a resident of Chicago, secured by mortgages of Chicago land to Illinois trustees, and promissory notes of the Southern Railway Company, a Virginia corporation. The appraiser held these notes taxable under the New York laws of 1905, c. 368, § 1, amending § 220 of an earlier law and imposing a tax "when the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident of the state at the time of his death." The Surrogate confirmed the appraiser's report, and his order was affirmed by the Appellate Division and the Court of Appeals. 143 App. Div. 327, 202 N. Y. 550. The executors contend that the tax deprives them of their property without due process of law.

In support of this position it was argued that if bonds were subject to taxation simply because of their presence within the jurisdiction it was due to the survival of primitive notions that identified the obligations with the parchment or paper upon which they were written, that bills and notes had a different history, and that there was no ground for extending the conceptions of the infancy of the race to them. It was pointed out that the power to tax simple contracts depends upon power over the person of one of the parties and does not attach to documentary evidence of such contracts that may happen to be within the jurisdiction. Cases were cited in which this court has pronounced bills and notes to be only evidences of the simple contracts that they express, Pelham v. Way, 15 Wall. 196; Wyman v. Halstead, 109 U. S. 654, 656, and the precise issue was thought to be disposed of by Buck v. Beach, 206 U. S. 392. We shall discuss this case, but for the moment it is enough to say that for the purposes of argument we assume that bills and notes stand as mere evidences at common law.

But we are bound by the construction given to the New York statutes by the New York courts, and the question is whether a statute that we must read as purporting to give to bills and notes within the state the same standing as bonds for purposes of taxation, goes beyond the constitutional power of the state. Again for the purposes of argument we may assume that there are limits to this kind of power; that the presence of a deed would not warrant a tax measured by the value of the real estate that it had conveyed, or even that a memorandum of a contract required by the statute of frauds would not support a tax on the value of the contract because it happened to be found in the testator's New York strong box. But it is plain that bills and notes, whatever they may be called, come very near to identification with the contract that they embody. An indorsement of the paper carries the contract to the endorsee. An indorsement in blank passes the debt from hand to hand so that whoever has the paper has the debt. It is true that in some cases there may be a recovery without producing and surrendering the paper, but so may there be upon a bond in modern times. It is not primitive tradition alone that gives their peculiarities to bonds, but a tradition laid hold of, modified and adapted to the convenience and understanding of business men. The same convenience and understanding apply to bills and notes, as no one would doubt in the case of bank notes, which technically do not differ from others. It would be an extraordinary deduction from the Fourteenth Amendment to deny the power of a state to adopt the usages and views of business men in a statute on the ground that it was depriving them of their property without due process of law. The necessity of caution in cutting down the power of taxation on the strength of the Fourteenth Amendment often has been adverted to. Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co., 197 U. S. 430, 434. Unless we are bound by authority, we think the statute, so far as we now are concerned with it, plainly within the power of the state to pass.

As to authority, it has been asserted or implied again and again that the states had the power to deal with negotiable paper on the footing of situs. "It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicil of the owner; * * * Notes and mortgages are of the same nature * * * we see no reason why a state may not declare that if found within its limits they shall be subject to taxation." New Orleans v. Stempel, 175 U. S. 309, 322, 323. Bristol v. Washington County, 177 U. S. 133, 141. State Board of Assessors v. Comptoir National d'Escompte, 191 U. S. 388, 403, 404. Metropolitan Life Insurance Co. v. New Orleans, 205 U. S. 395, 400, 402. This is the established law unless it has been overthrown by the decision in Buck v. Beach, 206 U. S. 392.

No such effect should be attributed to that case. The Ohio notes in Buck's hands that were held not to be taxable in Indiana were moved backward and forward between Ohio and Indiana with the intent to avoid taxation in either state. 206 U. S. 402. They really were in Ohio hands for business purposes, ibid., 395, and sending them to Indiana was spoken of by Mr. Justice Peckham as improper and unjustifiable. Ibid. 402. Their absence from Ohio evidently was regarded as a temporary absence from home. Ibid. 404. And the conclusion is carefully limited to a refusal to hold the presence of the notes "under the circumstances already stated" to amount to the presence of property within the state. A distinction was taken between the presence sufficient for a succession tax like that in this case, and that required for a property tax such as then was before the court, and the only point decided was that the notes had no such presence in Indiana as to warrant a property tax. See New York Central & Hudson River R. R. Co. v. Miller, 202 U. S. 584, 597. If Buck v. Beach is not to be distinguished on one of the foregoing grounds, as some of us think that it can be, we are of opinion that it must yield to the current of authorities to which we have referred.

In the case at bar it must be taken that the safe deposit box in which the notes were found was their permanent resting place and therefore that the power of the state so repeatedly asserted in our decisions could come into play.

Judgment affirmed.

MR. JUSTICE MCKENNA, concurring.

I concur in the result, but cannot concur in the reasoning of the opinion, or rather its controlling proposition unmodified. I might pass it by in silence if it did not have larger consequence than the decision of the pending case. The opinion is rested on the proposition, said to be based on authority, that the states have power to deal "with negotiable paper on the footing of situs," that is, to regard such paper so far concrete and tangible as to be of itself a subject of taxation, irrespective of the domicile of its owner or, I add, the locality of the debt which it represents. For the proposition announced, Mr. Justice Brewer, in New Orleans v. Stempel, 175 U. S. 309, is quoted from. Other cases are cited and it is said to be established law unless it has been overthrown by the decision in Buck v. Beach, 206 U. S. 392. I refrain from meeting the judgment of my brethren by simply opposing assertion, and I feel constrained to review the cases, including Buck v. Beach. I will do so in the order of their decision.

[Here the opinion distinguishes New Orleans v. Stempel, supra, Bristol v. Washington County, supra, and State Board of Assessors v. Comptoir National d'Escompte, supra, as holding that credits of nonresidents may be taxed by the state in which the credits have a business situs.]

It was the situs of the debt which determined the legality of the taxation in all of the cases and united them under the principle expressed in Metropolitan Life Insurance Co. v. New Orleans, that the law regards the place of the origin of negotiable paper as its true home, to which it will return to be paid, and its temporary absence can be left out of account. They do not support the broad proposition that to negotiable paper can be ascribed such tangibility and entity as to make it a taxable object of itself in a jurisdiction other than that of the obligation it represents. This broad generality is necessary to sustain the tax in the present case if it can be regarded a direct tax on property, for Illinois, not New York, is the situs of the debts of which the notes taxed are the evidence, and of the mortgages which secure them.

That broad proposition was asserted in Buck v. Beach and rejected. The notes involved had their origin in Ohio and represented investments in that state. Their owner died, and one of the two trustees of his will resided in Indiana. The notes were kept in the custody of the latter except that at the time of assessment of taxes in that state they were sent to Ohio and after a lapse of a few days returned to him. They were taxed in Indiana. The tax was sustained by the State Supreme Court but declared invalid by this court. * * *

And it was pointed out that the prior cases, which were specifically reviewed, gave no support to the rejected doctrine. It was not overlooked that certain specialty debts, state and municipal bonds and circulating notes of banking institutions, have sometimes been treated as property where they were found though removed from the domicile of the owner, and State Tax on Foreign-held Bonds, 15 Wall. 300, 324, was cited. Promissory notes were held not to be within the rule.

It is, however, asserted that the circumstances of the case showed that the notes were fugitives from taxation, alternately from Indiana and Ohio, and that their stay in Indiana was in evasion of their obligations to Ohio and was "a transit, although prolonged."

But the bad motive of the possessor of the notes was not made a ground of decision. If the court felt a retributive impulse to deny the notes sanctuary in Indiana it was suppressed. The court declared that the motive for sending the notes to Indiana was of no consequence and that the attempt to escape proper taxation in Ohio did not confer jurisdiction on Indiana to tax them (p. 402).

But we are not required to overrule Buck v. Beach nor make it yield in any particular in order to sustain the tax in the case at bar. It, in effect, reserved from its principle inheritance or succession taxing acts by rejecting as not in point cases which involved them. We said, "The foundation upon which such acts rest is different from that which exists where the assessment is levied upon property. The succession or inheritance tax is not a tax on property, as has been frequently held by this court, Knowlton v. Moore, 178 U. S. 41, and Blackstone v. Miller, 188 U. S. 189, and therefore the decisions arising under such inheritance tax cases are not in point" (p. 408).

The tax under review is of that kind. In other words, it is not a tax on property, but a tax upon the transfer of the property by the will of the testator of plaintiffs in error as provided by the laws of the state. The will was probated in Connecticut, where the deceased was a resident, but ancillary letters of administration were issued to plaintiffs in error by the Surrogate's Court, County of New York, State of New York, and the taxed notes were part of the property disposed of by his will. It appears, therefore, that the property is in the control of the courts of New York. In other words, the laws of New York are invoked, accomplish its transfer and subject it to the dispositions of the will and make effectual the purposes of the testator. Blackstone v. Miller, supra.

I am dealing with the power of taxation under our decisions. If there be injustice in its exercise by measuring the tax by the value of the credits represented by the notes, it is an injustice which this court cannot redress.

I am authorized to say that MR. JUSTICE PITNEY concurs in this opinion.

MR. JUSTICE LAMAR, dissenting.

I concur in Mr. Justice McKenna's analysis of Buck v. Beach and the other cases, but am of the opinion that the principle there decided, applies as well to inheritance and transfer taxes on notes as to direct taxes and that, therefore, the judgment in the present case should be reversed.

I am authorized to say that THE CHIEF JUSTICE [WHITE] and MR. JUSTICE VAN DEVANTER concur in this dissent.

FRICK v. PENNSYLVANIA.

1925. Supreme Court of the United States. 268 U. S. 473.

Error to the Supreme Court of Pennsylvania.

Mr. Justice Van Devanter delivered the opinion of the court.

These four cases involve the constitutional validity of particular features of a statute of Pennsylvania imposing a tax on the transfer of property by will or intestate laws. Act No. 258, Pa. Laws 1919, p. 521; Pa. Stat. 1920, §§ 20465-20499.

Henry C. Frick, domiciled in Pennsylvania, died testate December 2, 1919, leaving a large estate. By his will he disposed of the entire estate—giving about 53 per cent for charitable and public purposes and passing the rest to or for the use of individual beneficiaries. Besides real and personal property in Pennsylvania, the estate included tangible personalty having an actual situs in New York, tangible personalty having a like situs in Massachusetts, and various stocks in corporations of states other than Pennsylvania. The greater part of the tangible personalty in New York,[1] having a value of $13,132,391, was given to a corporation of that state for the purposes of a public art gallery, and the other part,[2] having a value of $77,818.75, to decedent's widow. The tangible personalty in Massachusetts,[3] having a value of $325,534.25, was also given to the widow. The will was probated in Pennsylvania, and letters testamentary were granted there. It was also proved in New York and Massachusetts, and ancillary letters were granted in those states. Under the laws of the United States the executors were required to pay to it, and did pay, an estate tax of $6,338,898.68; and under the laws of Kansas, West Virginia, and other states they were required to pay to such states, and did pay, large sums in taxes imposed as a prerequisite to an effective transfer from a nonresident deceased of stocks in corporations of those states.

The Pennsylvania statute provides that where a person domiciled in that state dies seised or possessed of property, real or personal, a tax shall be laid on the transfer of the property from him by will or intestate laws, whether the property be in that state or elsewhere; that the tax shall be 2 per cent. of the clear value of so much of the property as is transferred to or for the use of designated relatives of the decedent and 5 per cent. of the clear value of so much of it as is transferred to or for the use of others; and that the clear value shall be ascertained by taking the gross value of the estate and deducting therefrom the decedent's debts and the expenses of administration, but without making any deduction for taxes paid to the United States or to any other state.

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[1] This consisted of rare paintings, rugs, furniture, bronzes, porcelains and other art treasures known as "The Frick Collection" and housed in a building in New York City especially constructed for the purpose.

[2] This consisted of furniture, household furnishings, automobiles, tools, etc., in Mr. Frick's New York house and garage.

[3] This consisted of paintings, other objects of art, furniture, household furnishings, farming implements, etc., of Mr. Frick's estate at Prides Crossing.

In applying this statute to the Frick estate, the taxing officers included the value of the tangible personalty in New York and Massachusetts in the clear value on which they computed the tax; and in fixing that value refused to make any deduction on account of the estate tax paid to the United States or the stock transfer taxes paid to other states. In proceedings which reached the Supreme Court of the state the action of the taxing officers and the resulting tax were upheld by that court. 277 Pa. 242. The matter was then brought here on writs of error under section 237 of the Judicial Code.

The plaintiffs in error are the executors and an interested legatee. They contended in the state court, and contend here, that in so far as the Pennsylvania statute attempts to tax the transfer of tangible personal property having an actual situs in states other than Pennsylvania it transcends the power of that state, and thereby contravenes the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

This precise question has not been presented to this court before, but there are many decisions dealing with cognate questions which point the way to its solution. [Several decisions on property taxes were here cited and Union Refrigerator Transit Co. v. Kentucky, ante, p. 1608 was quoted from.]

The Pennsylvania statute is a tax law, not an escheat law. This is made plain by its terms and by the opinion of the state court. The tax which it imposes is not a property tax but one laid on the transfer of property on the death of the owner. This distinction is stressed by counsel for the state. But to impose either tax the state must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion and in contravention of due process of law. Here the tax was imposed on the transfer of tangible personalty having an actual situs in other states—New York and Massachusetts. This property, by reason of its character and situs, was wholly under the jurisdiction of those states and in no way under the jurisdiction of Pennsylvania. True, its owner was domiciled in Pennsylvania, but this neither brought it under the jurisdiction of that state nor subtracted anything from the jurisdiction of New York and Massachusetts. In these respects the situation was the same as if the property had been immovable realty. The jurisdiction possessed by the states of the situs was not partial but plenary, and included power to regulate the transfer both inter vivos and on the death of the owner, and power to tax both the property and the transfer.

Mr. Justice Story said in his work on Conflict of Laws, § 550: "A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. It may regulate its transfer, and subject it to process and execution, and provide for and control the uses and disposition of it, to the same extent that it may exert its authority over immovable property."

And in Pullman Car Co. v. Pennsylvania, 141 U. S. 18, 22, where this court held the actual situs of tangible personalty rather than the domicile of its owner to be the true test of jurisdiction and of power to tax, it was said:

"No general principles of law are better settled, or more fundamental, than that the legislative power of every state extends to all property within its borders, and that only so far as the comity of that state allows can such property be affected by the law of any other state. The old rule expressed in the maxim mobilia sequuntur personam, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the lex situs, the law of the place where the property is kept and used."

In support of the tax, counsel for the state refer to statutes of New York and Massachusetts evidencing an election by those states to accept and give effect to the domiciliary law regulating the transfer of personal property of owners dying while domiciled in other states; and from this they contend that the transfer we are considering was brought under the jurisdiction of Pennsylvania and made taxable there. We think the contention is not sound. The statutes do not evidence a surrender or abandonment of jurisdiction, if that were admissible. On the contrary, they in themselves are an assertion of jurisdiction and an exercise of it. They declare what law shall apply and require the local courts to give effect to it. And it should be observed that here the property was administered in those courts and none of it was taken to the domiciliary state. Obviously the accepted domiciliary law could not itself have any force or application outside that state. Only in virtue of its express or tacit adoption by the states of the situs could it have any force or application in them. Through its adoption by them it came to represent their will and this was the sole basis of its operation there. Burdick on American Constitution, § 257. In keeping with this view, New York and Massachusetts both provide for the taxation of transfers under the adopted domiciliary law; and they have imposed and collected such a tax on the transfer we are now considering.

Counsel for the state cite and rely on Blackstone v. Miller, 188 U. S. 189, and Bullen v. Wisconsin, 240 U. S. 625. Both cases related to intangible personalty, which has been regarded as on a different footing from tangible personalty. When they are read with this distinction in mind, and also in connection with other cases before cited, it is apparent that they do not support the tax in question.

We think it follows from what we have said that the transfer of the tangible personalty in New York and Massachusetts occurred under and in virtue of the jurisdiction and laws of those states, and not under the jurisdiction and laws of Pennsylvania, and therefore that Pennsylvania was without power to tax it.

One ground on which the state court put its decision was that, in taxing the transfer of the property which the decedent owned in Pennsylvania, it was admissible to take as a basis for computing the tax the combined value of that property and the property in New York and Massachusetts. Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the state had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the state's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail. If Pennsylvania could tax according to such a standard other states could. It would mean, as applied to the Frick estate, that Pennsylvania, New York and Massachusetts could each impose a tax based on the value of the entire estate, although severally having jurisdiction of only parts of it. Without question each state had power to tax the transfer of so much of the estate as was under its jurisdiction, and also had some discretion in respect of the rate; but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others. Western Union Telegraph Co. v. Foster, 247 U. S. 105, 114, and cases cited; Looney v. Crane Company, 245 U. S. 178, 188; International Paper Co. v. Massachusetts, 246 U. S. 135, 141; Air-Way Corporation v. Day, 266 U. S. 71, 81; Wallace v. Hines, 253 U. S. 66, 69; Louisville and Jeffersonville Ferry Company v. Kentucky, 188 U. S. 385, 395.

The state court cited in support of its view Maxwell v. Bugbee, 250 U. S. 525, 539. The case is on the border line, as is evidenced by the dissent of four members of the court. But it does not go so far as its citation by the state court suggests. The tax there in question was one imposed by New Jersey on the transfer of stock in a corporation of that state. The stock was part of the estate of a decedent who had resided elsewhere. The state statute, described according to its essence, provided for a tax graduated in rate according to the value of the entire state, and required that where the estate was partly within and partly without the state the transfer of the part within should bear a proportionate part of what according to the graduated rate would be the tax on the whole. The only bearing which the property without the state had on the tax imposed in respect of the property within was that it affected the rate of the tax. Thus, if the entire estate had a value which put it within the class for which the rate was 3 per cent. that rate was to be applied to the value of the property within the state in computing the tax on its transfer, although its value separately taken would put it within the class for which the rate was 2 per cent. There was no attempt, as here, to compute the tax in respect of the part within the state on the value of the whole. The court sustained the tax, but distinctly recognized that the state's power was subject to constitutional limitations, including the due process of law clause of the Fourteenth Amendment, and also that it would be a violation of that clause for a state to impose a tax on a thing within its jurisdiction "in such a way as to really amount to taxing that which is beyond its authority."

Another case cited by the state court is Plummer v. Coler, 178 U. S. 115, where it was held that a state, in taxing the transfer by will or descent of property within its jurisdiction, might lawfully measure the tax according to the value of the property, even though it included tax-exempt bonds of the United States; and this because the tax was not on the property but on the transfer. We think the case is not in point here. The objection to the present tax is that both the property and the transfer were within the jurisdiction of other states and without the jurisdiction of the taxing state.

For the reasons which have been stated, it must be held that the Pennsylvania statute, in so far as it attempts to tax the transfer of tangible personalty having an actual situs in other states, contravenes the due process of law clause of the Fourteenth Amendment and is invalid.

The next question relates to the provision which requires that, in computing the value of the estate for the purpose of fixing the amount of the tax, stocks in corporations of other states shall be included at their full value without any deduction for transfer taxes paid to those states in respect of the same stocks.

The decedent owned many stocks in corporations of states, other than Pennsylvania, which subjected their transfer on death to a tax and prescribed means of enforcement which practically gave those states the status of lienors in possession. As those states had created the corporations issuing the stocks, they had power to impose the tax and to enforce it by such means, irrespective of the decedent's domicile, and the actual situs of the stock certificates. Pennsylvania's jurisdiction over the stocks necessarily was subordinate to that power. Therefore to bring them into the administration in that state it was essential that the tax be paid. The executors paid it out of moneys forming part of the estate in Pennsylvania and the stocks were thereby brought into the administration there. We think it plain that such value as the stocks had in excess of the tax is all that could be regarded as within the range of Pennsylvania's taxing power. Estate of Henry Miller, 184 Cal. 674, 683. So much of the value as was required to release the superior claim of the other states was quite beyond Pennsylvania's control. Thus the inclusion of the full value in the computation on which that state based its tax, without any deduction for the tax paid to the other states, was nothing short of applying that state's taxing power to what was not within its range. That the stocks, with their full value, were ultimately brought into the administration in that state does not help. They were brought in through the payment of the tax in the other states out of moneys of the estate in Pennsylvania. The moneys paid out just balanced the excess in stock value brought in. Yet in computing the tax in that state both were included.

We are of opinion that in so far as the statute requires that stocks in corporations of other states be included at their full value, without deducting the tax paid to those states, it exceeds the power of the state and thereby infringes the constitutional guaranty of due process of law.

The remaining question relates to the provision declaring that, in determining the value of the estate for the purpose of computing the tax, there shall be no deduction of the estate tax paid to the United States. The plaintiffs in error contend that this provision is invalid, first, as being inconsistent with the constitutional supremacy of the United States, and, secondly, as making the state tax in part a tax on the federal tax.

In support of the contention we are referred to several cases in which state courts have held that the federal tax should be deducted in determining the value on which such a state tax is computed. But the cases plainly are not in point. In them the state courts were merely construing an earlier type of statute requiring that the state tax be computed on the clear or net value of the estate and containing no direction respecting the deduction of the federal tax. An earlier Pennsylvania statute of that type was so construed. Later statutes in the same states expressly forbidding any deduction of the federal tax have been construed according to their letter. This is true of the present Pennsylvania statute. The question here is not how the statute shall be construed, but whether, as construed by the state court, it is open to the constitutional objections urged against it.

While the federal tax is called an estate tax and the state tax is called a transfer tax, both are imposed as excises on the transfer of property from a decedent and both take effect at the instant of transfer. Thus both are laid on the same subject, and neither has priority in time over the other. Subject to exceptions not material here, the power of taxation granted to the United States does not curtail or interfere with the taxing power of the several states. This power in the two governments is generally so far concurrent as to render it admissible for both, each under its own laws and for its own purposes, to tax the same subject at the same time. * * *

With this understanding of the power in virtue of which the two taxes are imposed, we are of opinion that neither the United States nor the state is under any constitutional obligation in determining the amount of its tax to make any deduction on account of the tax of the other. With both the matter of making such a deduction rests in legislative discretion. In their present statutes both direct that such a deduction be not made. It is not as if the tax of one, unless and until paid, presented an obstacle to the exertion of the power of the other. Here both had power to tax and both exercised it as of the same moment. Neither encroached on the sphere or power of the other. The estate out of which each required that its tax be paid is much more than ample for the payment of both taxes. No question of supremacy can arise in such a situation. Whether, if the estate were not sufficient to pay both taxes, that of the United States should be preferred (see Lane County v. Oregon, 7 Wall. 71, 77) need not be considered. That question is not involved here.

The objection that when no deduction is made on account of the federal tax the state tax becomes to that extent a tax on the federal tax and not a tax on the transfer is answered by what already has been said. But by way of repetition it may be observed that what the state is taxing is the transfer of particular property, not such property depleted by the federal tax. The two taxes were concurrently imposed and stand on the same plane, save as the United States possibly might have a preferred right of enforcement if the estate were insufficient to pay both.

In conclusion we hold, first, that the value of the tangible personalty in New York and Massachusetts should not have been included in determining the clear value on which the Pennsylvania tax was computed; secondly, that in determining such clear value the stocks in corporations of other states should not have been included at their full value without deducting the transfer tax paid to such states in respect of those stocks; and thirdly, that there was no error in refusing to make any deduction from the clear value on account of the estate tax imposed by the United States.

Judgments reversed.

BLODGETT, TAX COMMISSIONER OF CONNECTICUT, v. SILBERMAN ET AL.

Take

1928. Supreme Court of the United States. 277 U. S. 1.

Certiorari and error to the Superior Court of Fairfield County, Connecticut.

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

These two cases, which are really one, grow out of the operation of a transfer tax by the State of Connecticut. They are brought to this Court, one by certiorari and one by writ of error. The questions presented are whether the tax on the transfer or certain parts of the large estate of Robert B. Hirsch was in violation of the due process clause of the Fourteenth Amendment to the federal Constitution, in that they were tangible property in New York and not in Connecticut. § Hirsch died September 23, 1924, domiciled at Stamford, Conn., leaving a will with two codicils executed in accordance with the laws of both New York and Connecticut. The plaintiffs are the surviving executors of the will. Hirsch left real estate, chattels, cattle, horses and poultry in Connecticut, and also a debt due from a resident of Connecticut and a certificate of stock in a Connecticut corporation, as to all of which there is no dispute about the tax that was imposed. § The great bulk of his estate, however, consisted of (1) a large interest, as general partner, appraised at $1,687,245.34, in the partnership of William Openhym & Sons, doing business in New York, and organized under the Limited Partnership Act of that state; point (2) certificates of stock in New York, New Jersey and Canada corporations, appraised at $277,864.25; (3) bonds and Treasury certificates of indebtedness of the United States, appraised at $615,121.17; (4) a small savings bank account in New York; (5) a life insurance policy in the Mutual Life Insurance Company of New York payable to the estate; and (6) a small amount of bank bills and coin in a deposit box in New York. All the bonds and certificates of stock at the time of the decedent's death, and for a long time prior thereto, had been physically placed and kept in safe deposit boxes in New York City and were never in Connecticut. The partnership assets consisted of real estate in New York and also in Connecticut merchandise, chattels, credits, and other personal property. The testator bequeathed the larger part of his estate to charitable and educational corporations organized under the laws of New York and existing in that state. The executors offered the will and codicils for probate in New York. They were admitted to probate in the Surrogate's Court in the county of New York, and thereafter the executors proceeded in the settlement of the estate in New York. They have paid from the funds of the estate legacies provided in the will and codicils amounting to $299,297.45. They have also paid the debts, the federal estate tax and the New York transfer or inheritance tax, which amounted to $19,166.04. The transfer report in that court exempted the legacies bequeathed to charitable and educational institutions in accord with New York law. The executors have paid to the trustees named in the will and codicils the amount therein mentioned for the benefit of certain persons named. The executors sold the stock standing in the name of the decedent and made transfer of the same to the purchaser, and the Mutual Life Insurance Company paid to the executors the proceeds of the policy. The National City Bank of New York paid to the executors the amount of a small deposit account therein to the credit of the decedent at the time of his death.

[In subsequent probate proceedings in Connecticut the tax commissioner of Connecticut filed a claim for Connecticut inheritance taxes on the devolution of the above described property and the case was reserved for the advice of the Connecticut Supreme Court of Errors.]

The Supreme Court of Errors held, first, that the interest of the decedent in the partnership was a chose in action and intangible and the transfer thereof was subject to the tax imposed by the law of the decedent's domicil; second, that the bonds and certificates of the United States were tangible property having a situs in New York and were not within the taxable jurisdiction of Connecticut, but were to be regarded as in the same class of tangibles as the paintings, works of art and furniture considered in the case of Frick v. Pennsylvania, 268 U. S. 473. In that case, Pennsylvania, the state of Mr. Frick's domicile, sought to impose a transfer or succession tax on the paintings and other tangible personalty, which had always been in New York City, and it was held that they had an actual situs in New York and that, under the Fourteenth Amendment, Pennsylvania could impose no transfer or succession tax in respect of them. Applying what it conceived to be the principle of that case to the bonds of the United States and certificates of its indebtedness in this, the Supreme Court of Errors held that their transfer could not be taxed in Connecticut.

Bonds

The Superior Court, following the advice of the Supreme Court of Errors, entered a judgment giving full effect to it. That is the final judgment in the case and it is the judgment now to be reviewed. * * *

The Connecticut Succession and Transfer Act, Ch. 190 of the Public Acts of 1923, says in its section 1:

"All property and any interest therein owned by a resident of this state at the time of his decease, and all real estate within this state owned by a nonresident of this state at the time of his decease, which shall pass by will or inheritance under the laws of this state; and all gifts of such property by deed, grant or other conveyance, made in contemplation of the death of the grantor or donor, or intended to take effect in possession or enjoyment at or after the death of such grantor or donor, shall be subject to the tax herein prescribed."

This is a tax not upon property but upon the right or privilege of succession to the property of a deceased person as is made clear in the opinion of the Supreme Court of Errors in this and prior cases.

* * *

The power of the state of a man's domicile to impose a tax upon the succession to, or the transfer of, his intangible property, even when the evidences of such property are outside of the state at the time of his death, has been constantly asserted by the legislatures of the various states. The Supreme Court of Errors in its opinion in this case says that at the present time the inheritance tax laws of over four-fifths of the states impose a tax similar to that imposed by Connecticut. Frothingham v. Shaw, 175 Mass. 59; In re Estate of Zook (Missouri), 296 S. W. 778; In re Sherwood's Estate, 122 Wash. 648; Mann v. Carter, 74 N. H. 345; People v. The Union Trust Company, 255 Ill. 168; In re Lines' Estate, 155 Pa. 378; In re Estate of Hodges, 170 Cal. 492; Commonwealth v. Williams' Executor, 102 Va. 778. The same principle was recognized by this Court in Carpenter v. Pennsylvania, 17 How. 456, before the adoption of the Fourteenth Amendment, and the principle was reaffirmed thereafter in Orr v. Gilman, 183 U. S. 278; Keeney v. New York, 222 U. S. 525; and Bullen v. Wisconsin, 240 U. S. 625. In the latter case the question arose as to the power of Wisconsin to impose a tax upon the succession to certain intangible property of one of its citizens, the evidences of which were held by a trust company in Illinois upon a revocable trust at the time of his death, and the power was sustained. Reference to the record in the case shows that the property included shares of stock in Missouri, New Jersey and Illinois corporations; stock in a national bank organized under the National Banking Act; mortgage bonds and debentures issued by New Jersey, Illinois, Missouri, Utah and Kansas corporations; promissory notes of residents of Illinois and Minnesota; insurance policies issued by New York, Canadian and Wisconsin insurance companies; and money on deposit in two Illinois banks. The same principle was affirmed in the Frick case.

At common law the maxim "mobilia sequuntur personam" applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the state of the domicile or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not.

Further, this principle is not to be shaken by the inquiry into the question whether the transfer of such intangibles, like specialties, bonds or promissory notes, is subject to taxation in another jurisdiction. As to that we need not inquire. It is not the issue in this case. For present purposes it suffices that intangible personalty has such a situs at the domicile of its owner that its transfer on his death may be taxed there.

This brings us to the question whether the partnership interest of the decedent in William Openhym & Sons was a chose in action and intangible personalty. The partnership was a limited partnership organized in New York; the last agreement therefor having been executed in December, 1921. The New York partnership law then in force was chapter 408, Laws of 1919.

Under section 51 of this law, a partner is a co-owner with his partner of specific partnership property, holding this property as a tenant in partnership. Such tenancy confers certain rights with limitations. A partner has a right equal to that of his partners to possess specific partnership property for partnership purposes, but not otherwise. His right in specific partnership property is not assignable, nor is it subject to attachment or execution upon a personal claim against him; upon his death the right to the specific property vests not in the partner's personal representative but in the surviving partner; his right in specific property is not subject to dower, curtesy, or allowance to widows, heirs or next of kin.

Section 52 specifically provides:

"A partner's interest in the partnership is his share of the profits and surplus and the same is personal property."

Under section 73, when any partner dies and the partnership continues, his personal representative may have the value of his interest at the date of dissolution ascertained and receive as an ordinary creditor an amount equal to the value of his interest in the partnership with interest.

Under section 98, c. 640, Laws of 1922, the rights of a general partner in a limited partnership, which was the interest of the decedent here when he died, are identical with those of a general partner in a general partnership. And in regard to a limited partner's interest, section 107 of the law specifically provides:

"A limited partner's interest in the partnership is personal property."

It is very plain, therefore, that the interest of the decedent in the partnership of William Openhym & Sons was simply a right to share in what would remain of the partnership assets after its liabilities were satisfied. It was merely an interest in the surplus, a chose in action. It is an intangible, and carries with it a right to an accounting.

There were among the holdings and property of the partnership buildings and land. Although these statutes were passed after the decision in Darrow v. Calkins, 154 N. Y. 503, we have no reason for thinking that the partnership law of New York is now any different from what its Court of Appeals said it was in that case, pp. 515, 516, as follows: [The quotation is to the effect that where by the partnership agreement it appears that it was the intention of the partners that the lands should be treated and administered as personalty for all purposes, effect will be given thereto.]

It thus clearly appears that both under the partnership agreement and under the laws of the State of New York the interest of the partner was the right to receive a sum of money equal to his share of the net value of the partnership after a settlement, and this right to his share is a debt owing to him, a chose in action, and an intangible. We concur with the Supreme Court of Errors that as such it was subject to the transfer tax of Connecticut.

We come then to the second question, whether bonds of the United States and certificates of indebtedness of the United States deposited in a safe deposit box in New York City, and never removed from there, owned by the decedent at the time of his death, were intangibles which come within the rule already stated.

The argument is that such bonds payable to bearer and transferable from hand to hand have lost their character as choses in action and have taken on the qualities of physical property, and cases are cited to indicate that they can be made the subject of execution and constitute a basis for the jurisdiction of the courts and of taxing officers of the state in which the paper upon which the evidence of the debt or obligation is written is found, although their owner lives and dies in another state.

The Supreme Court of Errors takes this view, citing Frick v. Pennsylvania, and holds that the transfer of the United States bonds and certificates is taxable only in New York where they are, and only there. The court cites, as sustaining its conclusion that the transfer of the bonds is only taxable in New York, the case of State Tax on Foreign-Held Bonds, 15 Wall. 300. This case is often cited to the point that Mr. Justice Field takes as indisputable (on page 319) that a state may not tax property that is not within its jurisdiction—a matter recognized in Frick v. Pennsylvania, 268 U. S. 473, 489; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 202; and Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 206. The effect of some of Mr. Justice Field's language in that case, and the exact point on which the decision there turned, have since been fully discussed by this court and qualified in Savings & Loan Society v. Multnomah County, 169 U. S. 421, 428; New Orleans v. Stempel, 175 U. S. 309, 319, 320; and Blackstone v. Miller, 188 U. S. 189, 206. The tax there held invalid was a tax imposed by a statute of Pennsylvania upon the interest due a nonresident bondholder on bonds issued by a corporation of that state. It is now settled in these later cases that the point decided in the State Tax on Foreign-

Held Bonds Case was that the law of Pennsylvania in requiring the railroad company, which issued the bonds, to pay the state tax on them and deduct it from the interest due the nonresident owners, was as to them a law impairing the obligation of contracts under Murray v. Charleston, 96 U. S. 432. The case, therefore, is not authority for the proposition for which the Supreme Court of Errors cites it, to wit: That such bonds are to be completely assimilated to tangible personal property. The other cases cited by the Supreme Court of Errors are New Orleans v. Stempel, 175 U. S. 309, 321, and like cases which follow it in which a state, not that of the domicile of the owner, has been held to have the right to tax bonds, promissory notes, and other written evidences of choses in action with which business is there carried on for the owner giving them what is sometimes called "a business situs," but such cases have little or no bearing on the power of the state of a decedent's domicile to tax the transfer of his bonds which we are now considering.

The question here is whether bonds, unlike other choses in action, may have a situs different from the owner's domicile such as will render their transfer taxable in the state of that situs and in only that state. We think bonds are not thus distinguishable from other choses in action. It is not enough to show that the written or printed evidence of ownership may, by the law of the state in which they are physically present, be permitted to be taken in execution or dealt with as reaching that of which they are evidence, even without the presence of the owner. While bonds often are so treated, they are nevertheless in their essence only evidences of debt. The Supreme Court of Errors expressly admits that they are choses in action. Whatever incidental qualities may be added by usage of business or by statutory provision, this characteristic remains, and shows itself by the fact that their destruction physically will not destroy the debt which they represent. They are representative, and not the thing itself. * * *

The line which was drawn in the case of Frick v. Pennsylvania, supra, was one which was adopted from the decision of this court in Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, and other cases cited in the same connection, where it was held that the power of taxation could not extend to tangible chattels having an actual situs outside the jurisdiction, although the owner was within it. It was pointed out that this is not true of debts and choses in action which usually have a taxable situs at the owner's domicile. * * *

The discussion in the Union Refrigerator Case shows what this court meant in the Frick Case in holding that personal property in the form of paintings and furniture having an actual situs in one state could not be subjected to a transfer tax in another state, and emphasizes the inference that it did not apply to anything having as its essence an indebtedness or a chose in action and could not apply to property in the form of specialties or bonds or other written evidences of indebtedness whether governmental or otherwise, even though they passed from hand to hand. The analogy between furniture and bonds cannot be complete because bonds are representative only and are not the thing represented. They are at most choses in action and intangibles.

We think, therefore, that the Supreme Court of Errors in extending the rule of the Frick Case from tangible personal property, like paintings, furniture or cattle, to bonds, is not warranted, and to that extent we must reverse its conclusion in denying to Connecticut the right to tax the transfer of the bonds and Treasury certificates. Of course this reasoning necessarily sustains the different views of that court that the transfer of certificates of stock in corporations of other states than Connecticut was taxable in the latter as the transfer of choses in action.

Among the other items is a savings bank account in New York which is certainly a chose in action and was properly treated as subject to the same rule. So, too, a life insurance policy payable to the estate was also of that character.

There was a small amount of cash, $287.48, in bank notes and coin in a safe deposit box in New York which the Supreme Court of Errors held not taxable in Connecticut. As to this, the contention on behalf of Connecticut is that it should be treated as attached to the person of the owner and subject to a transfer tax at the domicile. It is argued that it was not like coin or treasure in bulk, but like loose change, so to speak. To money of this amount usually and easily carried on the person, it is said that the doctrine of mobilia sequuntur personam has peculiar application in the historical derivation of the maxim. But we think that money, so definitely fixed and separated in its actual situs from the person of the owner as this was, is tangible property and cannot be distinguished from the paintings and furniture held in the Frick Case to be taxable only in the jurisdiction where they were.

The results thus stated lead to our reversing the judgment of the Superior Court of Connecticut, in respect to the tax on the transfer of the bonds and certificates of indebtedness of the United States and to our affirming the judgment in other respects. * * *

Affirmed in part and reversed in part.

STATE OF COLORADO v. HARBECK.

1921. Court of Appeals of New York. 232 N. Y. 71.

Pound, J. This action was brought to recover an inheritance tax upon the estate of John H. Harbeck, deceased. Harbeck was a resident of Boulder, Colorado. In October, 1910, he left his home in Colorado with the intention of going abroad. About a month later, while en route, in the city of New York, he died. On March 28, 1911, his will and four codicils were admitted to probate in New York county and letters testamentary thereunder were issued to the widow who was also the principal legatee under said will. The defendants Alfred S. Brown and Francis B. Clark are legatees under the codicils. The defendant The United States Trust Company is the trustee under certain trusts created by the will for the benefit of the defendant William Henry Harbeck. Transfer tax proceedings were had in New York and taxes assessed as upon the estate of a non-resident and paid. The executrix filed her account July 8, 1913, which was settled and allowed March 10, 1914. No provision was made for payment of a transfer tax to the state of Colorado, which had no notice of the proceedings in New York.

After the executrix had accounted and the estate had been distributed in New York, the state of Colorado instituted proceedings in its courts to assess a transfer tax under its laws upon the estate. An appraisal was had February 28, 1916, notice having been given by mail to all defendants as required by its law. The inheritance tax laws of Colorado provide (Laws of 1902, ch. 3, as amended in 1907, 1909, § 2) that the tax shall thereupon be immediately due and payable and remain a lien on the property transferred until paid. It is further provided (§ 1) that all legatees and executors shall be liable for such taxes until the same have been paid "as hereinafter directed." The tax was assessed as upon the estate of a resident and notice of assessment given to all the defendants as required by the statute and such notice was in fact received by them. The amount of such tax was upwards of $55,000. No appeal was taken under the Colorado statute to review the assessment. The estate thus assessed for taxation consisted of stocks, bonds and credits of the value of nearly $3,000,000, none of which were physically present in Colorado at the time of decedent's death nor have since come into the state. None of the defendants appeared in the Colorado tax proceedings. In February, 1916, an administrator with the will annexed of decedent was appointed and qualified in Colorado and continued to act as such. At the time the Colorado proceedings were instituted and this proceeding begun none of the defendants were residents of Colorado.

This action was thereafter begun in the Supreme Court of the state of New York, by the state of Colorado against the executrix and legatees to recover the amount of the transfer tax, the total amount from the executrix and from each defendant the amount assessed upon his legacy. The Trial Term dismissed the complaint on the ground that the collection of the tax could not be enforced by action in the state of New York. The Appellate Division reversed the judgment of the trial court and granted judgment against the defendants in the amount of nearly $100,000 on the ground that the tax having been regularly fixed and assessed under the laws of Colorado and defendants having received their legacies under the laws of the state of Colorado providing for the transmission of the estates of decedents by will, they assumed the statutory obligation to pay the tax thereon and made it their contractual obligation; that the payment of the tax by the beneficiaries is a duty imposed upon the right to acquire, and that the principle of comity between states demands that the courts of New York should assume jurisdiction and enforce the obligation.

The question is whether the inheritance tax of Colorado may, consistently with the due process clauses of the United States Constitution, be collected extraterritorially, by suit against the beneficiaries. (Maxwell v. Bugbee, 250 U. S. 525, 539.)

The court must read the Colorado statute as it is written. It imposes a special burden upon the right of succession to secure public revenue for governmental purposes. (Brown v. Elder, 32 Col. 527; Mackey Estate, 46 Col. 79.) Not only must the transfer tax be assessed in accordance with the statute but the method of collection provided by law must be followed. * * *

It is urged that the legatee becomes liable to pay the tax as upon an implied contract when he accepts the legacy under the will of a resident of Colorado and that he may be sued in the courts of another state wherever jurisdiction of the person may be obtained. But taxes are not debts or contracts. No contractual or quasi contractual obligation to pay arises out of the assessment of a tax. (City of Rochester v. Bloss, 185 N. Y. 42, 47; Meriwether v. Garrett, 102 U. S. 472, 513.) The enforcement of revenue law rests not on consent but on force and authority. Liability to pay is a consequence imposed by fiat. A transfer tax is a tax on the succession or the right to receive the bequest based on the value of the succession, but it is assessed against and paid by persons and it may not be collected from persons or out of property beyond the state's jurisdiction. (Maxwell v. Bugbee, supra.) No personal liability based upon the receipt of a legacy arises except under the provisions of the Colorado statute (§ 1) that the person to whom the property is transferred shall be personally liable for the tax until its payment and that liability is purely local and statutory.

The theory that a contract or implied promise or obligation to pay, enforcible by action in this state, springs from the Colorado statute is fallacious for a further reason. Colorado had acquired no control either of the property of the Harbeck estate or of its owners. The executrix paid the legacies by virtue of the authority vested in her on the probate of the will by the state of New York, without invoking any privilege or sanction conferred upon her by Colorado. Testator's right to make a valid will of his personal property which was in the state of New York did not rest on the laws of Colorado nor make the Colorado Statute of Wills the source of the legatee's title. "The question of the jurisdiction of the state to tax is one of fact and cannot turn upon theories or fictions." (Matter of Swift, 137 N. Y. 77, 86.) "It was never intended by the law to tax a theory having no real substance behind it." (Matter of Curtis, 142 N. Y. 219, 223.)

Cases of stockholders' liability for corporate debts under foreign statutes which rest on the stockholders' contract are not in point. (Howarth v. Angle, 162 N. Y. 179. Cf. Marshall v. Sherman, 148 N. Y. 9.) Workmen's compensation laws have been held to enter into the contract of employment without the state. (Matter of Post v. Burger & Gohlke, 216 N. Y. 544.) The right of a New York administrator to sue on a foreign death statute rests on the transitory obligation arising out of a personal injury which follows the person and, for sound reasons of public policy, may be enforced wherever the person may be found. Loucks v. Standard Oil Co., 224 N. Y. 99, 110.) These authorities are clearly distinguishable from the case at bar.

Although a liability to pay the tax exists under the Colorado statute, jurisdiction and power to enforce the liability in the New York tribunal must be established. Under the due process clause of the United States Constitution, where the delinquents are nonresidents of the taxing state and outside its jurisdiction, so that no personal liability or enforcible duty may be established as against them and where the property involved is without the taxing state so that no res exists upon which the taxing state may impose a lien, the state is powerless to collect the tax in its own courts and powerless to invoke the aid of a sister state to collect its revenue. (Pennoyer v. Neff, 95 U. S. 714; Dewey v. Des Moines, 173 U. S. 193; City of New York v. McLean, 170 N. Y. 374, 387, 388; Matter of Maltbie v. Lobsitz Mills Co., 223 N. Y. 227.)

But plaintiff contends that by the application of a familiar fiction of law the legal situs of decedent's personal property attaches to his domicile in Colorado, although the property was in every reasonable sense within the state of New York, where the stocks, bonds and credits were kept, and that Colorado has an enforcible lien thereon by virtue of the taxing order. A sufficient answer to this contention is that the judgment in suit imposes a personal liability only and enforces no lien. A further answer is that mobilia sequuntur personam is not an exclusive rule of universal application nor does it transfer property into the foreign from the domestic jurisdiction. It is a rule of convenience merely, permitting taxation at the domicile of the owner of personal property which may at the same time be subject to taxation where the property itself is permanently located. (Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 22; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 206; People ex rel. Hoyt v. Commissioners of Taxes, 23 N. Y. 224, 227;

Maxwell v. Bugbee, supra.) This state taxes the succession of personal property of nonresidents according to the actual situs of the thing (Matter of Romaine, 127 N. Y. 80, 89) and our courts may not say that the assets of the estate are at the same time actually within and without the state of New York. The tangible res was, therefore, at all times in New York and not in Colorado.

If these general and well-recognized principles of taxation are by any process of reasoning to be considered inapplicable to the collection of transfer taxes, a sufficient answer to the contention of the state of Colorado remains. When a statutory method of enforcing the collection of a tax is provided which requires judicial action before the liability of the taxpayer is finally fixed it is exclusive and must be followed. That it cannot be followed does not alter the case. The order which was entered in Colorado in the proceeding to fix the tax on notice by mail to defendants did not terminate a suit or controversy between parties and is not a judgment either in personam or in rem. (People v. Kellogg, 268 Ill. 489.) After the tax has been assessed by the preliminary order no person can be compelled to pay it until a citation issued out of a Colorado court having jurisdiction has been regularly served on him and he has had an opportunity to be heard. Unless this notice is given, the constitutional right to due process of law is invaded. (Matter of McPherson, 104 N. Y. 306, 321.) The Colorado statute thus provides (§§ 18, 19) for a proceeding to collect the tax, subsequent to the assessment, on notice to the persons interested in the property, in the nature of an action in rem. "A statutory remedy or proceeding cannot be enlarged by construction nor be made available or valid except by strictly following the directions of the act." (Matter of Maltbie v. Lobsitz Mills Co., supra, p. 232; Oakman v. Small, 282 Ill. 360.)

But it is urged that the right of the state of Colorado to maintain an action for the collection of the tax when the special remedy is ineffective, is upheld by its local laws (Pinnacle G. M. Co. v. People, 58 Colo. 86); that the Colorado statute provides that the attorney-general may collect the tax in "any other manner as may be provided in this act or by law" (Act of 1916, § 13), i. e., by a common-law action. This contention also is unsound. The attempt to give such a statutory provision extraterritorial effect would conflict with another well-settled principle of private international law which precludes one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The rule is universally recognized that the revenue laws of one state have no force in another. The remedy is a part of the law and we are once more brought to face the doctrine that the taxing power of the state is by the federal Constitution limited to persons and property within its jurisdiction. (Wisconsin v. Pelican Ins. Co., 127 U. S. 265; Marshall v. Sherman, 148 N. Y., supra, pp. 24-26; Loucks v. Standard

Oil Co., supra, p. 102; Walker v. Treasurer, etc., 221 Mass. 600; City of New York v. McLean, supra.)

The judgment of the Appellate Division should be reversed and that of the Trial Term affirmed, with costs in this court and in the Appellate Division.[4]

FARMERS LOAN & TRUST CO. v. MINNESOTA.

1930. Supreme Court of the United States. 280 U. S. 204.

Appeal from the Supreme Court of Minnesota.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Henry R. Taylor, while domiciled and residing in New York, died testate, December 4, 1925. He had long owned and kept within that state negotiable bonds and certificates of indebtedness issued by the

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[4] Where suit was brought in a federal district court in New York by an officer and citizen of Indiana, who was authorized by the State of Indiana to do so, against the New York administrator of the estate of Breed, to recover on an alleged liability for taxes incurred by Breed while residing in Indiana it was held that this "did not state a cause of action of which the court would take jurisdiction." Moore, Treasurer of Grant County, Ind. v. Mitchell (1929) 30 Fed. (2d) 600. In a concurring opinion, Circuit Judge Learned Hand said:

"While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign state, if they run counter to the "settled public policy" of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign state and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper." And see the same case, in (1930) 281 U. S. 18, 74 L. ed. —, where the Supreme Court affirmed but on the sole ground that the Indiana officer could not represent his state officially outside of its confines.

Cf. Bristol v. Washington County (1900) 177 U. S. 133, 44 L. ed. 701: A woman died domiciled in New York leaving property in Minnesota upon which taxes had not been paid. Her executor, a resident of New York, took out ancillary letters of administration in Minnesota. Washington County, Minn., filed a claim in the administration of the Minnesota property, for payment of the delinquent taxes. The administrator removed the contest of this claim to the Circuit Court of the United States for Minnesota. Judgment for the county was affirmed by the Supreme Court, which said that a state may make taxes assessed upon a nonresident's property in the state a lien upon all his property there situate, and though the liability may not be a personal debt it is at least a valid claim against his domestic estate.

See Extra-Territorial Collection of State Inheritance Taxes (1929) 29 Col. L. Rev. 782-791.

State of Minnesota and the Cities of Minneapolis and St. Paul, worth above $300,000. Some of these were registered, others were payable to bearer. None had any connection with business carried on by or for the decedent in Minnesota. All passed under his will which was probated in New York. There also his estate was administered and a tax exacted upon the testamentary transfer.

Minnesota assessed an inheritance tax upon the same transfer. Her Supreme Court approved this and upheld the validity of the authorizing statute. The executor—appellant—claims that, so construed and applied, that enactment conflicts with the Fourteenth Amendment.

When this cause first came before the Supreme Court of Minnesota it held negotiable public obligations were something more than mere evidences of debt and, like tangibles, taxable only at the place where found, regardless of the owner's domicile. It accordingly denied the power of that state to tax the testamentary transfer. After Blodgett v. Silberman, 277 U. S. 1, upon a rehearing, considering that cause along with Blackstone v. Miller, 188 U. S. 189, it felt obliged to treat the bonds and certificates like ordinary choses in action and to uphold the assessment.

Registration of certain of the bonds we regard as an immaterial circumstance. So did the court below. Counsel do not maintain otherwise.

Under Blodgett v. Silberman the obligations here involved were rightly regarded as if ordinary choses in action. The maxim mobilia sequuntur personam applied and gave them situs for taxation in New York—the owner's domicile. The testamentary transfer was properly taxed there. This is not controverted.

But it is said the obligations were debts of Minnesota and her corporations, subject to her control; that her laws gave them validity, protected them and provided means for enforcing payment. Accordingly, counsel argue that they had situs for taxation purposes in that state and maintain the validity of the challenged assessment.

Blackstone v. Miller, supra, and certain approving opinions, lend support to the doctrine that ordinarily choses in action are subject to taxation both at the debtor's domicile and at the domicile of the creditor; that two states may tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the Fourteenth Amendment. The inevitable tendency of that view is to disturb good relations among the states and produce the kind of discontent expected to subside after establishment of the Union. The Federalist, No. VII. The practical effect of it has been bad; perhaps two-thirds of the states have endeavored to avoid the evil by resort to reciprocal exemption laws. It has been stoutly assailed on principle. Having reconsidered the supporting arguments in the light of our more recent opinions, we are compelled to declare it untenable. Blackstone v. Miller no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled.

Four different views concerning the situs for taxation of negotiable public obligations have been advanced. One fixes this at the domicile of the owner; another at the debtor's domicile; a third at the place where the instruments are found—physically present; and the fourth within the jurisdiction where the owner has caused them to become integral parts of a localized business. If each state can adopt any of these and tax accordingly, obviously, the same bonds may be declared present for taxation in two, three, or four places at the same moment. Such a startling possibility suggests a wrong premise.

In this court the presently approved doctrine is that no state may tax anything not within her jurisdiction without violating the Fourteenth Amendment. State Tax on Foreign Held Bonds, 15 Wall. 300; Union Refrig. Transit Co. v. Kentucky, 199 U. S. 194; Safe Deposit & Trust Co. v. Virginia, ante, p. 83. Also no state can tax the testamentary transfer of property wholly beyond her power, Rhode Island Trust Co. v. Doughton, 270 U. S. 69, or impose death duties reckoned upon the value of tangibles permanently located outside her limits. Frick v. Pennsylvania, 268 U. S. 473. These principles became definitely settled subsequent to Blackstone v. Miller and are out of harmony with the reasoning advanced to support the conclusion there announced.

At this time it cannot be assumed that tangible chattels permanently located within another state may be treated as part of the universal succession and taken into account when estimating the succession tax laid at the decedent's domicile. Frick v. Pennsylvania is to the contrary.

Nor is it permissible broadly to say that notwithstanding the Fourteenth Amendment two states have power to tax the same personalty on different and inconsistent principles or that a state always may tax according to the fiction that in successions after death mobilia sequuntur personam and domicile govern the whole. Union Refrig. Transit Co. v. Kentucky, supra, Rhode Island Trust Co. v. Doughton, supra, and Safe Deposit & Trust Co. v. Virginia, supra, stand in opposition.

Southern Pacific Co. v. Kentucky, 222 U. S. 63, indicates plainly enough that the right of one state to tax may depend somewhat upon the power of another so to do. And Coe v. Errol, 116 U. S. 517, 524, though frequently cited to support the general affirmation that nothing in the Fourteenth Amendment prohibits double taxation, does not go so far. It affirmed the rather obvious proposition that the mere fact of taxation of tangibles by one state is not enough to exclude the right of another to tax them.

"If the owner of personal property within a state resides in another state which taxes him for that property as part of his general estate attached to his person, this action of the latter state does not in the least affect the right of the state in which the property is situated to tax it also. * * * The fact, therefore, that the owners of the logs in question were taxed for their value in Maine as a part of their general stock in trade, if such fact were proved, could have no influence in the decision of the case and may be laid out of view."

If Maine undertook to tax logs permanently located in another state, she transcended her legitimate powers. Union Refrig. Transit Co. v. Kentucky, supra. Of course, such action could not affect New Hampshire's rights in respect of property localized within her limits.

While debts have no actual territorial situs we have ruled that a state may properly apply the rule mobilia sequuntur personam and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the state where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two states apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment. Twenty-four years ago Union Refrig. Transit Co. v. Kentucky, supra, declared—"* * * in view of the enormous increase of such property [tangible personalty] since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a situs of its own for the purpose of taxation, and correlatively to exempt [it] at the domicile of the owner." And, certainly, existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction.

Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota.

Railroad Company v. Pennsylvania—"State Tax on Foreign Held Bonds Case"—15 Wall. 300, 320, distinctly held that the state was without power to tax the owner of bonds of a domestic railroad corporation made and payable outside her limits when issued to and held by citizens and residents of another state. Through Mr. Justice Field the court there said—

"But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement."

If the situs of the bonds for taxation had been at the debtor's domicile—Pennsylvania—the challenged effort to tax could not have interfered unduly with the debtor's contract to pay interest.

New Orleans v. Stempel, 175 U. S. 309, Bristol v. Washington County, 177 U. S. 133, Liverpool & L. & G. Ins. Co. v. Orleans Assessors, 221 U. S. 346, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile.

The bonds and certificates of the decedent had acquired permanent situs for taxation in New York; their testamentary transfer was properly taxable there but not in Minnesota.

The judgment appealed from must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE STONE, concurring.

I concur in the result. Whether or not control over a debt at the domicile of the debtor gives jurisdiction to tax the debt, Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 354, we are not here concerned with a property tax, but with an excise or privilege tax imposed on the transfer of an intangible, see Stebbins v. Riley, 268 U. S. 137; Saltonstall v. Saltonstall, 276 U. S. 260, and to sustain a privilege tax the privilege must be enjoyed in the state imposing it. Provident Savings Society v. Kentucky, 239 U. S. 103. It is enough, I think, to uphold the present decision that the trans fer was effected in New York by one domiciled there and is controlled by its law.

Even though the contract transferred was called into existence by the laws of Minnesota, its obligation cannot be constitutionally impaired or withdrawn from the protection which those laws gave it at its inception. See Provident Savings Society v. Kentucky, 239 U. S. 103, 113, 144; Bedford v. Eastern Building & Loan Association, 181 U. S. 227. And while the creditor may rely on Minnesota law to enforce the debt, that may be equally true of the law of any other state where the debtor or his property may be found. So far as the transfer, as distinguished from the contract itself, is concerned, it is New York law and not that of Minnesota which, by generally accepted rules, is applied there and receives recognition elsewhere. See Bullen v. Wisconsin, 240 U. S. 625, 631; Russell v. Grigsby, 168 Fed. 577; Lee v. Abdy, 17 Q. B. Div. 309; Miller v. Campbell, 140 N. Y. 457, 460; Spencer v. Myers, 150 N. Y. 269. Once the bonds had passed beyond the state and were acquired by an owner domiciled elsewhere, the law of Minnesota neither protected, nor could it withhold the power of transfer or prescribe its terms.

In the light of these considerations, granting that the continued existence of the contract rested in part on the law of Minnesota, the relation of that law to the transfer in New York, both in point of theory and in every practical aspect, appears to me to be too attenuated to constitute any reasonable basis for deeming the transfer to be within the taxing jurisdiction of Minnesota.

As the present is not a tax on the debt, but only on the transfer of it, neither the analogies drawn from the law of property taxes nor the attempt to solve the present problem by ascribing to a legal relationship unconnected with any physical thing, a fictitious situs, can, I think, carry us very far toward a solution. Nor does it seem that the invocation of the Fourteenth Amendment to relieve from the burdens of double taxation, as such, promises more.

Hitherto the fact that taxation is "double" has not been deemed to affect its constitutionality and there are, I think, too many situations in which a single economic interest may have such legal relationships with different taxing jurisdictions as to justify its taxation in both, to admit of our laying down any constitutional principle broadly prohibiting taxation merely because it is double, at least until that characterization is more precisely defined.

It seems to me to be unnecessary and undesirable to lay down any doctrine whose extent and content are so dubious. Whether it is far reaching enough to overturn those cases which, in circumstances differing somewhat from the present, have been regarded as permitting taxation in more than one state, reaching the same economic interest, is so uncertain as to suggest doubts of its trustworthiness and utility as a principle of judicial decision. See

Wheeler v. Sohmer, 233 U. S. 434, and Blodgett v. Silberman, 277 U. S. 1; Scottish Union & National Ins. Co. v. Bowland, 196 U. S. 611, 620; Rogers v. Hennepin County, 240 U. S. 184, 191; New Orleans v. Stempel, 175 U. S. 309; Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395; Bristol v. Washington County, 177 U. S. 133; Kirtland v. Hotchkiss, 100 U. S. 491, and Savings & Loan Society v. Multnomah County, 169 U. S. 421; Union Refrig. Transit Co. v. Kentucky, 199 U. S. 194, 205; Tappan v. Merchants National Bank, 19 Wall. 490, 499; Corry v. Baltimore, 196 U. S. 466, and Hawley v. Malden, 232 U. S. 1, 12; Blackstone v. Miller, 188 U. S. 189 (so far as it relates to the transfer tax on a bank account in the state of the bank), and Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54, 58; Bullen v. Wisconsin, 240 U. S. 625, 631.

MR. JUSTICE HOLMES, dissenting.

This is a proceeding for the determination of a tax alleged to be due to the State of Minnesota but objected to by the appellant as contrary to the Fourteenth Amendment of the Constitution of the United States. The tax is imposed in respect of the transfer by will of bonds and certificates of indebtedness of the State of Minnesota and bonds of two cities of that state. The testator died domiciled in New York and the bonds were there at the time of his death. The Supreme Court of the state upheld the tax, In re Estate of Taylor, 176 Minn. 634, and the executor appeals.

It is not disputed that the transfer was taxable in New York, but there is no constitutional objection to the same transaction being taxed by two states, if the laws of both have to be invoked in order to give it effect. It may be assumed that the transfer considered by itself alone depends on the law of New York, but if the law of Minnesota is necessary to the existence of anything beyond a piece of paper to be transferred then Minnesota may demand payment for a privilege that could not exist without its help. It seems to me that the law of Minnesota is a present force necessary to the existence of the obligation, and that therefore, however contrary it may be to enlightened policy, the tax is good.

No one would doubt that the law of Minnesota was necessary to call the obligation into existence. Other states do not attempt to determine the legal consequences of acts done outside of their jurisdiction, and therefore whether certain acts done in Minnesota constitute a contract or not depends on the law of Minnesota alone. I think the same thing is true of the continuance of the obligation to the present time. It seems to me that it is the law of Minnesota alone that keeps the debt alive. Obviously at the beginning that law could have provided that the debt should be extinguished by the death of the creditor or by such other event as that law might point out. It gave the debt its duration. The continued operation of that law keeps the debt alive. Not to go too far into the field of speculation but confining the discussion to cities of the state and the state itself, the continued existence of the cities and the readiness of the state to keep its promises depend upon the will of the state. If there were no Constitution the state might abolish the debt by its fiat. The only effect of the Constitution is that the law that originally gave the bonds continuance remains in force unchanged. But it is still the law of that state and no other. When such obligations are enforced by suit in another state it is on the footing of recognition, not of creation. Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U. S. 517, 519. Another state, if it is civilized, does not undertake to say to the debtor now that we have caught you we will force an obligation upon you whether you still are bound by the law of your own state or not. I believe this to be the vital point. Unless I am wrong the debt, wherever enforced, is enforced only because it is recognized as such by the law that created it and keeps it still a debt. No doubt sometimes obligations are enforced elsewhere when the statute of limitations has run at home. But such decisions when defencible stand on the ground that the limitation is only procedural and does not extinguish the duty. If the statute extinguishes the debt by lapse of time no foreign jurisdiction that intelligently understood its function would attempt to make the debtor pay.

I will not repeat what I said the other day in Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, concerning the attempt to draw conclusions from the supposed situs of a debt. The right to tax exists in this case because the party needs the help of Minnesota to acquire a right, and that state can demand a quid pro quo in return. Southern Pacific Co. v. Kentucky, 222 U. S. 63, 68. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 206.

I do not dwell on the practical necessity of resorting to the state in order to secure payment of state or municipal bonds. Even if the creditor had a complete and adequate remedy elsewhere, I still should think that a correct decision of the case must rest on whether I am right or not about the theoretical dependence of the continued existence of the bonds upon Minnesota law.

Blackstone v. Miller, 188 U. S. 189, supports my conclusions and I do not think that it should be overruled. A good deal has to be read into the Fourteenth Amendment to give it any bearing upon this case. The Amendment does not condemn everything that we may think undesirable on economic or social grounds.

MR. JUSTICE BRANDEIS agrees with this opinion.[5]

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[5] On state taxation of intangibles see notes in (1930) 43 Harv. L. Rev. 792-797; (1930) 30 Col. L. Rev. 404-406; same, 539-547; (1930) 16 Va. L. Rev. 521-530, and Walter L. Nossaman, The Fourteenth Amendment in its Relation to State Taxation of Intangibles (1930) 18 Calif. L. Rev. 345-372.

BALDWIN v. MISSOURI.

1930. Supreme Court of the United States. 281 U. S. ——.

On appeal from the Supreme Court of Missouri.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The validity of section 558, R. S. of Missouri, 1919, was duly challenged in the court below; by the judgment there the rights of the parties were finally determined; the cause is properly here on appeal.

While a resident of Quincy, Adams County, Ill., Carrie Pool Baldwin died, Oct. 4, 1926. By will she left all her property to Thomas A. Baldwin, her son, a resident of the same place, and appointed him sole executor. The will was duly probated at her residence and under the statute of Illinois an inheritance tax was there laid upon the value of all her intangible personalty, wherever situated.

Ancillary letters of administration with the will annexed issued out of the Probate Court of Lewis County, Missouri, to Harry Carstarphen, Oct. 22, 1926. A report to that court revealed that at the time of her death Mrs. Baldwin owned real estate in Missouri; credits for cash deposited with two or more banks located there; also certain coupon bonds issued by the United States and sundry promissory notes which were then physically within that state. Most of these notes were executed by citizens of Missouri and the larger part were secured by liens upon lands lying therein.

Under section 558, R. S. 1919, the State of Missouri demanded transfer of inheritance taxes reckoned upon the value of all the above described property. No denial of this claim was made in respect of the real estate; but as to the personalty it was resisted upon the ground that the property was not within the jurisdiction of the state for taxation purposes and to enforce the demand would violate the due process clause of the Fourteenth Amendment.

The Lewis County Circuit Court declared the transfer of the personal property not subject to taxation; the supreme court reached a different conclusion and directed payment.

It does not appear and is not claimed that either the decedent or her son ever resided in Missouri. The record discloses nothing tending to show that the personal property had been given a business situs in that state. * * *

The challenged judgment rests upon the broad theory that a state may lay succession or inheritance taxes measured by the value of any deposits in local banks passing from a nonresident decedent; also upon the value of bonds issued by the United States and promissory notes executed by individual citizens of the state when devised by such nonresident if these bonds or notes happen to be found within the confines of the state when death occurs. The cause was decided below prior to our determination of Farmers

Loan & Trust Co. v. Minnesota, 280 U. S. 204. Blackstone v. Miller, 188 U. S. 189, was cited in support of the conclusion reached. Considering Farmers Loan & Trust Co. v. Minnesota and previous opinions there referred to, the theory upon which the court below proceeded is untenable and its judgment must be reversed.

Ordinarily, bank deposits are mere credits and for purposes of ad valorem taxation have situs at the domicile of the creditor only. The same general rule applies to negotiable bonds and notes whether secured by liens on real estate or otherwise.

[Here follow quotations from Kirtland v. Hotchkiss, 100 U. S. 491, 498, 499, to the effect that a state may levy a property tax on a resident with respect to a debt owed him by a nonresident secured by mortgage on land in the latter's state; and from Blodgett v. Silberman, the first complete paragraph on p. 1678, ante.]

We find nothing to exempt the effort to tax the transfer of the deposits in Missouri banks from the principle applied in Farmers Loan & Trust Co. v. Minnesota, supra. So far as disclosed by the record the situs of the credit was in Illinois where the depositor had her domicile. There the property interest in the credit passed under her will; and there the transfer was actually taxed. This passing was properly taxable at that place and not otherwhere.

The bonds and notes, although physically within Missouri, under our former opinions were choses in action with situs at the domicile of the creditor. At that point they too passed from the dead to the living and there this transfer was actually taxed. As they were not within Missouri for taxation purposes the transfer was not subject to her power. Rhode Island Trust Co. v. Doughton, 270 U. S. 69.

It has been suggested that should the state of the domicile be unable to enforce collection of the tax laid by it upon the transfer, then in practice all taxation thereon might be evaded. The inference seems to be that double taxation—by two states on the same transfer—should be sustained in order to prevent escape from liability in exceptional cases. We cannot assent. In Schlesinger v. Wisconsin, 270 U. S. 230, 240, a similar notion was rejected.

"The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the state readily to collect lawful charges against 'B.' Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

If the possibility of evasion be considered from a practical standpoint, then the federal Estate Tax Law, under which credit is only allowed where a tax is paid to the state, section 1093, title 26, U. S.

C., must be given due weight. Also, the significance of the adoption of reciprocal exemption laws by most of the states, Farmers Loan & Trust Co. v. Minnesota, supra, cannot be disregarded.

Normally, as in the present instance, the state of the domicile enforces its own tax and we need not now consider the possibility of establishing a situs in another state by one who should undertake to arrange for succession there and thus defeat the collection of the death duties prescribed at his domicile.

This cause does not involve the right of a state to tax either the interest which a mortgagee as such may have in lands lying therein, or the transfer of that interest.

Reversed.

[A dissenting opinion by Holmes, J., with whom Brandeis and Stone, JJ., agreed is omitted.]

Opinion of Mr. Justice Stone.—I agree with what Mr. Justice Holmes has said, but as I concurred, on special grounds, with the result in Farmers Loan & Trust Company v. Minnesota, 280 U. S. 204, and Safe Deposit & Trust Company v. Virginia, 280 U. S. 83, I would say a word of the application now given to those precedents. I do not think that the overturning of one conclusion in Blackstone v. Miller by those cases should be deemed to carry with it Scottish Union & National Insurance Co. v. Bowland, 196 U. S. 611, Wheeler v. Sohmer, 233 U. S. 434, upholding a tax measured by a nonresident's bonds and notes, located within the taxing state; Savings Society v. Multnomah County, 169 U. S. 421, upholding a tax measured by a nonresident's notes, secured by mortgages on land within the taxing state; or Bristol v. Washington County, 177 U. S. 133, and Metropolitan Life Insurance Co. v. New Orleans, 205 U. S. 395, upholding a tax upon intangibles having a "business situs" within the taxing state, but owned by a nonresident. These cases rest upon principles other than those applied in Blackstone v. Miller and are not dependent upon it for support.

It is true that the bonds and notes located in Missouri are choses in action, rights in which may be transferred at the domicile of the owner as well as in any other state in which he may chance to be. But the transfer made there is not completely effected without their delivery, which ordinarily can be compelled only in Missouri and in accordance with its laws. If negotiable, which so far as appears some of them were, their transfer by delivery within Missouri could defeat the transfer made in Illinois. When secured by mortgage on real estate, the transfer of the security, which is an inseparable incident of the chose in action, Carpenter v. Longan, 16 Wall. 271, Lipscomb v. Talbott, 243 Mo. 1, 3, may be affected by the recording laws, availed of only through the recording facilities where the land is located. See Pickett v. Barron, 29 Barb. 505; Curtis v Moore, 152 N. Y. 159, 163.

These circumstances, I think, are sufficient to give the jurisdiction which I thought lacking in Farmers Loan & Trust Company v. Minnesota, to tax the transfer in Missouri, see Hatch v. Reardon, 204 U. S. 152 and Rogers v. Hennepin County, 240 U. S. 184; to say nothing of the further fact that Missouri laws alone protect the physical notes and bonds and the security located there. Apart from the question of jurisdiction, that one must pay a tax in two places, reaching the same economic interest, with respect to which he has sought and secured the benefit of the laws in both, does not seem to me so oppressive or arbitrary as to infringe constitutional limitations.

Taxation is a practical matter and if, in the choice of the rule we adopt, we may, as the court has said in Farmers Loan & Trust Company v. Minnesota, give some consideration to its practical effect, we ought not, I think, to overturn long established rules governing the constitutional power to tax, without some consideration of the necessity and of all consequences of the change. Under the law as it has been, no one need subject himself to double taxation by keeping his securities in a state different from his domicile, or by seeking the protection of its laws for his mortgage investments. But it is a practical consideration of some moment that taxation becomes increasingly difficult if the securities of a nonresident may not be taxed where located, and where alone they may be reached, but where the courts are not open to the tax gatherers of the domicile. See Moore v. Mitchell, 281 U. S. 18; 30 F. (2d) 600; Colorado v. Harbeck, 232 N. Y. 71.

It is said that the present record discloses nothing tending to show that the decedent's personal property had been given a business situs in Missouri. The Supreme Court of Missouri said: "It is a reasonable inference that the cash and notes in such large quantities in Missouri, when none of it was held in Illinois, was retained in this state for the purpose of investment. They may have established a business situs in this state * * *."

The burden is not on the state to establish the constitutionality of its laws, nor are we limited in supporting their constitutionality to the reasons assigned by the state court. I do not assume, from anything that has been said in this or the earlier cases, that constitutional power to tax the transfer of notes and bonds at their business situs no longer exists. As this court has often held, the burden rests upon him who assails a statute to establish its unconstitutionality. Upon this ambiguous record it is for the appellant to show that the stock and bonds subjected to the tax had no business situs within the taxing jurisdiction. See Corporation Commission of Oklahoma v. Lowe, 281 U. S. ——; Toombs v. Citizens Bank of Waynesboro, 281 U. S. ——.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS join in this opinion.

RHODE ISLAND HOSPITAL TRUST CO. v. DOUGHTON.

1926. Supreme Court of the United States. 270 U. S. 69.

Error to the Supreme Court of North Carolina.

Mr. Chief Justice Taft delivered the opinion of the court. * * *

The question here presented is whether North Carolina can validly impose a transfer or inheritance tax upon shares of stock owned by a nonresident in a business corporation of New Jersey, because the corporation does business and has two-thirds of its property within the limits of North Carolina. We think that the law of North Carolina by which this is attempted, is invalid. It goes without saying that a state may not tax property which is not within its territorial jurisdiction. State Tax on Foreign Held Bonds, 15 Wall. 300; Louisville Ferry Company v. Kentucky, 188 U. S. 385; Delaware Railroad v. Pennsylvania, 198 U. S. 341; Union Ref. Transit Company v. Kentucky, 199 U. S. 194; Metropolitan Life Insurance Company v. New Orleans, 205 U. S. 395, 399; United States v. Bennett, 232 U. S. 299, 306; International Paper Company v. Massachusetts, 246 U. S. 135, 142; Frick v. Pennsylvania, 268 U. S. 473, 488.

The tax here is not upon property, but upon the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the state applies as well in the case of a transfer tax as in that of a property tax. A state has no power to tax the devolution of the property of a nonresident unless it has jurisdiction of the property devolved or transferred. In the matter of intangibles, like choses in action, shares of stock, and bonds, the situs of which is with the owner, a transfer tax of course may be properly levied by the state in which he resides. So, too, it is well established that the state in which a corporation is organized may provide in creating it for the taxation in that state of all its shares, whether owned by residents or nonresidents. Hawley v. Malden, 232 U. S. 1, 12; Hannis Distillery Co. v. Baltimore, 216 U. S. 285, 293, 294; Corry v. Baltimore, 196 U. S. 466; Tappan v. Bank, 19 Wall. 490, 503.

In this case the jurisdiction of North Carolina rests on the claim that, because the New Jersey corporation has two-thirds of its property in North Carolina, the state may treat shares of its stock as having a situs in North Carolina to the extent of the ratio in value of its property in North Carolina to all of its property. This is on the theory that the stockholder is the owner of the property of the corporation, and the state which has jurisdiction of any of the corporate property has pro tanto jurisdiction of his shares of stock. We can not concur in this view. The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share in what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. But he does not own the corporate property. * * *

In North Carolina and in some other states, the state constitution requires all property, real and personal, to be taxed equally. Laws have been passed exempting shares of stock in North Carolina corporations from taxation, on the ground that the property of the corporation is taxed which is held to be equivalent to taxing the shares. Person v. Watts, 184 N. Car. 499; Jones v. Davis, 35 O. S. 474. But such cases grow out of state constitutional difficulties and are hardly applicable to questions of state jurisdiction of shares of foreign corporation stock. The cases of Bronson's Estate, 150 N. Y. 1, 8, and In re Culver's Estate, 145 Iowa 1, said to hold that a stockholder owns the property of the corporation, are really authorities to the point that shares of stock in a corporation of a state have their situs for purposes of taxation in that state, as well as in the residence of the owner of the shares. But whatever the view of the other courts, that of this court is clear: the stockholder does not own the corporate property. Jurisdiction for tax purposes over his shares can not, therefore, be made to rest on the situs of part of the corporate property within the taxing state. North Carolina can not control the devolution of New Jersey shares. That is determined by the laws of Rhode Island where the decedent owner lived or by those of New Jersey, because the shares have a situs in the state of incorporation. There is nothing in the statutory conditions on which the Tobacco Company began or continued business in North Carolina which suggests that its shareholders subjected their stock to the taxing jurisdiction of that state by the company's doing business there.

Our conclusion is in accord with the great majority of cases in the state courts where this exact question has arisen. Welsh v. Burrill, 223 Mass. 87; People v. Dennett, 276 Ill. 43; State v. Dunlap, 28 Idaho 784; State v. Walker, 70 Montana 484; In re Harkness Estate, 83 Okla. 107. Tyler v. Dane County, 289 Fed. 843, contains a full and satisfactory discussion of the subject in a Wisconsin case which has been followed by the Supreme Court of Wisconsin in Estate of Shepard, 184 Wis. 88. See article by Professor Beale, 38 Harvard Law Review 291.

In an addendum to its opinion in this case, the Supreme Court of North Carolina suggests that the jurisdiction of the state to tax the shares of the New Jersey corporation may be based on the view that the corporation has been domesticated in North Carolina. So far as the statutes of the state show, it has been authorized to do and does business in the state and owns property therein and pays a fee for the permission to do so. It has not been reincorporated in the state. It is still a foreign corporation and the rights of its stockholders are to be determined accordingly.

We conclude that the statute of North Carolina, above set out, in so far as it attempts to subject the shares of stock in the New Jersey corporation, held by a resident of Rhode Island, to a transfer tax deprives the executor of Briggs of his property without due process of law and is invalid.

Judgment reversed.[6]

WACHOVIA BANK & TRUST CO. v. DOUGHTON.

1926. Supreme Court of the United States. 272 U. S. 567.

Error to the Supreme Court of North Carolina.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Stanford L. Haynes, of Springfield, Mass., died May 21, 1920, leaving a will which was duly probated at that place. The fifth clause gave to the Springfield Safe Deposit & Trust Company, Massachusetts corporation, the residue of the estate in trust, one-half to be set aside and the net income paid to his daughter, Theodosia, so long as she should live, and at her death to be transferred to "such person or persons and in such proportions as said Theodosia shall by will appoint, or in the event that said Theodosia shall fail to exercise the power of appointment hereby conferred upon her and shall leave issue surviving her, such payment and transfer shall be made to such issue by right of representation." The corporation accepted the trust and received a large fund.

After her father's death Theodosia intermarried with Taylor and resided at Morgantown, N. C. She died there June 23, 1921, leaving an infant child. By will dated March 18, 1921, executed in North Carolina and adequate under the laws of that state and of Massachusetts, she directed that the property described by the fifth clause of her father's will should be divided between her husband and child. She also disposed of some land and personal property in North Carolina. The will was duly probated in the latter state and plaintiff in error became administrator of the estate. The fund held by the trust company and subject to appointment was made up of stocks and bonds valued at $395,279.93.

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[6] See decisions of many state courts, holding that a state may levy an inheritance tax upon the devolution of shares of a nonresident in a domestic corporation, collected in (1926) 42 A. L. R. 365 ff. Accord: Commonwealth v. Taylor's Ex'r. (1929) 297 Pa. 335, 147 Atl. 71. The Supreme Court of the United States seems not yet (1930) to have passed upon this question. Compare, Corry v. Baltimore, ante, p. 1633.

See Northern Central R. Co. v. Fidelity Trust Co. (1927) 152 Md. 94, 136 Atl. 66, 60 A. L. R. 558 (illustrating the possibility that under this doctrine succession to shares in "a corporation of two or more states," may be subject to tax at full value by as many states as have incorporated the one business entity, even though the deceased shareholder died domiciled in still another state, where also the devolution of the shares is taxable.

See notes on how many jurisdictions may tax succession to the same corporation shares (1925) 38 Harv. L. Rev. 809-816; (1925) 23 Mich. L. Rev. 272-274.

Section 6, c. 34, Public Laws N. C. 1921, ratified March 8, 1921, directs that all real and personal property passing by will or the intestate laws of the state shall be subject to a tax, and—

"Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will, and the rate shall be determined by the relationship between the beneficiary under the power and the donor; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

Acting under this statute, the proper officer demanded payment of a tax computed upon the value of the property which passed under the appointment by Mrs. Taylor. The Supreme Court of North Carolina approved the demand and specifically held that enforcement would not offend the Fourteenth Amendment by depriving the interested parties of property without due process of law. It declared that the statute taxed the exercise of the power of appointment made by permission and under direct protection of local laws. 189 N. C. 50. * * *

Except perhaps where the instrument which created the power provides that the appointment must be by will executed according to the law of the donee's domicile, to be proved and allowed there, the following propositions are established in Massachusetts: "Personal property over which one has the power of appointment is not the property of the donee, but of the donor of the power." The appointee takes, not as the legatee of him who appoints, but of the original donor. "Property in the hands of domestic trustees appointed under the will of a domestic testator, who conferred a power of appointment upon a nonresident, must be distributed according to the law of this commonwealth and * * * the execution of the power must be interpreted according to our law and in conformity to the power conferred." Walker v. Treasurer & Receiver General, 221 Mass. 600, 602, 603, and cases there cited; Shattuck v. Burrage, 229 Mass. 448. These principles are commonly accepted. Blount v. Walker, 134 U. S. 607; United States v. Field, 255 U. S. 257, 264; Murphy v. Deichler, House of Lords L. R. (1909), A. C. 446; In re Harriman's Estate, 208 N. Y. S. 672; Matter of New York Life Insurance & Trust Co., 209 N. Y. 585; Bingham's Appeal, 64 Pa. St. 345; Rhode Island Trust Co. v. Dunnell, 34 R. I. 394; Prince de Bearn v. Winans, 111 Md. 434; State ex rel. Bankers' Trust Co. v. Walker, 70 Mont. 484; Estate of Bowditch, 189 Cal. 377.

We think the assets of the trust estate established by the will of Haynes had no situs, actual or constructive, in North Carolina. The exercise of the power of appointment was subject to the laws of Massachusetts and nothing relative thereto was done by permission of the state where Mrs. Taylor happened to have her domicile. No right exercised by the donee was conferred on her by North Carolina. A state may not subject to taxation things wholly beyond her jurisdiction or control. Frick v. Pennsylvania, 268 U. S. 473.

The judgment below must be reversed.

Mr. Justice Holmes. In Bullen v. Wisconsin, 240 U. S. 625, where a fund was given in trust for the donor's widow and children, reserving to the donor a general power of revocation and the disposition of the income during his life, it was held that upon his death an inheritance tax could be levied in Wisconsin, the place of his domicile, although the trustee and trust fund were outside of the jurisdiction. The general power was considered to have the same effect as ownership. In this case the power was not so broad, because it was to be executed only by will; but the command over the fund was substantially the same. Mrs. Taylor, the donee, had the life interest and the power to dispose of the remainder by a will which she could bind herself to make. I dare say that it may be desirable to limit the *universitas* as was done in Frick v. Pennsylvania, 268 U. S. 473, but I cannot help doubting whether the present decision can be reconciled with Bullen's Case.

Mr. Justice Brandeis and Mr. Justice Stone concur in this view.

Section 6.—Limitations on Taxation of Commerce.

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BROWN ET AL. v. THE STATE OF MARYLAND.

1827. Supreme Court of the United States. 12 Wheat. 419.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court.

This is a writ of error to a judgment rendered in the Court of Appeals of Maryland, affirming a judgment of the City Court of Baltimore, on an indictment found in that court against the plaintiffs in error, for violating an Act of the Legislature of Maryland. The indictment was founded on the second section of that Act, which is in these words: "And be it enacted, that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, &c., and other persons selling the same by wholesale, bale, or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them on demurrer for the penalty which the Act prescribes for the offence; and that judgment is now before this court.

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The cause depends entirely on the question whether the legislature of a state can constitutionally require the importer of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported. * * *

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1. The first inquiry is into the extent of the prohibition upon states "to lay any imposts or duties on imports or exports." * * *

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What, then, is the meaning of the words, "imposts, or duties on imports or exports?"

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before, or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports"? The lexicons inform us, they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. * * *

Whether the prohibition to "lay imposts, or duties on imports or exports," proceeded from an apprehension that the power might be so exercised as to disturb that equality among the states which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious, that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a state, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular state. We are told that * * * the states will never be so mad as to destroy their own commerce, or even to lessen it. * * *

Conceding, to the full extent which is required, that every state would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded that each would respect the interests of others. A duty on imports is a tax on the article which is paid by the consumer. The great importing states would thus levy a tax on the non-importing states, which would not be less a tax because their interests would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those states whose situation was less favorable to importation. For this, among other reasons, the whole power of laying duties on imports was, with a single and slight exception, taken from the states. When we are inquiring whether a particular Act is within this prohibition, the question is not, whether the state may so legislate as to hurt itself, but whether the Act is within the words and mischief of the prohibitory clause. It has already been shown, that a tax on the article in the hands of the importer, is within its words; and we think it too clear for controversy, that the same tax is within its mischief. We think it unquestionable, that such a tax has precisely the same tendency to enhance the price of the article, as if imposed upon it while entering the port.

The counsel for the State of Maryland insist, with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the states, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and, if this be admitted, they insist that entering the country is the point of time when the prohibition ceases, and the power of the state to tax commences. * * * While we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the Constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the state to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious that this construction would defeat the prohibition. * * *

It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and re-exported in the same vessel, goods landed and carried over land for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties.

The counsel for the defendant in error have endeavored to illustrate their proposition, that the constitutional prohibition ceases the instant the goods enter the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of duties, he may, they say, exert that right when, where, and as he pleases, and the state cannot regulate it. * * * An importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages, and traveling with them as an itinerant pedler. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the state. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer. * * *

But if it should be proved, that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the Constitution. * * *

We think, then, that the act under which the plaintiffs in error were indicted, is repugnant to that article of the Constitution which declares that "no State shall lay any impost or duties on imports or exports."

2. Is it also repugnant to that clause in the Constitution which empowers "Congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes"? * * *

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states? This question was considered in the case of Gibbons v. Ogden, 9 Wheat. Rep. 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse: one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell.

If this be admitted, and we think it cannot be denied, what can be the meaning of an Act of Congress which authorizes importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? * * *

We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article in his character of importer, must be in opposition to the Act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce.

It has been contended that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a state to tax its own citizens, or their property within its territory.

We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. * * * If the states may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the state from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a state from taxing any article passing through it from one state to another, for the purpose of traffic? or from taxing the transportation of articles passing from the state itself to another state, for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given. * * *

It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles. * * * Reversed.

[THOMPSON, J., delivered a dissenting opinion.]

PECK & CO. v. LOWE.

1918. Supreme Court of the United States. 247 U. S. 165.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action to recover a tax paid under protest and alleged to have been imposed contrary to the constitutional provision (Art. 1, § 9, cl. 5) that "No tax or duty shall be laid on articles exported from any state." The judgment below was for the defendant. 234 Fed. Rep. 125.

The plaintiff is a domestic corporation chiefly engaged in buying goods in the several states, shipping them to foreign countries and there selling them. In 1914 its net income from this business was $30,173.66, and from other sources $12,436.24. An income tax for that year, computed on the aggregate of these sums, was assessed against it and paid under compulsion. It is conceded that so much of the tax as was based on the income from other sources was valid, and the controversy is over so much of it as was attributable to the income from shipping goods to foreign countries and there selling them. * * *

The Constitution broadly empowers Congress not only "to lay and collect taxes, duties, imposts and excises," but also "to regulate commerce with foreign nations." So, if the prohibitory clause invoked by the plaintiff be not in the way, Congress undoubtedly has power to lay and collect such a tax as is here in question. That clause says "No tax or duty shall be laid on articles exported from any state." Of course it qualifies and restricts the power to tax as broadly conferred. But to what extent? The decisions of this court answer that it excepts from the range of that power articles in course of exportation, Turpin v. Burgess, 117 U. S. 504, 507; the act or occupation of exporting, Brown v. Maryland, 12 Wheat. 419, 445; bills of lading for articles being exported, Fairbanks v. United States, 181 U. S. 283; charter parties for the carriage of cargoes from state to foreign ports, United States v. Hvoslef, 237 U. S. 1; and policies of marine insurance on articles being exported,—such insurance being uniformly regarded as "an integral part of the exportation" and the policy as "one of the ordinary shipping documents," Thames and Mersey Insurance Co. v. United States, 237 U. S. 19. In short, the court has interpreted the clause as meaning that exportation must be free from taxation, and therefore as requiring "not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation." Fairbank v. United States, supra, pp. 292-293. And the court has indicated that where the tax is not laid on the articles themselves while in course of exportation the true test of its validity is whether it "so directly and closely" bears on the "process of exporting" as to be in substance a tax on the exportation. Thames and Mersey Insurance Co. v. United States, supra, p. 25. In this view it has been held that the clause does not condemn or invalidate charges or taxes, not laid on property while being exported, merely because they affect exportation indirectly or remotely. Thus a charge for stamps which each package of manufactured tobacco intended for export was required to bear before removal from the factory was upheld in Pace v. Burgess, 92 U. S. 372, and Turpin v. Burgess, 117 U. S. 504; and the application of a manufacturing tax on all filled cheese to cheese manufactured under contract for export, and actually exported, was upheld in Cornell v. Coyne, 192 U. S. 418. In that case it was said, p. 427: "The true construction of the constitutional provisions is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation."

While fully assenting and adhering to the interpretation which has been put on the clause in giving effect to its spirit as well as its letter, we are of opinion that to broaden that interpretation would be to depart from both the spirit and letter.

The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax (see Stanton v. Baltic Mining Co., supra, p. 113), it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are "net income arising or accruing from all sources." There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation.

For these reasons we hold that the objection urged against the tax is not well grounded.

Judgment affirmed.

CASE OF THE STATE FREIGHT TAX.

1873. Supreme Court of the United States. 15 Wall. 232.

[Error to the Supreme Court of Pennsylvania which had sustained the statute involved, by which a tax of 2 to 5 cents a ton, varying according to the commodity carried, was levied upon freight carried in the state.]

facts. Held it bad for tax on transportation.

Mr. Justice Strong delivered the opinion of the court. * * *

The case presents the question whether the statute in question—so far as it imposes a tax upon freight taken up within the state and carried out of it, or taken up outside the state and delivered within it, or, in different words, upon all freight other than that taken up and delivered within the state—is not repugnant to the provision of the Constitution of the United States which ordains "that Congress shall have power to regulate commerce with foreign nations and among the several states." * * *

Before proceeding, however, to a consideration of the direct question whether the statute is in direct conflict with any provision of the Constitution of the United States, it is necessary to have a clear apprehension of the subject and the nature of the tax imposed by it. It has repeatedly been held that the constitutionality, or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. * * *

Upon what, then, is the tax imposed by the Act of August 25th, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried. The companies are required to pay to the state treasurer for the use of the commonwealth, "on each two thousand pounds of freight so carried," a tax at the specified rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight. And when it is observed that the act provides "where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried upon one line, and the whole tax shall be paid by such one of said companies as the state treasurer may select and notify thereof," no room is left for doubt. This provision demonstrates that the tax has no reference to the business of the companies. In the case of connected lines thousands of tons may be carried over the line of one company without any liability of that company to pay the tax. The state treasurer is to decide which of several shall pay the whole. There is still another provision in the act which shows that the burden of the tax was not intended to be imposed upon the companies designated by it, neither upon their franchises, their property, or their business. The provision is as follows: "Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the same therewith." Evidently this contemplates a liability for the tax beyond that of the company required to pay it into the treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier to the thing carried. Improvement companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their roadway, but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can, therefore, add the tax to the charge for transportation without further authority. In view of these provisions of the statute it is impossible to escape from the conviction that the burden of the tax rests upon the freight transported, or upon the consignor or consignee of the freight (imposed because the freight is transported), and that the company authorized to collect the tax and required to pay it into the state treasury is, in effect, only a tax-gatherer. * * *

Considering it, then, as manifest that the tax demanded by the act is imposed, not upon the company, but upon the freight carried, and because carried, we proceed to inquire whether, so far as it affects commodities transported through the state, or from points without the state to points within it, or from points within the state to points without it, the act is a regulation of interstate commerce. Beyond all question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by any state was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the states. * * *

Then, why is not a tax upon freight transported from state to state a regulation of interstate transportation, and, therefore, a regulation of commerce among the states? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the state, and in taking them out? The present case is the best possible illustration. The legislature of Pennsylvania has in effect declared that every ton of freight taken up within the state and carried out, or taken up in other states and brought within her limits, shall pay a specified tax. The payment of that tax is a condition upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the state, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one state to another without being obstructed by the intervention of state lines. It would hardly be maintained, we think, that had the state established custom-houses on her borders, wherever a railroad or canal comes to the state line, and demanded at these houses a duty for allowing merchandise to enter or to leave the state upon one of those railroads or canals, such an imposition would not have been a regulation of commerce with her sister states. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand. The goods of no citizen of New York, New Jersey, Ohio, or of any other state, may be placed upon a canal, railroad, or steamboat within the state for transportation any distance, either into or out of the state, without being subjected to the burden. Nor can it make any difference that the legislative purpose was to raise money for the support of the state government, and not to regulate transportation. It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate trade. We are not at this moment inquiring further than whether taxing goods carried because they are carried is a regulation of carriage. The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state. Nor is a rule prescribed for carriage of goods through, out of, or into a state any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal. Doubtless a state may regulate its internal commerce as it pleases. If a state chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another state, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the state. * * *

If, then, this is a tax upon freight carried between states, and a tax because of its transportation, and if such a tax is in effect a regulation of interstate commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States. * * * The rule has been asserted with great clearness, that whenever the subjects over which a power to regular commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. Cooley v. Port Wardens, 12 How. 299; Gilman v. Philadelphia, 3 Wall. 713; Crandall v. State of Nevada, 6 Wall. 42. Surely transportation of passengers or merchandise through a state, or from one state to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one state can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between states remote from each other may be destroyed. The produce of Western states may thus be effectually excluded from Eastern markets, for though it might bear the imposition of a single tax, it would be crushed under the load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the states was conferred upon the federal government. * * *

Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is pro tanto a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the states, we regard it as established that no state can impose a tax upon freight transported from state to state, or upon the transporter because of such transportation. * * *

Judgment reversed.[1]

[SWAYNE and DAVIS, JJ., dissented.]

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[1] See Thomas Reed Powell, Taxation of Things in Transit (1920-21) 7 Va. L. Rev. 167-194, 245-279, 429-454, 497-535.

BROWN ET AL. v. HOUSTON.

1885. Supreme Court of the United States. 114 U. S. 622.

[This was a suit to restrain a state tax-collector in Louisiana from seizing and selling several flat-boat loads of coal to pay taxes levied upon it for the year 1880. The coal belonged to the plaintiffs who were residents and did business in Pittsburgh, Pennsylvania. It had been mined in Pennsylvania and shipped to New Orleans where, at the time the taxes were assessed, it had just arrived in flat-boats and was lying in the Mississippi River "in its original condition and in its original packages," in the hands of plaintiffs' agents for sale. The taxes were claimed under a Louisiana statute which in terms "levied annual taxes, amounting in the aggregate to six mills on the dollar of the assessed valuation * * * of all property situated within the State of Louisiana." The Supreme Court of Louisiana sustained the tax and this writ of error was taken.]

MR. JUSTICE BRADLEY delivered the opinion of the court. * * *

In short, it may be laid down as the settled doctrine of this court, at this day, that a state can no more regulate or impede commerce among the several states than it can regulate or impede commerce with foreign nations.

This being the recognized law, the question then arises whether the assessment of the tax in question amounted to any interference with, or restriction upon the free introduction of the plaintiffs' coal from the State of Pennsylvania into the State of Louisiana, and the free disposal of the same in commerce in the latter state; in other words, whether the tax amounted to a regulation of, or restriction upon, commerce among the states; or only to an exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within the power of the state until Congress shall see fit to interfere and make express regulations on the subject.

As to the character and mode of the assessment, little need be added to what has already been said. It was not a tax imposed upon the coal as a foreign product, or as the product of another state than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that state to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the state, and as such it was taxed for the current year (1880), as all other property in the City of New Orleans was taxed. Under the law, it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated.

It cannot be seriously contended, at least in the absence of any Congressional legislation to the contrary, that all goods which are the product of other states are to be free from taxation in the state to which they may be carried for use or sale. Take the City of New York, for example. When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grain-fields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital,—provided always, that the assessment be a general one, and made without discrimination between goods the product of New York, and goods the product of other states? Of course the assessment should be a general one, and not discriminative between goods of different states. The taxing of goods coming from other states, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed. But if, after their arrival within the state,—that being their place of destination for use or trade,—if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce which would have the objectionable effect referred to.

We do not mean to say that if a tax-collector should be stationed at every ferry and railroad depot in the City of New York, charged with the duty of collecting a tax on every wagon load, or car load of produce and merchandise brought into the city, that it would not be a regulation of, and restraint upon interstate commerce, so far as the tax should be imposed on articles brought from other states. We think it would be, and that it would be an encroachment upon the exclusive powers of Congress. It would be very different from the tax laid on auction sales of all property indiscriminately, as in the case of Woodruff v. Parham, which had no relation to the movement of goods from one state to another. It would be very different from a tax laid, as in the present case, on property which had reached its destination, and had become part of the general mass of property of the city, and which was only taxed as a part of that general mass in common with all other property in the city, and in precisely the same manner.

When Congress shall see fit to make a regulation on the subject of property transported from one state to another, which may have the effect to give it a temporary exemption from taxation in the state to which it is transported, it will be time enough to consider any conflict that may arise between such regulation and the general taxing laws of the state. In the present case we see no such conflict, either in the law itself or in the proceedings which have been had under it and sustained by the state tribunals, nor any conflict with the general rule that a state cannot pass a law which shall interfere with the unrestricted freedom of commerce between the states. * * *

The judgment of the Supreme Court of Louisiana is affirmed.

CHAMPLAIN REALTY CO. v. TOWN OF BRATTLEBORO.

1922. Supreme Court of the United States. 260 U. S. 366.

[Certiorari to the Supreme Court of Vermont. Plaintiff cut pulp wood at various places in Vermont and floated it down the West River, thence into the Connecticut River at the junction of these rivers in the town (township) of Brattleboro, Vermont, thence to their mill at Hinsdale, New Hampshire, which was about three miles below Brattleboro, on the Connecticut River. They maintained a log boom at the mill to stop and hold the wood. This boom was not strong enough for these purposes when the waters of the Connecticut were high. At such times plaintiffs detained the wood in a pond, an enlargement of West River, in Brattleboro, near its junction with the Connecticut, holding the wood there by a boom. In March, 1929, plaintiffs had 10,000 cords to float down and some of it reached the pond and boom in Brattleboro on March 29, where the plaintiffs held it because the Connecticut was then at high water. Prior to April 3, 4000 cords had reached and been held there. On that date plaintiffs cut the West River boom and the wood entered the Connecticut. The remainder of the wood coming down later floated on through to Hinsdale without detention. The town of Brattleboro required taxes to be paid on the wood that was in that town on April 1, that is, so much of the wood as was then being held in the pond. To recover the money so paid, the plaintiff brought this suit. The Supreme Court of Vermont reversed the county court's judgment for the plaintiff.]

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Mr. Chief Justice Taft delivered the opinion of the court.

The Vermont Supreme Court depended for its conclusions chiefly upon Coe v. Errol, 116 U. S. 517, which is the leading case on this subject. There logs had been cut on Wentworth's Location in New Hampshire during the winter and had been drawn down to Errol in the same state, and placed in Clear Stream and on the banks thereof on lands of John Akers and part on land of George C. Demerritt in said town, to be from thence floated down the Androscoggin river to the State of Maine (p. 518).

It is not clear how long they had lain there, but certainly for part of one winter season. This court, speaking by Mr. Justice Bradley, sought to fix the time when such logs, in the course of their being taken from New Hampshire to Maine, ceased to be part of the mass of property of New Hampshire and passed into the immunity from state taxation as things actually in interstate commerce. The learned Justice states the rule to be:

"That such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey." (p. 527.)

Again, on page 528, Justice Bradley said:

"The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in the course of transportation out of the state. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether in fieri and not at all a fixed and certain thing.

"The application of these principles to the present case is obvious. The logs which were taxed, and the tax on which was not abated by the Supreme Court of New Hampshire, had not, when so taxed, been shipped or started on their final voyage or journey to the State of Maine. They had only been drawn down from Wentworth's Location to Errol, the place from which they were to be transported to Lewiston in the State of Maine. There they were to remain until it should be convenient to send them to their destination."

The question here then is: Where did the interstate shipment begin? When the wood was placed in the waters of the West river in the towns of Jamaica, Stratton, Londonderry and Winhall, or at the boom in Brattleboro? The whole drive was 10,000 cords. Six thousand cords of that, shipped from these towns after the 3d of April, went through directly to Hinsdale, N. H., without stopping. Certainly that was a continuous passage, and the wood when floating in the West River was as much in interstate commerce as when on the Connecticut. Why was it any more in interstate commerce than that which had been shipped before April 3d from the same towns for the same destination by the same natural carrying agency, to wit, the flowing water of the West and Connecticut Rivers? Did the fact that before April 3d the waters of the Connecticut were frozen, or so high as to prevent the logs reaching Hinsdale, requiring a temporary halting at the mouth of the West River, break the real continuity of the interstate journey? We think not. The preparation for the interstate journey had all been completed at the towns on the West River where the wood had been put in the stream. The boom at the mouth of the West River did not constitute an entrepôt or depot for the gathering of logs preparatory for the final journey. It was only a safety appliance in the course of the journey. It was a harbor of refuge from danger to a shipment on its way. It was not used by the owner for any beneficial purpose of his own except to facilitate the safe delivery of the wood at Hinsdale on their final journey already begun. The logs were not detained to be classified, measured, counted, or in any way dealt with by the owner for his benefit, except to save them from destruction in the course of their journey that, but for natural causes, over which he could exercise no control, would have been actually continuous.. This was not the case in Coe v. Errol. It is evident from the statement of that case, and Mr. Justice Bradley's language that the logs were partly drawn and partly floated to Errol, and deposited some in the stream and some on the banks, where "they were to remain until it should be convenient to send them to their destination," and they were being gathered there for the whole previous winter season. It was an entrepôt or depot, as the Justice several times describes it. The mere fact that the owner intended to send them out of the state under such circumstances did not put them into transit in interstate commerce. But here we have the intention put into accomplishment by launching, and manifested by an actually continuous journey of more than half the drive, with a halting of less than half of it in the course of the interstate journey to save it from loss, and only for that purpose.

The case at bar is easily distinguishable from the other cases cited by the Vermont Supreme Court. In Bacon v. Illinois, 227 U. S. 504, Bacon had bought shipments of grain in transitu from Western states to New York in the contract for which the carriers had given the shipper the right to remove it "for the mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading or mixing, or changing the ownership, consignee or destination." On arrival of the grain in Chicago, Bacon removed the grain from the cars to his private elevator. This removal was for the purpose of inspecting, weighing, grading, mixing, etc., but not to change its ownership, consignee, or destination. It was held that, whatever his intention, the grain was at rest, within his complete power of disposition, and held for his own benefit and was taxable. His storing of the grain was not to facilitate interstate shipment of the grain, or save it from the danger of the journey. It was to enable him to treat the grain, so as to enable him more conveniently to dispose of it. He made his warehouse a depot for its preparation for further shipment and sale. He had thus suspended the interstate commerce journey and brought the grain within the taxable jurisdiction of the state.[2]

So, in General Oil Co. v. Crain, 209 U. S. 211, the Oil Company had its principal place of business in Memphis, Tenn., for the manufacture and sale of illuminating oils in interstate commerce. It imported oil from other states and put it into a tank, appropriately marked for distribution in smaller vessels to fill orders for oil already sold in Arkansas, Louisiana, and Mississippi. The court held that the first shipment had ended, that its storage at Memphis for division and distribution to various points was for the business purposes and profit of the company. The court continued:

"It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation." (p. 231.)

The tank at Memphis thus became a depot in its oil business for preparing the oil for another interstate journey. So far as it bears upon this case, American Steel and Wire Co. v. Speed, 192 U. S. 500, presented a similar state of facts and ruling.

In Diamond Match Co. v. Ontonagon, 188 U. S. 82, the company cut 180,000,000 feet of lumber for the purpose of saving the same from fire, and to protect and preserve it, put it into the Ontonagon River, Mich. It was drawn down to the mouth of the river into the township of Ontonagon, Mich., to the sorting ground and pier jams of the company and there it was taxed. The logs remained there and were shipped as they were needed to Green Bay, Wis., to the mills of the company. Not more than 40,000,000 feet a season were needed. Palpably the company's sorting grounds and pier jams were a depot for the keeping of the logs for the business purposes of the company, and there was no interstate commerce until the final shipment to Green Bay began.

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[2] In the cited case, Hughes, J., delivering the opinion of the court said obiter: "It is now contended * * * that even if the property was in transit and was the subject of interstate commerce, it was nevertheless liable to assessment, in common with the other personal property of the plaintiff in error, because he was a resident of the state and the property was within the limits of the county where the assessment was made.

"This argument proceeds upon a misconception of the ground upon which the power to tax articles actually moving in interstate transportation is denied to the states. * * * Its postulate is the necessary freedom of that commerce from the burden of such local exactions. * * * The fact that such a burden is sought to be imposed by the state of the domicile of the owner, upon property moving in interstate commerce, creates no exception. That state enjoys no prerogative to make levy upon such property passing through it, because it may belong to its citizens. They, as well as others, are under the shelter of the commerce clause. The question is determined not by the residence of the owner but by the nature and effect of the particular state action with respect to a subject which has come under the sway of a paramount authority."

In the cases of Brown v. Houston, 114 U. S. 622, and Pittsburgh Coal Co. v. Bates, 156 U. S. 577, the coal in barges in the Mississippi river which was the subject of taxation had come to rest in Louisiana, after a trip from Pittsburgh, and were being held for sale to any one who might wish to buy.

The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation which is not discriminative unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one state to another, in the course of such an uninterrupted journey it is clearly immune. The doubt arises when there are interruptions in the journey, and when the property in its transportation is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken. State v. Engle, 34 N. J. L. 425; State v. Carrigan, 39 N. J. L. 35. This was the case in Kelley v. Rhoads, 188 U. S. 1, in which sheep driven 500 miles from Utah to Nebraska which traveled nine miles a day were held immune from taxation in Wyoming where they stopped and grazed on their way. Another instance is as to that part of the logs in Coe v. Errol, which were not before this court because the Supreme Court of New Hampshire had found them nontaxable in New Hampshire. They were cut in Maine and were floated down the Androscoggin on their way to Lewiston, Me., but were delayed for a season at Errol, N. H., because of low water. In the cases just cited the transit had begun in one state and was continued through another on the way to a third. This circumstance strengthened the inference that the interruption in the intermediate state did not destroy interstate continuity of the trip. But this was not always so, as Bacon v. Illinois and General Oil Co. v. Crain show. In other words, in such cases interstate continuity of transit is to be determined by a consideration of the various factors of the situation. Chief among these are the intention of the owner, the control he retains to change destination, the agency by which the transit is effected, the actual continuity of the transportation, and the occasion or purpose of the interruption during which the tax is sought to be levied.

Of all the cases in this court where such movable property has been held taxable, none is nearer in its facts than Coe v. Errol to the case at bar. We have pointed out the distinction between the two, which requires a different conclusion here.

Reversed.

HEISLER v. THOMAS COLLIERY CO.

1922. Supreme Court of the United States. 260 U. S. 245.

Error to a decree of the Supreme Court of Pennsylvania affirming a decree of a lower court, which dismissed a bill brought by Heisler, as a stockholder, to enjoin the Colliery Company and its trustees from paying a state tax and defendant state officials from enforcing it.

MR. JUSTICE MCKENNA delivered the opinion of the court. * * *

In 1921 the commonwealth passed the act here involved (P. L. 1921, p. 479). It provided that from and after its passage each ton of anthracite coal mined, "washed, screened, or otherwise prepared for market" in the commonwealth should be "subject to a tax of 1½ per cent. of the value thereof when prepared for market." It was provided that the tax should be assessed at the time when the coal has been subjected to the indicated preparation "and is ready for shipment or market."

Anthracite coal * * *is asserted to be found in only nine counties in the state, and practically nowhere else in the United States. The fact, it is further said, gives the state a monopoly of it, and that a tax upon it is levying a tribute upon the consumption of other states, and nine of them have appeared by their attorneys general to assail it as illegal and denounce it as an attempt to regulate interstate commerce. In emphasis of the contention, the Governor of the state is quoted as urging the tax because of that effect. The fact, tribute upon the consumers of the coal in other states, is pronounced inevitable, as, it is the assertion, 80% of the total production is shipped to other states, and that this constitutes its "major 'market.'" And the dependency upon Pennsylvania is represented as impossible of evasion or relief. Anthracite coal, is the assertion, has become a prime necessity of those states, "particularly for domestic purposes" and even "municipal laws and ordinances have been passed forbidding the use of other coal for heating purposes." * * *

The contention that the tax is a regulation of interstate commerce seems to be based somewhat upon the declaration of the Governor of the state of its effect upon consumers in other states. We are unable to discern in the fact any materiality or pertinency, nor in the fact that Pennsylvania has a monopoly (if we may use the word) of the coal. Whether any statute or action of a state impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it, and a tax upon articles in one state that are destined for use in another state cannot be called a regulation of interstate commerce whether imposed in the certainty of a return from a monopoly existing, or in the doubt and chances because of competition. The action of the state as a regulation of interstate commerce does not depend upon the degree of interference; it is illegal in any degree.

We may, therefore, disregard the adventitious considerations referred to and their confusion, and by doing so we can estimate the contention made. It is that the products of a state that have, or are destined to have, a market in other states are subjects of interstate commerce, though they have not moved from the place of their production or preparation.

The reach and consequences of the contention repel its acceptance. If the possibility, or indeed certainty, of exportation of a product or article from a state determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other states at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet "on the hoof," wool yet unshorn, and coal yet unmined because they are in varying percentages destined for and surely to be exported to states other than those of their production.

However, we need not proceed further in speculation and argument. Ingenuity and imagination have been exercised heretofore upon a like contention. There is temptation to it in the relation of the states to the federal government, being yet superior to the states in instances or rather, having spheres of action exclusive of them. The instances cannot in all cases be precisely defined. And the uncertainty attracts disputes, and is availed of to assert or suppose collisions which, in fact, do not exist. There is illustration in the cases. In Coe v. Errol, 116 U. S. 517, the precise contention here made was passed upon and rejected. It involved the taxing power of a state, and the property subject to it (timber cut in its forests) was intended for exportation and had progressed nearer to exportation than the coal in the present case. The question in the case was said to be:

"Whether the products of a state (in this case timber cut in its forests) are liable to be taxed like other property within the state, though intended for exportation to another state, and partially prepared for that purpose by being deposited at a place of shipment, such products being owned by persons residing in another state."

And again:

"Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation?

In answer to the questions, the point of time when goods cease to be under the power of the state and come under the protection of the Constitution was considered. To express it as the court did:

"There must be a point of time when they [goods] cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination."

And again:

"Nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state."

Until then, it was said, they were a part of the general mass of property of the state, and subject to its jurisdiction.

Other cases have decided the same and afford illustrations of it. Cornell v. Coyne, 192 U. S. 418; Susquehanna Coal Co. v. South Amboy, 228 U. S. 665; Bacon v. Illinois, 227 U. S. 504; General Oil Co. v. Crain, 209 U. S. 211; United Mine Workers v. Coronado Coal Co., 259 U. S. 344.

The effect of these cases is attempted to be evaded by the assertion that the statute in imposing the tax when the coal " 'is ready for shipment or market' is a plain and intentional fraud upon the commerce clause." We cannot accept the accusation as justified, or that the situation of the coal can be changed by it and as moving in interstate commerce when it is plainly not so moving. The coal, therefore, is too definitely situated to be misunderstood and the cases cited to establish a different character and subjection need not be reviewed.

Decree affirmed.[3]

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[3] In Oliver Iron Min. Co. v. Lord (1923) 262 U. S. 172, 67 L. ed. 929, a Minnesota statute was sustained which levied for each year an "occupation tax" on mining iron or other ores, equal to 6% of the ore mined during the preceding year,—such tax to be "in addition to all other taxes." The court said:

"We think the tax in its essence is what the act calls it—an occupation tax. It is not laid on the land containing the ore, nor on the ore after removal, but on the business of mining the ore, which consists in severing it from its natural bed and bringing it to the surface where it can become an article of commerce and be utilized in the industrial arts. * * *

"The chief contention is that mining as conducted by the plaintiffs, if not actually a part of interstate commerce, is so closely connected therewith that to tax it

American Refrigerator Transit Co. v. Hall (1899) 174 U. S. 70, 80-82. Shiras, J., after summarizing and quoting from Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, see ante, p. 1624, and Adams Express Co. v. Ohio State Auditor, ante, p. 1614, stated the facts and the opinion of the court as follows:

"The American Refrigerator Transit Company is a corporation of the State of Illinois, engaged in the business of furnishing refrigerator cars for the transportation of perishable products over the various lines of railroads in the United States, and receives as compensation for the use of its cars a mileage of three-fourths of a cent per mile from each railroad company over whose lines said cars are run.

"The receiver of the Union Pacific, Denver and Gulf Company reported to the board of equalization that he had on the line of the railroad which he was operating within the State of Colorado forty-two refrigerator cars belonging to the American Refrigerator Transit Company on December 31, 1894. The board thereupon assessed to the Transit Company said forty-two cars, at a valuation of two hundred and fifty dollars each, and distributed said assessment to the different counties through which the line of said railroad extended.

"It was stipulated in the trial court 'that it is necessary for the railroad companies operating within the State of Colorado, and which are required to carry over their lines perishable freight, to have such character of cars wherein they can safely transport such

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is to burden or interfere with such commerce, which a state cannot do consistently with the commerce clause of the Constitution of the United States.

"The facts on which the contention rests are as follows: The demand or market within the state for iron ore covers only a negligible percentage of what is mined by the plaintiffs. Practically all of their output is mined to fill existing contracts with consumers outside the state and passes at once into the channels of interstate commerce. Three-fourths of it is from open pit mines and one-fourth from underground mines. At the open pit mines empty cars are run from adjacent railroad yards into the mines and there loaded. Steam shovels sever the ore from its natural bed and lift it directly into the cars. When loaded the cars are promptly returned to the railroad yards, where they are put into trains which start the ore on its interstate journey. The several steps follow in such succession that there is practical continuity of movement from the time the ore is severed from its natural bed. The operations within the mine and the movement of the cars into and out of the mine are conducted by the plaintiffs. The subsequent transportation is by public carriers. * * *

"Plainly the facts do not support the contention. Mining is not interstate commerce, but, like manufacturing, is a local business subject to local regulation and taxation. * * * Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce. * * * The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."

See Thomas Reed Powell, State Production Taxes and the Commerce Clause (1923) 12 Cal. L. Rev. 17-24; and editorial notes (1923), 2 Wis. L. Rev. 187-188 and (1923) 32 Yale L. J. 406-407.

freight; and that owing to the varying and irregular demands for such cars, the various railroad companies within the State of Colorado have not deemed it profitable to build or own cars of such character, and therefore rely upon securing such cars when needed from the Transit Company, or corporations doing a like business."

"It was further stipulated 'that the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado during the year for which such assessment was made would equal forty, and that the cash value of plaintiff's cars exceeds the sum of two hundred and fifty dollars per car, and that if such property of the plaintiff is assessable and taxable within such state, then the amount for which such cars, the property of the plaintiff, is assessed by said state board of equalization is just and reasonable, and not in excess of the value placed upon other like property within said state for the purposes of taxation.'

"Applying the reasoning and conclusions of the cases hereinbefore cited to those admitted facts, we have no difficulty in affirming the judgment of the Supreme Court of Colorado sustaining the validity of the taxation in question.

"The state statutes impose no burdens on the business of the plaintiff in error, but contemplate only the assessment and levy of taxes upon the property situated within the state; and the only question is whether it was competent to ascertain the number of the cars to be subjected to taxation by inquiring into the average number used within the state limits during the period for which the assessment was made.

"It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation invalid. Marye v. Baltimore & Ohio Railroad, 127 U. S. 117; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18."

Affirmed.

Mr. Justice Harlan and Mr. Justice White dissented.

WELTON v. MISSOURI.

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1875. Supreme Court of the United States. 91 U. S. 275.

Error to the Supreme Court of Missouri.

Welton was indicted, tried, and convicted in the Circuit Court for the County of Henry, in the State of Missouri, for selling goods without a license.

The first section of the statute under which the indictment was found is as follows:

"Whoever shall deal in the selling of patent or other medicines, goods, wares, or merchandise, except books, charts, maps and stationery, which are not the growth, produce, or manufacture of this state, by going from place to place to sell the same, is declared to be a peddler."

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The ~~other~~ sections prohibit a person dealing as a peddler without license, and impose a penalty therefor, and prescribe the rate of charge for such license. No license is required for selling, "by going from place to place," the growth, produce, or manufacture of the state.

The Supreme Court, on appeal, affirmed the decision of the Circuit Court, on the ground that the statute applied solely to the internal commerce of the state, and made no discrimination against citizens of other states, but merely imposed a tax upon a *calling* or a *profession,* and neither directly nor indirectly upon property. * * *

Mr. Justice Field delivered the opinion of the court. * * *

The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the state; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the state.

The general power of the state to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the state to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license. * * * [Brown v. Maryland, ante, p. 1701, is here discussed.] So, in like manner, the license tax exacted by the State of Missouri from dealers in goods which are not the product or manufacture of the state, before they can be sold from place to place within the state, must be regarded as a tax upon such goods themselves; and the question presented is, whether legislation thus discriminating against the products of other states in the conditions of their sale by a certain class of dealers is valid under the Constitution of the United States. * * *

It will not be denied that that portion of commerce with foreign countries and between the states which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the Constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question. * * *

The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, and to no greater burdens. If, at any time before it has thus become incorporated into the mass of property of the state or nation, it can be subjected to any restrictions by state legislation, the object of investing the control in Congress may be entirely defeated. If Missouri can require a license tax for the sale by travelling dealers of goods which are the growth, product, or manufacture of other states or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion.

The power of the state to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one state and injurious to the interests of other states and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the states.

There is a difficulty, it is true, in all cases of this character, in drawing the line precisely where the commercial power of Congress ends and the power of the state begins. * * * It would be premature to state any rule which would be universal in its application to determine when the commercial power of the federal government over a commodity has ceased, and the power of the state has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character.[4] That power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect, and is therefore, in our judgment, unconstitutional and void.

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[4] "While it is undoubted that it has been settled that where property which has moved in the channels of interstate commerce is at rest within a state and has

The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri. * * *

Judgment reversed.

ROBBINS v. SHELBY COUNTY TAXING DISTRICT.

1887. Supreme Court of the United States. 120 U. S. 489.

[A Tennessee statute required "all drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, * * * therein, by sample," to pay a license tax of $25 per month. Robbins was convicted of drumming without a license, on evidence that he solicited buyers in Shelby County as a drummer for a firm whose place of business was in Cincinnati, Ohio. The state supreme court sustained the conviction and this writ of error was taken.]

MR. JUSTICE BRADLEY delivered the opinion of the court. * * *

In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer or a merchant of one state to sell his goods in another state, without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited

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become commingled with the mass of property therein, it may be taxed by such state without thereby imposing a direct burden upon interstate commerce, that doctrine * * * has always expressly excluded the conception that a state could, without directly burdening interstate commerce, discriminate against such property by imposing upon it a burden of taxation greater than that levied upon domestic property of a like nature." White, J., in Darnell & Son Co. v. Memphis (1908) 208 U. S. 113, 119-120, 52 L. ed. 413.

demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or woodenware, may, perhaps, safely take his goods to the city of New York, and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another state without first procuring an order for them. It is true, a merchant or manufacturer in one state may erect or hire a warehouse or store in another state, in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or store in every state with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business, it may be adopted with advantage. Many manufacturers do open houses or places of business in other states than those in which they reside and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do, who wishes to sell his goods in other states? Must he sit still in his factory or warehouse, and wait for the people of those states to come to him? This would be a silly and ruinous proceeding.

The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other states. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce, is to speak at least unadvisedly, and without due attention to the truth of things.

It may be suggested that the merchant or manufacturer has the post-office at his command, and may solicit orders through the mails. We do not suppose, however, that any one would seriously contend that this is the only way in which his business can be transacted without being amenable to exactions on the part of the state. Besides, why could not the state to which his letters might be sent, tax him for soliciting orders in this way, as well as in any other way?

The truth is, that in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other states is to obtain them by personal application, either by himself or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale, whether by word of mouth only, or by the exhibition of samples. If the right exists, any

New York or Chicago merchant, visiting New Orleans or Jacksonville for pleasure or for his health, and casually taking an order for goods to be sent from his warehouse, could be made liable to pay a tax for so doing, or be convicted of a misdemeanor for not having taken out a license. The right to tax would apply equally as well to the principal as to his agent, and to a single act of sale as to a hundred acts.

But it will be said that a denial of this power of taxation will interfere with the right of the state to tax business pursuits and callings carried on within its limits, and its right to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent, but only in those cases in which the states themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution; and this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirements of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the state gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege, cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former, independent of the latter, and free from any interference or restraint from them.

To deny to the state the power to lay the tax or require the license in question, will not, in any perceptible degree, diminish its resources, or its just power of taxation. It is very true that, if the goods when sold were in the state, and part of its general mass of property, they would be liable to taxation; but when brought into the state in consequence of the sale, they will be equally liable; so that, in the end, the state will derive just as much revenue from them as if they were there before the sale. As soon as the goods are in the state, and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of Brown v. Houston, 114 U. S. 622. When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws, provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are.

Brown v. Houston, supra; Machine Co. v. Gage, 100 U. S. 676. But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself.

It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers, —those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of The State Freight Tax, 15 Wall. 232. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and, in the other, of interstate, commerce, both of which are subject to regulation by Congress alone.

It would not be difficult, however, to show that the tax authorized by the state of Tennessee in the present case is discriminative against the merchants and manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of is principal objects. And if a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it.

If the selling of goods by sample, and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject would be but a repetition of the disorder which prevailed under the Articles of Confederation.

To say that the tax, if invalid as against drummers from other states, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument; because, the state is not bound to tax its own drummers; and if it does so, whilst having no power to tax those of other states, it acts of its own free will, and is itself the author of such discrimination. As before said, the state may tax its own internal commerce; but that does not give it any right to tax interstate commerce.

Judgment reversed.[5]

MR. CHIEF JUSTICE WAITE, with whom concurred MR. JUSTICE FIELD and MR. JUSTICE GRAY, dissenting. * * * There is no discrimination between citizens of the state and citizens of other states. * * * Merchants in Tennessee are by law required to pay taxes on the amount of their stocks on hand and a privilege tax besides. Under these circumstances it is easy to see that if a merchant from another state could carry on a business in the district by sending his agents there with samples of his goods to secure orders for deliveries from his stock at home, he would enjoy a privilege of exemption from taxation which the local merchant would not have unless in some form he could be subjected to taxation for what he did in the locality. The same would be true in respect to all inhabitants of the state who were sellers by sample in this district, but who had no place of business there. And so they, like citizens of other states, were required to pay for the privilege. Thus all were treated alike, whether they were citizens of Tennessee or of some other state, and under these circumstances, I can see no constitutional objection to such a taxation of citizens of the other states for their business in the district. * * *

BROWNING v. CITY OF WAYCROSS.

1914. Supreme Court of the United States. 233 U. S. 16.
[Printed ante, p. 1242.]

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[5] Accord: Real Silk Hosiery Mills v. Portland (1925) 268 U. S. 325, 69 L. ed. 982 (house to house soliciting of orders to be filled by shipment from outside the state.)

RALEY & BROTHERS v. RICHARDSON.

1924. Supreme Court of the United States. 264 U. S. 157.

MR. JUSTICE SUTHERLAND delivered the opinion of the court.

A statute of Georgia (Acts 1921, p. 46, par. 30) imposes a flat tax of $100 upon any broker or commission merchant buying or selling merchandise on commission for another, or engaged in the business of receiving or distributing articles of merchandise shipped to such broker or merchant for distribution on account of the shipper. The bill filed below sought to enjoin the collection of the tax on the ground that the statute violates the Commerce Clause of the federal Constitution and also, contingently, upon the further ground that the statute is void under the equal protection clause of the Fourteenth Amendment.

The complainants were divided into two classes, A and B. The business of those in Class B was to solicit orders for goods from dealers in Georgia, which orders were sent to be filled, sometimes to nonresident and sometimes to resident principals, the greater part of the business being with nonresident principals. The business of those in Class A was wholly confined to representation of nonresident principals. Upon acceptance of an order the goods are shipped by the principal to the purchaser, but remain the property of the former until the time of sale.

The trial court sustained the tax as to Class B and enjoined its collection as to Class A, and its judgment was affirmed by the Supreme Court. 154 Ga. 140. We are concerned here with the judgment only in so far as it affects Class B.

The contention is that the tax is laid, expressly, upon all brokers and commission merchants in the state and upon the business done by them, whether interstate or intrastate, without separating one from the other. The state courts, by whose construction we are bound, held that the statute did not apply to interstate business; and we consider it as though it so provided in terms. It was held, however, that inasmuch as Class B complainants were engaged in intrastate business they were subject to the tax, and none the less because they were also engaged in interstate business. With this conclusion we fully agree.

The complainants were definitely engaged in the domestic business described in the statute and were liable to the tax, irrespective of the extent of it and whether they engaged in interstate business in addition or not. That the former was small in comparison with the latter makes no difference; nor does the fact that both were carried on at the same time and in the same establishment. If the two were not distinct, but the former a mere incident of the latter, the burden was upon complainants to furnish the proof; in which case a different question would arise. Kehrer v. Stewart, 197 U. S.

60, 69. Certainly, one cannot avoid a tax upon a taxable business by also engaging in a non-taxable business.

There is nothing in the contention that, because, under the construction placed upon the statute by the state courts, the tax falls upon those engaged in domestic business and does not fall upon those engaged in interstate business, it is void for inequality. It would be a strange application of the equality provision of the Fourteenth Amendment to say that because a state is forbidden by paramount law to impose a tax upon some merchants, it is therefore powerless to impose it upon other merchants to whom the restriction does not apply. It is enough if the state observe the rule of equality among the persons subject to its taxing power.

Affirmed.

SONNEBORN BROTHERS v. CURETON.

1923. Supreme Court of the United States. 262 U. S. 506.

Mr. Chief Justice Taft delivered the opinion of the court.

This is an appeal from a decree of a United States District Court under § 238, Judicial Code, in a case in which a law of Texas is claimed to be in contravention of the Constitution of the United States. The law in question is Art. 7377 of the Revised Civil Statutes of Texas, approved May 16, 1907, Acts of 1907, p. 479. It provides that every individual, firm or corporation, foreign or domestic, engaging as a wholesale dealer in coal oil or other oils refined from petroleum, shall make a quarterly report to the State Comptroller, showing the gross amount collected and uncollected from any and all sales made within the state during the quarter next preceding, and that an occupation tax shall be paid by such dealer equal to two per cent. of the gross amount of such sales collected or uncollected.

From an agreed statement of facts, the following appears:

Sonneborn Brothers is a firm of nonresident merchants selling petroleum products, with its principal place of business in New York City. In January, 1910, it opened an office in Dallas, Texas, and since that time has maintained it and connecting warerooms and has rented space in a public warehouse at San Antonio, Texas. From January, 1910, until April 11, 1919, receipts from its total sales, made through orders received at the Dallas office, have amounted to $860,801.50. This sum included:

(1) Those from the sale of oil which, when sold, was not in Texas.

(2) Those from sales of oil to be delivered from Texas out of the state.

(3) Those arising from the sale of oil shipped into Texas and afterwards sold from the storerooms in unbroken original packages.

(4) Those from sales in Texas from broken packages.

The receipts from the first two classes amounted to $643,622.40 and the state authorities made no effort to tax them. The receipts from (4) amounted in the period named to $16,549.84, and appellants do not deny their liability for the tax thereon. The sales made under (3) of unbroken packages, after their arrival in Texas, and after storage in the warerooms or warehouse of appellants, amounted to $217,179.10, and the tax on this amounting to $4,674.58 is the subject of the contest here.

The question we have to decide is whether oil transported by appellants from New York or elsewhere outside of Texas to their warerooms or warehouse in Texas, there held for sales in Texas in original packages of transportation, and subsequently sold and delivered in Texas in such original packages, may be made the basis of an occupation tax upon appellants, when the state tax applies to all wholesale dealers in oil engaged in making sales and delivery in Texas.

Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had come to a state of rest in the warehouse of the appellants and had become a part of their stock with which they proposed to do business as wholesale dealers in the state. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject.

This has been established so far as property taxes on the merchandise are concerned by a formidable line of authorities. Brown v. Houston, 114 U. S. 622; Coe v. Erroll, 116 U. S. 517; Pittsburg & Southern Coal Co. v. Bates, 156 U. S. 577; Diamond Match Co. v. Ontonagon, 188 U. S. 82; American Steel & Wire Co. v. Speed, 192 U. S. 500, 520; General Oil Co. v. Crain, 209 U. S. 211; Bacon v. Illinois, 227 U. S. 504.

But the argument is that for articles in original packages, the sale is a final step in the interstate commerce, and that the owner may not be taxed upon such sale because this is a direct burden on that step. The reasoning is based on the supposed analogy of the immunity from state taxation of imports from foreign countries which lasts until the article imported has been sold, or has been taken from its original packages of importation and added to the mass of merchandise of the state. This immunity of imports was established by this court in Brown v. Maryland, 12 Wheat. 419, 446, 447, and was declared in obedience to the prohibition of the Constitution contained in § 10, Article I, par. 2, providing that:

"No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The holding was that the sale was part of the importation. It is the article itself to which the immunity attaches and whether it is in transit or is at rest, so long as it is in the form and package in which imported and in the custody and ownership of the importer, the state may not tax it. This immunity has been enforced as against a license or occupation tax on the importer in Brown v. Maryland, 12 Wheat. 419, as against a personal property tax on a stock of wines of a wine dealer to the extent to which the stock included imported wines in the original packages, Low v. Austin, 13 Wall. 29, and as against an occupation tax on an auctioneer measured by his commissions on the sales of such imports, Cook v. Pennsylvania, 97 U. S. 566. When, however, the article imported is sold or is taken from the original packages and exposed for sale, the immunity is gone. Waring v. The Mayor, 8 Wall. 110; May v. New Orleans, 178 U. S. 496.

Cases subsequent to Brown v. Maryland show that the analogy between imports and articles in original packages in interstate commerce in respect of immunity from taxation fails. The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce.

The first of the cases making this distinction is Woodruff v. Parham, 8 Wall. 123. In that case, Woodruff, an auctioneer in Mobile, received, in the course of his general business for himself and as consignee and agent for others, merchandise from Alabama and from other states and sold it in unbroken packages. The City of Mobile under its charter levied a uniform tax on real and personal property, on sales at auction, on sales of merchandise, and on capital employed in the business in the city. Woodruff objected to paying any tax on the auction sales of merchandise from other states in original packages. The question most considered by the court was whether merchandise exported from one state to another was an export which a state was forbidden to tax by Article I, § 10, par. 2, of the federal Constitution, above quoted. It was held that it was not, and that the words "imports and exports" as there used referred to, and included only merchandise brought in from, or transported to, foreign countries. The court (p. 140) further held that such a tax which did not discriminate against the sales of goods from other states, but was imposed upon sales of all merchandise, whether its origin was in Alabama or in any other state, was not "an attempt to fetter commerce among the states."

At the close of the opinion in Brown v. Maryland, Chief Justice Marshall made the remark "that we suppose the principles laid down in this case apply equally to importations from a sister state." This was pronounced in Woodruff v. Parham not to be a judicial decision of the question but an obiter dictum. * * *

The case of Woodruff v. Parham has never been overruled but has often been approved and followed as the cases above cited show. As an authority it controls the case before us and shows conclusively that the tax in question is valid.

The distinction between the immunity from state taxation of imports in original packages, and that of articles coming from interstate commerce in original packages, is again brought out with emphasis by Mr. Justice White, afterwards Chief Justice, in American Steel & Wire Co. v. Speed, 192 U. S. 522. In that case, articles of hardware were shipped by the American Steel & Wire Company from their factories in the East to Memphis, Tennessee, and there kept in store in original packages to be distributed to Arkansas and other states when sold, on orders to be subsequently secured. Memphis, under a general law, imposed a merchant's tax on the Wire Company, based on the average capital invested in the business and included this stock of original packages in the average. The court conceded that if these goods were "imports," they could not be taxed under Brown v. Maryland, but said (p. 519):

"But the goods not having been brought from abroad, they were not imported in the legal sense and were subject to state taxation after they had reached their destination and whilst held in the state for sale," and cited the cases of Woodruff v. Parham, and Brown v. Houston. * * *

Support for the contention that a state tax on sales of merchandise in original packages brought in from another state is to be distinguished from ad valorem taxes on the merchandise itself is supposed to be found in the cases of Leisy v. Hardin, 135 U. S. 100, and Lyng v. Michigan, 135 U. S. 161. In those cases it was held that a law of a state which forbade sales of merchandise brought into the state from another state and subjected it to forfeiture, was invalid because freedom to sell was part of interstate commerce and interference with such freedom was an obstruction and would be so regarded as long as the merchandise was unsold and in an original package. The reasoning in .Brown v. Maryland as to the necessity of sale to complete importation was resorted to by the court in Leisy v. Hardin to sustain the view that a sale was a part of interstate commerce and any state action which intercepted the merchandise brought in before sale in the original package was void. In drawing the proper line between the valid operation of state prohibition laws and lawful interstate commerce, Chief Justice Marshall's conception of that to be drawn between importation from abroad under the Constitution and state taxation was adopted. Without questioning the reasoning used to reach the conclusion in Leisy v. Hardin, it is enough to point out the radical difference between state legislation preventing any sale at all accompanied by forfeiture of the merchandise, and a provision for an occupation tax applicable to all sales of such merchandise whether domestic or brought from another state. The one plainly interferes with or destroys the commerce, the other merely puts the merchandise on an equality with all other merchandise in the state, and constitutes no real hindrance to introducing the merchandise into the state for sale upon the basis of equal competition. Mr. Justice White in his opinion in American Steel & Wire Co. v. Speed, thus distinguished Leisy v. Hardin from the case then before the court. * * *

Many of the sales by the appellants were made by them before the oil to fulfill the sales was sent to Texas. These were properly treated by the state authorities as exempt from state taxation. They were in effect contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence and any state tax upon it is a regulation of it and a burden upon it. Robbins v. Shelby County Taxing District, 120 U. S. 489; Asher v. Texas, 128 U. S. 129; Stoutenburgh v. Hennick, 129 U. S. 141, 147; Caldwell v. North Carolina, 187 U. S. 622; Rearick v. Pennsylvania, 203 U. S. 507; Brennan v. Titusville, 153 U. S. 289; Dozier v. Alabama, 218 U. S. 124; Crenshaw v. Arkansas, 227 U. S. 389; Stewart v. Michigan, 232 U. S. 665; Western Oil Refining Co. v. Lipscomb, 244 U. S. 346. * * *

A state tax upon merchandise brought in from another state or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another state. This distinction is illustrated in the difference between those cases which uphold the validity of a tax upon peddlers engaged in selling merchandise from out of the state which they carry with them, like those of Machine Co. v. Gage, 100 U. S. 676, Emert v. Missouri, 156 U. S. 296, Baccus v. Louisiana, 232 U. S. 334, and Wagner v. Covington, 251 U. S. 95, on the one hand, and that of Welton v. Missouri, 91 U. S. 275, in which a peddler's tax was held bad because it was levied only on goods from other states, on the other. Ward v. Maryland, 12 Wall. 418, 429, Guy v. Baltimore, 100 U. S. 434, 442-443, Tiernan v. Rinker, 102 U. S. 123, Webber v. Virginia, 103 U. S. 344, 350, and Walling v. Michigan, 116 U. S. 446, are other instances showing the invalidity of state tax laws discriminating against merchandise brought in from other states.

Appellants' chief argument to sustain their contention that a sale of merchandise in the original package made after it is brought into the state from another state is exempt from state taxation is based upon the language of the opinions in certain recent cases in this court. They are Standard Oil Co. v. Graves, 249 U. S. 389; Askren v. Continental Oil Co., 252 U. S. 444; Bowman v. Continental Oil Co., 256 U. S. 642, and Texas Co. v. Brown, 258 U. S. 466. [After extended comment upon these cases the following conclusion is stated:] The facts upon which the line between taxable and non-taxable sales could be correctly drawn do not appear fully in any of the cases, or to have been discussed by counsel. This is what has led to a confusion as to the real distinctions and to observations in the opinions which unless much restricted in their application constitute a departure from theretofore established principles.

In Woodruff v. Parham (p. 137), Mr. Justice Miller gives an illustration of the injustice which would arise if the constitutional immunity from state taxation as to imports from abroad were to be held to apply to imports from one state to another. It correctly describes the result if the interstate commerce clause were to afford the same immunity:

"The merchant at Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all state, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the state nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens."

This argument is as strong today as when it was written and it would be a source of confusion and injustice if through too broad expressions in a few opinions, a different conclusion from that to which it should carry us, were to obtain.

The decree of the District Court is

Affirmed.

MR. JUSTICE MCREYNOLDS, concurring. * * *

CREW LEVICK CO. v. PENNSYLVANIA.

1917. Supreme Court of the United States. 245 U. S. 292.

Error to the Supreme Court of Pennsylvania.

MR. JUSTICE PITNEY delivered the opinion of the court.

The State of Pennsylvania, by an Act of May 2, 1899, P. L., p. 184, imposes an annual mercantile license tax of three dollars upon each wholesale vender of or dealer in goods, wares, and merchandise, and "one-half mill additional on each dollar of the whole volume, gross, of business transacted annually," and like taxes at another rate upon retail venders, and at still another upon venders at an exchange or board of trade. In the year 1913 plaintiff in error sold and delivered at wholesale, from a warehouse located in that state, merchandise to the value of about $47,000 to purchasers within the state, and merchandise to the value of about $430,000 to customers in foreign countries: the latter sales usually having been negotiated by agents abroad who took orders and transmitted them to plaintiff in error at its office in the state of Pennsylvania, subject to its approval, while in some cases orders were sent direct by the customers in foreign countries to plaintiff in error; and the goods thus ordered, upon the acceptance of the orders, having been shipped direct by plaintiff in error from its warehouse in Pennsylvania to its customers in the foreign countries. Under the Act of 1899 a mercantile license tax was imposed upon plaintiff in error, based upon the amount of its gross annual receipts. Plaintiff in error protested against the assessment of so much of the tax as was based upon the gross receipts from merchandise shipped to foreign countries. The Court of Common Pleas of Philadelphia and, upon appeal, the Supreme Court of the state (256 Pa. St. 508) sustained the tax, overruling the contention that it amounted to a regulation of foreign commerce and also was an impost or duty on exports levied without the consent of Congress, contrary to §§ 8 and 10 of Art. I of the Constitution of the United States. * * *

The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms. And there is no suggestion that the tax is limited to the necessities of inspection, or that the consent of Congress has been given.

We are constrained to hold that the answer must be in the affirmative. No question is made as to the validity of the small fixed tax of $3 imposed upon wholesale venders doing business within the state in both internal and foreign commerce; but the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of it; and, for the same reason, to be in effect an impost or duty upon exports. This view is so clearly supported by numerous previous decisions of this court that it is necessary to do little more than refer to a few of the most pertinent. Case of the State Freight Tax, 15 Wall. 232, 276-277; Robbins v. Shelby County Taxing District, 120 U. S. 489; Fargo v. Michigan, 121 U. S. 230, 244; Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U. S. 326, 336; Leloup v. Port of Mobile, 127 U. S. 640, 648; McCall v. California, 136 U. S. 104, 109; Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217, 227.

Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned.

The principal reliance of the commonwealth is upon Ficklen v. Shelby County Taxing District, 145 U. S. 1. Undoubtedly that case is near the border line; but we think its authority would have to be stretched in order to sustain such a tax as is here in question. Consistently with due regard for the constitutional provisions, we are unable thus to extend it. In that case the complaining parties were established in business within the taxing district as general merchandise brokers, and had taken out general and unrestricted licenses to do business of all kinds, both internal and interstate. As it happened, one of them (Ficklen), during the year in question, did an interstate business exclusively, and the other (Cooper & Co.) did a business nine-tenths of which was interstate. And the court, by Mr. Chief Justice Fuller, said (p. 21): "Where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and nonresident merchants, of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution;" and again (p. 24): "What position they [the plaintiffs in error] would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for nonresident principals, is an entirely different question, which does not arise upon this record." Besides, the tax imposed in the Ficklen Case was not directly upon the business itself or upon the volume thereof, but upon the amount of commissions earned by the brokers, which, although probably corresponding with the volume of the transactions, was not necessarily proportionate thereto. For these and other reasons the case has been deemed exceptional.

In Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 695, the court, again speaking by Mr. Chief Justice Fuller, said: "It is settled that where, by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained."

The tax now under consideration, so far as it is challenged, fully responds to these tests. It bears no semblance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the state, a part of every dollar received in such transactions. That it applies to internal as well as to foreign commerce cannot save it; for, as was said in Case of the State Freight Tax, 15 Wall. 232, 277, "The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state." That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it. * * *

Reversed.[6]

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[6] Philadelphia & Southern Steamship Co. v. Pennsylvania (1887) 122 U. S. 326, 30 L. ed. 1200: A Pennsylvania statute provided: "Every * * * transportation company * * * incorporated by * * * this commonwealth or * * * by any other state, and doing business in this commonwealth * * * shall pay * * * a tax of 8/10 of 1% upon the gross receipts of said company for tolls and transportation, telegraph business or express business." This was held invalid as applied to the gross receipts of a steamship company incorporated by Pennsylvania, all derived from carriage of goods and passengers by sea between different states and to and from foreign countries. For a unanimous court, Bradley, J., said:

"The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different states, and between the states and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this court, it cannot be pretended that the state could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. * * *

"If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning. * * *

"The corporate franchises, the property, the business, the income of corporations created by the state may undoubtedly be taxed by the state; but in imposing such

UNITED STATES GLUE COMPANY v. TOWN OF OAK CREEK.

1918. Supreme Court of the United States. 247 U. S. 321.

[On writ of error to review a decision of the Supreme Court of Wisconsin which had denied recovery by plaintiff, a Wisconsin corporation, of a tax paid under a general income tax law of that state. The statute provided that as to persons and corporations engaged in business the profits should be considered taxable income, and that any person including corporations "engaged in business within and without the state shall, with respect to income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, be taxed only upon that proportion of such income as is derived from business transacted and property located within the state," to be determined as stated in the opinion.]

Mr. Justice Pitney delivered the opinion of the court. * * *

In order to determine what part of the income of a corporation engaged in business within and without the state (other than that derived from rentals, stocks, bonds, securities, etc.) is to be taxed as derived from business transacted and property located within the state, * * * the gross business in dollars of the corporation in the state, added to the value in dollars of its property in the state, is made the numerator of a fraction of which the denominator consists of the total gross business in dollars of the corporation both within and without the state. The resulting fraction is taken by the income tax law as representing the proportion of the income which is deemed to be derived from business transacted and property located within the state. This formula was applied in apportioning plaintiff's net "business income" for the year 1911, and upon the portion thus attributed to the state, plus the income from rentals, stocks, bonds, etc., the tax in question was levied.

Plaintiff was and is a corporation organized under the laws of the State of Wisconsin, having its principal office and place of business in the Town of Oak Creek, where it conducted an extensive manufacturing plant, selling its products throughout the state and in other states and foreign countries. Its net "business income" in the year 1911, exclusive of that derived from rentals, stocks, bonds, etc., and after making the deductions allowed by the act, amounted to about $124,000, derived from the following sources: (a) about $16,000 from goods sold to customers within the state and delivered from its factory; (b) about $65,000 from goods sold to customers outside of the state and delivered from its factory; (c)

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taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce."

A state tax on a transportation company's gross receipts solely from intrastate commerce is valid notwithstanding the company also engaged in interstate commerce. Pacific Express Co. v. Seibert (1892) 142 U. S. 339, 35 L. ed. 1035.

about $31,000 from goods sold to customers outside of the state, the sales having been made and goods shipped from plaintiff's branches in other states, and the goods having been manufactured at plaintiff's factory and shipped before sale to said branches; (d) about $7,000 from goods sold to customers outside of the state, the sales having been made and goods shipped from plaintiff's branches without the state, these goods having been purchased by plaintiff outside of the state and shipped to plaintiff's factory in the state, and thence shipped before sale from the factory to the branches; (e) about $5,000 from goods sold outside of the state, the sales having been made and goods shipped from said branches, and the goods having been purchased by plaintiff outside of the state and shipped from the points of purchase to the branches without coming into the State of Wisconsin.

No contention was made as to the taxability of the income designated in item (a). Plaintiff's contention that items (d) and (e) were not taxable because not derived from property located or business transacted within the state was upheld by the state courts. Thus the controversy is narrowed to the contention, overruled by the supreme court, that items (b) and (c) were not taxable because derived from interstate commerce.

Stated concisely, the question is whether a state, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause of the Constitution of the United States.

It is settled that a state may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule. * * *

The distinction between direct and indirect burdens, with particular reference to a comparison between a tax upon the gross returns of carriers in interstate commerce and a general income tax imposed upon all inhabitants incidentally affecting carriers engaged in such commerce, was the subject of consideration in Philadelphia & Southern S. S. Co. v. Pennsylvania, 122 U. S. 326, 345, where the court, by Mr. Justice Bradley, said: "The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the federal government." Many previous cases were referred to.

The correct line of distinction is so well illustrated in two cases decided at the present term that we hardly need go further. In Crew Levick Co. v. Pennsylvania, 245 U. S. 292, we held that a state tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross transactions in such commerce, was by its necessary effect a tax upon the commerce, and at the same time a duty upon exports, contrary to §§ 8 and 10 of Article I of the Constitution, since it operated to lay a direct burden upon every transaction by withholding for the use of the state a part of every dollar received. On the other hand, in Peck & Co. v. Lowe, 247 U. S. 165, we held that the Income Tax Act of October 3, 1913, c. 16, § 2, 38 Stat. 166, 172, when carried into effect by imposing an assessment upon the entire net income of a corporation, approximately three-fourths of which was derived from the export of goods to foreign countries, did not amount to laying a tax or duty on articles exported within the meaning of Art. 1, § 9, cl. 5 of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden.

The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the federal Constitution because they happen to be engaged in commerce among the states.

And so we hold that the Wisconsin income tax law, as applied to the plaintiff in the case before us, can not be deemed to be so direct a burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the states. It was measured not by the gross receipts, but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, and in the same way that other corporations doing business within the state are taxed upon that proportion of their income derived from business transacted and property located within the state, whatever the nature of their business.

Judgment affirmed.[7]

MR. CHIEF JUSTICE WHITE concurs in the result.

LELOUP V. PORT OF MOBILE (1888) 127 U. S. 640, 32 L. ed. 311, holding invalid as applied to the Western Union Telegraph Company, engaged in sending intrastate and interstate messages, an ordinance of Mobile, Alabama, which levied upon every telegraph company a "license tax" of the specific sum of $225 a year, the court, by Bradley, J., said:

"It is proper to note that the license tax in question is purely a tax on the privilege of doing the business in which the telegraph company was engaged. By the laws of Alabama in force at the time this tax was imposed, the telegraph company was required, in addition, to pay taxes to the state, county, and port of Mobile, on its poles, wires, fixtures, and other property, at the same rate and to the same extent as other corporations and individuals were required to do. Besides the tax on tangible property, they were also required to pay a tax of three-quarters of one per cent. on their gross receipts within the state.

"The question is squarely presented to us, therefore, whether a state, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one state to another and between the United States and foreign countries. * * * Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a state can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business. * * * It is true, the tax is not laid upon individual messages, but it is laid on the occupation, or the business of sending such messages. * * *

"But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the state. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company. * * *

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[7] On state taxation of net income from interstate commerce transactions within the state, see also Shaffer v. Carter (1920) 252 U. S. 37, 64 L. ed. 445; Underwood Typewriter Co. v. Chamberlain (1920) 254 U. S. 113, 65 L. ed. 165.

"No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."[8]

HELSON & RANDOLPH, CO-PARTNERS v. KENTUCKY.

1929. Supreme Court of the United States. 279 U. S. 245.

MR. JUSTICE SUTHERLAND delivered the opinion of the court.

This is an action brought by the Commonwealth of Kentucky against plaintiffs in error to recover an amount levied under § 1, c. 120, Acts 1924, which imposes a tax of three cents per gallon on all gasoline sold within the commonwealth at wholesale. The words "sold 'at wholesale,'" as used in the act, are defined to include "any and all sales made for the purpose of resale or distribution or *for use*," and also to include any person who shall purchase such gasoline without the state "and sell or distribute *or use* the same within the state." The tax was increased from three cents to five cents a gallon by § 1, c. 169, Acts 1926; and part of the amount sued for was computed at the latter rate.

Plaintiffs in error are engaged in operating a ferry boat on the Ohio River between Kentucky and Illinois. They do an exclusively interstate business. They are citizens and residents of Illinois. Their office and place of business and the situs of all their personal property is in that state. The motive power of the boat is created by the use of gasoline, all of which is purchased and delivered to plaintiffs in error in Illinois. It is stipulated that 75% of this gasoline was actually consumed within the limits of Kentucky, but all of it in the making of interstate journeys. The tax, in question, was computed and imposed upon the use of the gasoline thus consumed.

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[8] Gloucester Ferry Co. v. Pennsylvania (1885) 114 U. S. 196, 29 L. ed. 158: An interstate boundary ferry company, a New Jersey corporation, with a ferry franchise granted by New Jersey, had in Pennsylvania no property except a leasehold interest in a wharf at which it landed and took on goods and passengers. Pennsylvania, though permitting ferriage from its shore, had not granted the company any franchise. While admitting that the leasehold interest in the wharf was taxable as property in the state, it was held that Pennsylvania could not treat the company's privilege to do interstate business in the state as a thing of value granted by it and on that account taxable by it.

The trial court rendered judgment for the commonwealth, which was affirmed by the state court of appeals. 225 Ky. 45. The validity of the statute as applied by the state courts was assailed upon the grounds—(1) that it violated the provisions of the state constitution requiring that taxes should be uniform upon all property of the same class, and (2) that it was in contravention of the commerce clause and other provisions of the federal Constitution. The state court of appeals held that the tax was not a property tax, but an excise, and therefore, the uniformity clause of the state constitution was not involved. The claim under the commerce clause of the federal Constitution was denied on the ground that the tax was confined to gasoline used within the limits of the state and the commerce clause was not affected. It is with the latter question only that we are here concerned.

Regulation of interstate and foreign commerce is a matter committed exclusively to the control of Congress, and the rule is settled by innumerable decisions of this court, unnecessary to be cited, that a state law which directly burdens such commerce by taxation or otherwise, constitutes a regulation beyond the power of the state under the Constitution. It is likewise settled that transportation by ferry from one state to another is interstate commerce and immune from the interference of such state legislation. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 217; Mayor of Vidalia v. McNeely, 274 U. S. 676, 680. The power vested in Congress to regulate commerce embraces within its control all the instrumentalities by which that commerce may be carried on. Gloucester Ferry Co. v. Pennsylvania, supra, p. 204. A state cannot "lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on." Leloup v. Port of Mobile, 117 U. S. 640, 648; Lyng v. Michigan, 135 U. S. 161, 166; Ozark Pipe Line v. Monier, 266 U. S. 555, 562. While a state has power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax which is, in effect, a tax for the privilege of transacting such commerce. Adams Express Company v. Ohio, 166 U. S. 185, 218.

The following are a few of the cases illustrating the many applications of these principles.

A state statute imposing a tax upon freight, taken up within the state and carried out of it, or taken up without the state and brought within it, was held, in the Case of the State Freight Tax, 15 Wall. 232, to constitute a regulation of interstate commerce in conflict with the Constitution. The court said (pp. 275-276):

> "Then, why is not a tax upon freight transported from state to state a regulation of interstate transportation, and, therefore, a regulation of commerce among the states? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the state, and in taking them out? The present case is the best possible illustration. The legislature of Pennsylvania has in effect declared that every ton of freight taken up within the state and carried out, or taken up in other states and brought within her limits, shall pay a specified tax. The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the state, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one state to another without being obstructed by the intervention of state lines."

A state or state municipality is without power to impose a tax upon persons for selling or seeking to sell the goods of a nonresident within the state prior to their introduction therein, Stockard v. Morgan, 185 U. S. 27; or for securing or seeking to secure the transportation of freight or passengers in interstate or foreign commerce. McCall v. California, 136 U. S. 104; Texas Transp. Co. v. New Orleans, 264 U. S. 150. Nor can a state impose a tax on alien passengers coming by vessels from foreign countries. People v. Compagnie Gen. Transatlantique, 107 U. S. 59; and see Passenger Cases, 7 How. 283. In Minot v. Philadelphia, W. & B. R. Co., 2 Abb. (N. S.) 323, 343; 17 Fed. Cas. 458, 464, it was held that a state law imposing a tax for the use within the state of locomotives, passenger and freight cars, and for the use of rolling stock generally, was a license fee exacted for the privilege of such use. It appearing that the larger portion of the locomotives, etc., was used for the interstate transportation of persons and property, the court held that the statute constituted a regulation of such commerce. In the course of the opinion, by Mr. Justice Strong, it is said:

> "It is of national importance that in regard to such subjects there should be but one regulating power, for if one state can directly tax persons and property passing through it, or indirectly, *by taxing the use of means of transportation,* every other may; thus commercial intercourse between states remote from each other may be destroyed."

To the same effect is a decision by Mr. Justice Matthews, in respect of a similar state statute imposing a tax for the running or using of sleeping cars within the state in the transportation of interstate passengers. Pullman Southern Car Co. v. Nolan, 22 Fed. 276, 280-281. On error from this court, the decision was affirmed and the tax condemned as one laid on the right of transit between states. Sub nom. Pickard v. Pullman Southern Car Co., 117 U. S. 34, 46. To impose a tax upon the transit of passengers from foreign countries or between states is to regulate commerce and is beyond state power. The doctrine of Crandall v. Nevada, 6 Wall. 35, so far as it is to the contrary, has not been followed. Head Money Cases, 112 U. S. 580, 591-594; Henderson v. Mayor of N. Y., 92 U. S. 259, 270; Pickard v. Pullman Southern Car Co., supra, p. 48. The stamp tax on bills of lading for the transportation of gold and silver from within the state to points outside, which was held invalid (inadvertently on the ground that it was a tax on exports) in Almy v. California, 24 How. 169, was characterized in Woodruff v. Parham, 8 Wall. 123, 138, as "a regulation of commerce, a tax imposed upon the transportation of goods from one state to another, over the high seas, in conflict with that freedom of transit of goods and persons between one state and another, which is within the rule laid down in Crandall v. Nevada, and with[-in] the authority of Congress to regulate commerce among the states."

The statute here assailed clearly comes within the principle of these and numerous other decisions of like character which might be added. The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat, would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax, which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. "All restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the states." Gloucester Ferry Co. v. Pennsylvania, supra, p. 214.

Judgment reversed.

MR. JUSTICE MCREYNOLDS is of opinion that the judgment below should be affirmed.

Concurring opinion of MR. JUSTICE STONE.

In view of earlier decisions of the court, I acquiesce in the result. But I cannot yield assent to the reasoning by which the present forbidden tax on the use of property in interstate commerce is distinguished from a permissible tax on property, measured by its use or use value in interstate commerce. Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 456; Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus, 154 U. S. 439, 445; Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 220; Western Union Tel. Co. v. Missouri, 190 U. S. 412, 422; ch. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18. Nor can I find any practical justification for this distinction or for an interpretation of the commerce clause which would relieve those engaged in interstate commerce from their fair share of the expense of government of the states in which they operate by exempting them from the payment of a tax of general application, which is neither aimed at nor discriminates against interstate commerce. It "affects commerce among the states and impedes the transit of persons and property from one state to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed." Delaware Railroad Tax, 18 Wall. 206, 232.

MR. JUSTICE HOLMES and MR JUSTICE BRANDEIS concur in this opinion.

POSTAL TELEGRAPH CABLE CO. v. ADAMS.

1895. Supreme Court of the United States. 155 U. S. 688.

By the revenue laws of Mississippi certain taxes were levied as privilege taxes on various corporations, such as express companies, telegraph companies, insurance companies, sleeping-car companies, banks of deposit or discount, gas companies, and the like; and on taverns, hotels, restaurants, brokers, auctioneers, peddlers, liquor sellers, dealers in malt liquors, and so on. Code Miss. 1880, c. 10, Sec. 585; Sess. Laws Miss. 1888, act of March 8, c. 3. The tax required to be paid by telegraph companies was $3,000 on each telegraph company operating within the state one thousand miles or more of wire, and on each telegraph company operating less than one thousand miles of wire a tax of one dollar per mile, and the tax thus levied was "in lieu of other state, county, and municipal taxes." During the fiscal years 1890 and 1891 the Postal Telegraph Cable Company, a corporation chartered under the laws of New York, operated within the State of Mississippi 391.28 miles of wire, the telegraph lines, equipment, and property appertaining thereto, owned and operated by the company within the limits of eighteen counties of the state, were during these years worth and valued at the sum of $41,967.54. The tax levied on the company by the law of March 8, 1888, under the name of privilege tax, amounted annually to $391.28, or an aggregate for the two years of $782.56. Under the general revenue laws of the state the ad valorem tax on the property of the company for the two years would have been $1,188.56 for state and county purposes only, not including what might have been assessed and collected by municipalities in the way of ad valorem taxes for municipal purposes. [Upon refusal of the company to pay these taxes for the years 1890 and 1891, Adams, the state revenue agent, brought suit and obtained judgment. This was affirmed by the state Supreme Court and this writ of error taken.]

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment. * * *

Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. Cleveland, Cincinnati, &c. Railway v. Backus, 154 U. S. 439, 445. * * *

In the case at bar the [state] Supreme Court, in its examination of the liability of plaintiff in error for the taxes in question, said:

"It will be thus seen at once that this is a tax imposed upon a telegraph company, in lieu of all others, as a privilege tax, and its amount is graduated according to the amount and value of the property measured by miles. It is to be noticed that it is in lieu of all other taxes, state, county, municipal. The reasonableness of the imposition appears in the record, as shown by the second count of the declaration and its exhibits whereby the appellant seems to be burdened in this way with a tax much less than that which would be produced if its property had been subjected to a single ad valorem tax." This exposition of the statute brings it within the rule where ad valorem taxes are compounded or commuted for a just equivalent, determined by reference to the amount and value of the property. Being thus brought within the rule, the tax becomes substantially a mere tax on property and not one imposed on the privilege of doing interstate business. The substance and not the shadow determines the validity of the exercise of the power.

The act in prescribing the ascertainment of the charge as to telegraph companies operating less than one thousand miles of wire, was directed to reach a reasonable commutation of the amount which the company would be compelled to pay if the taxation were ad valorem. The taxation was neither arbitrary nor discriminating, nor, so far as we are advised, was payment made a condition precedent to doing business, but collection was enforceable by suit and the remedies pertaining thereto, and not otherwise. Code Mississippi, 1880, §§ 585, 587, 588, 589, 594.

We concur with the view of the act thus expressed by the Supreme Court of the state. * * * The tax was graduated according to the amount and value of the property measured by miles, and was in lieu of taxes levied directly on the property. In marking the distinction between the power over commerce and municipal power, literal adherence to particular nomenclature should not be allowed to control construction in arriving at the true intention and effect of state legislation. We are of opinion that it was within the power of the state to levy a charge upon this company in the form of a franchise tax but arrived at with reference to the value of its property within the state and in lieu of all other taxes, and that the exercise of that power by this statute, as expounded by the highest judicial tribunal of the state in the language we have quoted, did not amount to a regulation of interstate commerce or put an unconstitutional restraint thereon.

Judgment affirmed.

Mr. Justice Brewer, with whom concurred Mr. Justice Harlan, dissenting. * * *

ADAMS EXPRESS CO. v. OHIO STATE AUDITOR.

1897. Supreme Court of the United States. 166 U. S. 185.
[Printed ante, p. 1614.]

GALVESTON, HARRISBURG & SAN ANTONIO R. CO. v. TEXAS.

1908. Supreme Court of the United States. 210 U. S. 217.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action against certain railroads to recover taxes and penalties. The Supreme Court of the state held the penalties to be void under the state constitution, but upheld the tax. 97 S. W. Rep. 71. The railroads bring the case here mainly on the ground that the law upon which the action is based is an attempt to regulate commerce among the states.

The act in question is entitled "An Act imposing a tax upon railroad corporations * * * and other persons * * * owning * * * or controlling any line of railroad in this state * * * equal to one per cent. of their gross receipts * * * ."

The lines of the railroads concerned are wholly within the state, but they connect with other lines, and a part, in some instances much the larger part, of their gross receipts is derived from the carriage of passengers and freight coming from, or destined to, points without the state. In view of this portion of their business, the railroads contend that the case is governed by Philadelphia & Southern Mail Steamship Co. v. Pennsylvania, 122 U. S. 326. The counsel for the state rely upon Maine v. Grand Trunk Ry. Co., 142 U. S. 217, and maintain, if necessary, that the later overrules the earlier case.

In Philadelphia & Southern Mail S. S. Co. v. Pennsylvania, supra, it was decided that a tax upon the gross receipts[9] of a steamship corporation of the state, when such receipts were derived from commerce between the states and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law. * * * In Maine v. Grand Trunk Ry. Co. supra, the authority of the Philadelphia Steamship Company Case was accepted without question, and the decision was justified by the majority as not in any way qualifying or impairing it. The validity of the distinction was what divided the court.

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[9] See the language of the statute and portions of the opinion in the cited case in the note to p. 1741, ante.

Where the tax laid on a domestic corporation, conducting a telephone business, giving service both intrastate and interstate, was construed by the court to be "a direct tax on gross receipts," it was held invalid as applied to that part of the receipts that were derived from interstate communication. New Jersey Bell Telephone Co. v. State Board of Taxes (1930) 280 U. S. 338 (construing the tax as not in lieu of any permissible tax).

It being once admitted, as of course it must be, that not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the states both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines. As the property of companies engaged in such commerce may be taxed, Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, and may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged. Adams Express Co. v. Ohio State Auditor, 165 U. S. 194; S. C. 166 U. S. 171; Fargo v. Hart, 193 U. S. 490, 499. So it has been held that a tax on the property and business of a railroad operated within the state might be estimated prima facie by gross income, computed by adding to the income derived from business within the state the proportion of interstate business equal to the proportion between the road over which the business was carried within the state to the total length of the road over which it was carried. Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379.

Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least in the long run, come out of income, obviously taxes called taxes on property, and those called taxes on income or receipts, tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern. In Wisconsin & Michigan Ry. Co. v. Powers, supra, the measure of property by income purported only to be prima facie valid. But the extreme case came earlier. In Maine v. Grand Trunk Ry. Co. supra, "an annual excise tax for the privilege of exercising its franchise" was levied upon everyone operating a railroad in the state, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the state, when the road extended outside. This seems at first sight like a reaction from the Philadelphia & Southern Mail Steamship Company Case. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the state was to reach that value, and not to fasten on the receipts from transportation as such, was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. See Ficklen v. Taxing District of Shelby County, 145 U. S. 1, 23; Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 697; McHenry v. Alford, 168 U. S. 651, 670, 671.

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution." Postal Telegraph Cable Co. v. Adams, supra. See New York, Lake Erie & Western R. R. Co. v. Pennsylvania, 158 U. S. 431, 438, 439. The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt or to effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. Stockard v. Morgan, 185 U. S. 27, 37; Asbell v. Kansas, 209 U. S. 251, 254, 256.

We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states. The distinction between a tax "equal to" one per cent. of gross receipts, and a tax of one per cent. of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that another tax on the property of the railroad is upon a valuation of that property, taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words "equal to."

Of course, it does not matter that the plaintiffs in error are domestic corporations, or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the state.

Judgment reversed.[10]

[Harlan, J., gave a dissenting opinion, in which concurred Fuller, C. J., and White and McKenna, JJ.]

OHIO TAX CASES.

1914. Supreme Court of the United States. 232 U. S. 576.

[In 1911 Ohio enacted a statute levying franchise or privilege taxes upon various public utilities including railroads. It provided for "collection, from each railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on * * * the gross earnings of such company on its intrastate business for the year * * * by taking four per cent. of all such gross earnings." Two Ohio railroad corporations, engaged in both intrastate and interstate transportation in Ohio applied to the United States District Court for a decree restraining the application of this statute to them. Injunctions were refused and this appeal taken.]

Mr. Justice Pitney delivered the opinion of the court. * * *

It is contended that the history of the legislation upon the subject shows that the act of May 31, 1911, was really contrived to impose upon the railroad companies a franchise tax proportionate to their interstate commerce, and that such is its actual as well as intended effect.

It is said that the present act is a re-enactment, without material change so far as present purposes are concerned, of an act of March 10, 1910; that prior to the latter act a law known as the Cole Law was in force, under which each railroad was compelled to pay a tax equal to one per centum of its entire gross earnings, computed by multiplying the average gross earnings per mile over the entire system by the number of miles in Ohio; that this act was obnoxious to the "commerce clause" of the federal Constitution, for the reasons that entered into the decision of this court in Galveston, Harrisburg &c. Ry. Co. v. Texas, 210 U. S. 217; that after the decision of this case in May, 1908, it was anticipated that the Cole Law would probably be held unconstitutional (as it has since been held by an inferior state court in Ohio), and so the legislature contrived the act of March 10, 1910, for the purpose of imposing a tax upon the railroads as heavy as that imposed by the Cole Law, while avoiding the form of that enactment; and that for this reason the act of March 10, 1910, increased the percentages in accordance with which the taxes were to be severally determined as follows: Railroads and pipe line companies from 1 to 4 per cent.; express and telegraph companies from 1 to 2 per cent.; all other utilities from 1 to 1⅕ per cent.; but that instead of taking all the gross earnings, the new percentages were to be applied only to intrastate earnings. It is contended that the increase in the percentages as to railroad and pipe line companies was due to the fact that it was conceived that about three-fourths of their business was interstate, and that therefore a tax of 4% on the intrastate earnings would be about equal to a tax of 1% on the total; in other words, that the tax rate was increased fourfold because such utilities were engaged in interstate commerce.

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[10] A state tax equal to 3% of the gross receipts, declared in the statute to be levied on the "franchise and other property" used in business in the state, was held valid as to a sleeping car company, a foreign corporation, the gross receipts considered being all the fares of intrastate passengers and that proportion of the fare of every interstate passenger, carried into, out of or through the state, that the miles he was carried in the state bore to the total mileage of his trip,—and the statute expressly declared the tax to be in lieu of all other taxes, state, county and municipal upon the property of such companies. Pullman Co. v. Richardson (1923) 261 U. S. 330, 67 L. ed. 682. See also Cudahy Packing Co. v. Minnesota (1918) 246 U. S. 450, 62 L. ed. 827; United States Express Co. v. Minnesota (1912) 223 U. S. 335, 56 L. ed. 459.

The tax is, however, in substance as well as in form, an excise or privilege tax. Its reasonableness, unless some federal right be violated, is within the discretion of the state legislature. We have seen that the classification adopted cannot be deemed illusory; that is, there is no apparent violation of the equality provisions of the state constitution or of the "equal protection" clause of the Fourteenth Amendment, although railroad and pipe line companies are required to pay at the rate of four per cent. of the annual intrastate earnings, while other public service corporations pay a less percentage. It is, of course, entirely settled that a state cannot, consistently with the federal control of interstate commerce, lay such taxes, either upon property rights or upon franchises or privileges, as in effect to burden such commerce. But the line is not always easily drawn, as recent cases sufficiently show. Galveston, Harrisburg &c. Ry. Co. v. Texas, 210 U. S. 217, 225, 229; United States Express Co. v. Minnesota, 223 U. S. 335, 344; Williams v. Talladega, 226 U. S. 404, 416; Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 82.

The present act does not on its face manifest a purpose to interfere with interstate commerce, and we are unable to accept the historical facts alluded to as sufficient evidence of a sinister purpose, such as would justify this court in striking down the law. We could not do this without in effect denouncing the legislature of the state as guilty of a conscious attempt to evade the obligations of the federal Constitution. Assuming the law was changed in 1910 because of a fear that the Cole Law would be held unconstitutional, the mere fact that, while excluding interstate earnings from the multiplicand, the multiplier was increased, is not of itself deemed sufficient evidence of an unlawful effort to burden a privilege that is not a proper subject of state taxation. * * *

Decrees affirmed.

Section 7.—Corporation Franchise and Privilege Taxes.[1]

HORN SILVER MINING CO. v. NEW YORK.

1892. Supreme Court of the United States. 143 U. S. 305.

[The Horn Silver Mining Company was a corporation organized under the laws of the Territory of Utah with a capital stock of $10,000,000 invested in mines and a refinery, in Utah and Illinois. It was engaged exclusively in mining and refining and the financial business incidental thereto. It maintained a head office in New York City where its corporate proceedings and principal financial operations were conducted, and where it received silver bullion from its refinery and sold it to the United States at the federal assay office in New York. By an act of 1881 New York State levied on every corporation, foreign and domestic, with immaterial exceptions, an annual tax "upon its corporate franchise or business" to be computed by taking a specified percentage of its total capital stock. In a suit by New York to recover a tax levied on the mining company it insisted that the statute was invalid as to it because it fixed the amount of tax wholly without regard to the extent of the corporate franchises exercised by it in the state, and without regard to the amount of business done within the state, or the amount of capital employed or the amount of its capital stock held in the state, and the extent of the protection and benefits derived from its laws and agencies, and because it sought to tax property and persons not within the jurisdiction of the state or in any way subject to its authority. It also insisted that the taxation attempted was a regulation of commerce among the several states, and taxing property and business without the jurisdiction of the State of New York. The case was referred to a referee who found that the corporation did business in the state and that the taxes and penalties due amounted to $42,250. The New York Court of Appeals affirmed a judgment therefor, and this writ of error was taken.]

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[1] In this section are collected cases dealing with limitations found both in the Commerce Clause and in the Fourteenth Amendment.

Mr. Justice Field delivered the opinion of the court.

A corporation being the mere creature of the legislature, its rights, privileges, and powers are dependent solely upon the terms of its charter. Its creation (except where the corporation is sole) is the investing of two or more persons with the capacity to act as a single individual, with a common name, and the privilege of succession in its members without dissolution, and with a limited individual liability. The right and privilege, or the franchise, as it may be termed, of being a corporation, is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most states, this franchise, or privilege of being a corporation is deemed personal property, and is subject to separate taxation. The right of the states to thus tax it has been recognized by this court and the state courts in instances without number. It was said in Delaware Railroad Tax, 18 Wall. 206, 231, that "the state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion;" except, we may add, as that discretion is controlled by the organic law of the state. And, as we there said also, it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state. Our only concern is with the validity of the tax. All else lies beyond the domain of our jurisdiction."

The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interests and policy. It may impose as a condition of the grant, as well as also of its continued exercise, the payment of a specific sum to the state each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. There can be therefore no possible objection to the validity of the tax prescribed by the statute of New York, so far as it relates to its own corporations. Nor can there be any greater objection to a similar tax upon a foreign corporation doing business by its permission within the state. As to a foreign corporation,—and all corporations in states other than the state of its creation are deemed to be foreign corporations,—it can claim a right to do business in another state, to any extent, only subject to the conditions imposed by its laws.

As said in Paul v. Virginia, 8 Wall. 168, 181, * * * "Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose." * * *

This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest.

Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than a half century ago in Bank of Augusta v. Earle, 13 Pet. 519. One of these qualifications is that the state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 12. The other limitation on the power of the state is where the corporation is in the employ of the general government. * * *

Having the absolute power of excluding the foreign corporation, the state may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. No individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the state may require for the grant of its privileges. It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation. The counsel for the appellant objects that the statute of New York is to be treated as a tax law, and not as a license to the corporation for permission to do business in the state. Conceding such to be the case, we do not perceive how it in any respect affects the validity of the tax. However it may be regarded, it is the condition upon which a foreign corporation can do business in the state, and in doing such business it puts itself under the law of the state, however that may be characterized.

It is true, the greater part of the business of the company was done out of the state, and the greater part of its capital was also without it, but the statute of New York does not require that the whole business of a foreign corporation shall be done within the state in order to subject it to the taxing power of the state. It makes, in that respect, no difference between home corporations and foreign corporations, as to the franchise or business of the corporation upon which the tax is levied, provided it does business within the state, as such corporation.

There seems to be a hardship in estimating the amount of the tax upon the corporation, for doing business within the state, according to the amount of its business or capital without the state. That is a matter, however, resting entirely in the control of the state, and not a matter of federal law, and with which, of course, this court can in no way interfere. * * *

The extent of the tax is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference with interstate commerce we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation. The products of the mine can be brought into the state, and sold there without taxation, and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company.

Judgment affirmed.

MR. JUSTICE HARLAN dissented.

INTERNATIONAL PAPER COMPANY v. MASSACHUSETTS.

1918. Supreme Court of the United States. 246 U. S. 135.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit by a New York corporation to recover the amount of an excise tax assessed against it in Massachusetts for the year 1915 and paid under protest, the right of recovery being predicated on the asserted invalidity of the tax under the commerce clause of the Constitution and the due process clause of the Fourteenth Amendment. The tax is also assailed on other grounds which will be passed without particular notice. The case is set forth in an agreed statement, in the light of which the state court has sustained the tax. 228 Massachusetts, 101. The Massachusetts statutes under which the tax was imposed are as follows:

St. 1909, c. 490, Part III, § 56. "Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent. of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

St. 1914, c. 724, § 1. "Every foreign corporation subject to the tax imposed by section fifty-six of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one-hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition."

The facts shortly stated are these: The company, as before indicated, is a New York corporation. Its authorized capital stock, on which the tax was computed, is $45,000,000. Its total assets are not less than $39,000,000 or $40,000,000, of which not more than 1¾ per cent. are located or invested in Massachusetts. Its authorized and actual business is manufacturing and selling paper, in which connection it operates 23 paper mills,—1 in Massachusetts and 22 in other states. The output of its mills is sold by it in both interstate and intrastate commerce, principally the former. In Massachusetts it maintains a selling office where two salesmen, with a bookkeeping and clerical force, negotiate sales of a part of the output to consumers in the New England states, subject to the approval of the home office in New York. About 86 per cent. of the sales negotiated through this selling office are in interstate commerce and the remainder are local to Massachusetts. The sales are made largely through long-term contracts with proprietors of newspapers whereby the company engages to supply their needs from its mills and from the output in transit at the time. No stock of goods is kept on hand in Massachusetts from which current sales are made. The executive and financial offices of the company are in New York, and none of its corporate or business activities are carried on in Massachusetts save as is here indicated. It pays local property taxes in Massachusetts on its real and personal property located there. In 1915 the assessed value of such property was $472,000 and the tax paid thereon was $8,118. The tax in question was in addition to the property tax and amounted to $5,500. It was imposed, so the state court holds, as an annual excise for the privilege of doing a local business within the state.

While the legislation under which the tax was assessed and collected was enacted in part in 1909 and in part in 1914, its operation and validity must be determined here by considering it as a whole, for the opinion of the state court not only holds that the "maximum limitation" put on the tax by the part first enacted "is removed" by the other, but treats the two parts as exacting a single tax based on the par value of "the entire authorized capital" and computed as to ten million dollars thereof at the rate of one fiftieth of one per cent. and as to the excess at the rate of one one-hundredth of one per cent.

Cases involving the validity of state legislation of this character often have been before this court. The statutes considered have differed greatly, as have the circumstances in which they were applied, and the questions presented have varied accordingly. In disposing of these questions there has been at times some diversity of opinion among the members of the court and some of the decisions have not been in full accord with others. But the general principles which govern have come to be so well established as no longer to be open to controversy.

The subject was extensively considered in Western Union Telegraph Co. v. Kansas, 216 U. S. 1. A statute of Kansas was there in question. As construed by the state court, it required a foreign corporation doing an interstate and local business in that and other states to pay a license fee or excise of a given per cent. of its authorized capital for the privilege of conducting a local business in that state. After reviewing the earlier decisions this court pronounced the statute invalid as being repugnant to the commerce clause of the Constitution and the due process clause of the Fourteenth Amendment. In that and two other cases (Pullman Company v. Kansas, 216 U. S. 56, and Ludwig v. Western Union Telegraph Co., 216 U. S. 146), which were before the court at the same time, it was held:

1. The power of a state to regulate the transaction of a local business within its borders by a foreign corporation,—meaning a corporation of a sister state,—is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on state action.

2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted.

3. Consistently with the due process clause, a state cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the state.

4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a state in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the state cannot require the corporation as a condition of the right to do a local business therein to submit to a tax on its interstate business or on its property outside the state.

5. A license fee or excise of a given per cent. of the entire authorized capital of a foreign corporation doing both a local and interstate business in several states, although declared by the state imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other

states; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located.

6. When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the state.

True, those were cases where the business, interstate and local, in which the foreign corporation was engaged was that of a common carrier. But the immunity of interstate commerce from state taxation is not confined to what is done by the carriers in such commerce. On the contrary, it is universal and covers every class of interstate commerce, including that conducted by merchants and trading companies. And as respects the power of a state to tax property beyond its jurisdiction belonging to a foreign corporation, it is of no moment whether the corporation be a carrier or a trading company, for a state is wholly without power to impose such a tax. * * *

True, the tax sustained in Baltic Mining Co. v. Massachusetts was imposed under the first of the statutes now in question, the one of 1909; but at that time the statute placed a maximum limit on the amount of the tax which, as shown in that and other cases, was a material factor in the decision.[2] This limitation, as the state court

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[2] A statute of the State of Washington levied on foreign corporations doing business in the state annual "license fees" varying with the amount of a corporation's total authorized capital stock, but in no case to exceed $3,000. The Cudahy Packing Company was a Maine corporation doing business in the State of Washington and throughout the United States. It had an authorized capital stock of $45,000,000, about $30,000,000 of which had been issued. Its gross sales everywhere for the year 1926 were $231,750,000. Of these $1,313,275 were in Washington, about half purely intrastate sales. An annual "license fee" of $580 imposed in accordance with the above statute was held invalid. Cudahy Packing Co. v. Hinckle (1929) 278 U. S. 460, 73 L. ed. 454. The court, by Reynolds, J., said:

"Baltic Mining Co. v. Massachusetts, 231 U. S. 68, upheld a tax based upon authorized capital stock, but limited to $2,000, imposed by Massachusetts upon foreign corporations for the privilege of doing local and domestic business therein. Consideration was given to the fact that the corporate assets were four times the authorized capital and to the limitation. Weighing all the circumstances, the court concluded that no direct substantial burden was imposed upon interstate commerce and that property beyond the state was not taxed.

"In Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 218, we said:

" 'It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause; and the Fourteenth Amendment does not permit taxation of property beyond that state's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved.'

"Baltic Mining Co. v. Massachusetts had sometimes been regarded as lending holds, was "removed" by the statute of 1914, which also made a partial reduction in the tax rate. Since then the tax has been assessed on the par value of "the entire authorized capital" at one fiftieth of one per cent. up to $10,000,000 and at one one hundredth of one per cent. for the excess. Accepting the state court's view of the change wrought by the later statute, it is apparent that since 1914 the Massachusetts law has been in its essential and practical operation like those held invalid in 1910 in Western Union Telegraph Co. v. Kansas; Pullman Co. v. Kansas, and Ludwig v. Western Union Telegraph Co., and like that held invalid at the present term in Looney v. Crane Company, 245 U. S. 178.

What has been said sufficiently shows that the tax in question should have been declared unconstitutional and void as placing a prohibited burden on interstate commerce and laid on property of a foreign corporation located and used beyond the jurisdiction of the state.

Judgment reversed.

ST. LOUIS SOUTHWESTERN R. CO. v. ARKANSAS.

1914. Supreme Court of the United States. 235 U. S. 350.

[Suit by Arkansas to recover from the railway company, a Missouri corporation operating a railroad in Missouri, Arkansas and other states, taxes levied for the year 1911 under two Arkansas statutes enacted that year. Act No. 112 provided for "annual franchise taxes" upon all corporations, and as to any foreign corporation, "for the privilege of exercising its franchise in this state, 1/20 of 1% each year upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in the state." Act No. 251 provided for "the manner of assessing for taxation the property of railroads" and other transportation companies, and declared: "The franchise (other than the right to be a corporation) of all railroads * * * are [sic] declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations" and "the Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible."

Under Act No. 251 the defendant's property in the state was assessed at $11,260,240, and the tax thereon was $239,388.84.

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support to the theory that a tax which really burdens interstate commerce and reaches property beyond the state may be sustained if relatively small. This view did not harmonize with the principles approved by Looney v. Crane Co., and was expressly disapproved by Alpha Portland Cement Co. v. Mass."

The defendant had an authorized capital stock of $55,000,000, of which $36,249,750 was issued and outstanding. In accordance with Act No. 112, the Tax Commission allocated to Arkansas $13,596,520 of the outstanding stock, and took 1/20 of 1 % of it as the amount of the franchise tax, viz., $6,798.26. The defendant objected to paying the latter sum in addition to the property tax levied under Act No. 251. From judgment against it in the state courts this writ of error was taken.]

MR. JUSTICE PITNEY delivered the opinion of the court.

The validity of Act No. 112, and of the tax that, pursuant to its provisions, has been levied against plaintiff in error, is questioned on the ground of repugnancy to the commerce clause of the Constitution of the United States and the "due process" and "equal protection" clauses of the Fourteenth Amendment. * * *

We therefore accept the construction of Act No. 112 that we have quoted from the opinion of the state court, which is, in short, that it imposes an annual franchise tax upon the right to exist as a corporation or to exercise corporate powers within the state, the amount of the tax being fixed solely by reference to the property of the corporation that is within the state and used in business transacted within the state, and excluding any imposition upon or interference with interstate commerce. By this we understand that the franchise of a foreign corporation that is intended to be taxed is that which relates solely to intrastate business; and this exposition of Act No. 112 brings it into harmony with Act No. 87 * * *, which requires foreign corporations to pay initial fees only for the privilege of doing intrastate business; and renders it harmonious, also, with Act No. 251, under which the franchise of corporate existence is excluded from the assessment. * * *

The tax, as will be observed, is not in any wise based upon the receipts of the railroad company from interstate commerce, either taken alone or in connection with the receipts from its intrastate business. Since, therefore, the amount of the imposition is not made to fluctuate with the volume or the value of the business done, we are relieved from those difficulties that arise where state taxes are based upon the earnings of interstate carriers, as in Maine v. Grand Trunk Ry., 142 U. S. 217; Wisconsin & Michigan Ry. v. Powers, 191 U. S. 379; Galveston, Harrisburg & San Antonio Ry. v. Texas, 210 U. S. 217; Oklahoma v. Wells, Fargo & Co., 223 U. S. 298; and U. S. Express Co. v. Minnesota, 223 U. S. 335.

And we have no hesitation in overruling the contention that the tax is repugnant to the "due process" clause on the ground of being in effect based on property located beyond the limits of the state, as in Western Union Tel. Co. v. Kansas, 216 U. S. 1, 30; and in Ludwig v. West. Un. Tel. Co., 216 U. S. 146, 162; for this tax is measured by reference to property situate wholly within the confines of the state.

So far as the commerce clause is concerned, it seems to us that the principles upon whose application the present decision must depend are those set forth in Postal Tel. Cable Co. v. Adams, 155 U. S. 688, 695, where the court, by Mr. Chief Justice Fuller, said: "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes." * * *

Applying these principles, we have no difficulty in sustaining the tax in question as a legitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intrastate business in corporate form, the tax being based upon the amount and value of its property within the state. It is fixed at a definite percentage (1/20 of one per cent.) of "the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this state," and the Act provides machinery for ascertaining the market value of the entire capital stock and striking a proportion between the value of the property owned and used by the corporation in the state and that owned and used by it outside of the state. In its essence the tax is not distinguishable from that which was sustained by this court in Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, and in another case between the same parties, 141 U. S. 40. See also Pittsburgh &c. Ry. v. Backus, 154 U. S. 421, 430, 435; Indianapolis &c. R. R. v. Backus, 154 U. S. 438; Cleveland &c. Ry. v. Backus, 154 U. S. 439, 444, 445; Western Union Telegraph Co. v. Taggart, 163 U. S. 1, 18; Western Union Tel. Co. v. Gottlieb, 190 U. S. 412, 424.

It is insisted that Act No. 112, as construed by the state court, in connection with Act. No. 251, subjects the property of plaintiff in error to double taxation, and that this contravenes the constitutional guaranties respecting due process of law and the equal protection of the laws. No attempt is made to show that the classification of corporations adopted in Act No. 112 is not a reasonable one, or that in any respect corporations of the class to which plaintiff in error belongs are discriminated against in favor of domestic corporations, as was the case in Southern Railway Co. v. Greene, 216 U. S. 400. * * * The gist of the criticism seems to be that the two Acts in question subject the property of plaintiff in error, as well as that of all other corporations that are within the operation of those Acts, to double taxation, and that this is a denial of "equal protection" in favor of other classes of tax-payers. Reference is made to an extract from the opinion in the Adams Case (155 U. S. 696), where the court said: "Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefore, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. Cleveland &c. Ry. v. Backus, 154 U. S. 439, 445. "This, however, does not mean, as is contended, that because of the Fourteenth Amendment a state may not, in addition to the imposition of an ordinary property tax upon an instrumentality of interstate or international commerce, impose a franchise tax ascertained by reference to the property of the corporation within the state, including that employed in interstate commerce. The court was dealing only with the Commerce Clause, and the language quoted means that, by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack; and that it is permissible to value the property at what it is worth in view of its use in interstate commerce, so long as no added burden is imposed as a condition of such use. This is evident from a reading of the context and from the reference made to the opinion in 154 U. S. at p. 445.

Nothing in the Fourteenth Amendment imposes any iron-clad rule upon the states with respect to their internal taxation, or prevents them from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions. * * *

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

OZARK PIPE LINE CORPORATION v. MONIER.

1925. Supreme Court of the United States. 266 U. S. 555.

[A Maryland corporation owned and operated an oil pipe line from a point in Oklahoma across Missouri to a point in Illinois, neither receiving nor delivering oil in Missouri. Its main office was in Missouri, from which it carried on the major part of its business. It had applied for and obtained a license from the State of Missouri to engage "exclusively in the business of transporting crude petroleum by pipe line," and thereby acquired the right of eminent domain from the state. It was subjected to general property taxes upon the Missouri portion of its pipe line and other assets in Missouri. It does not appear whether or not this was assessed in a manner to attribute to it any portion of the intangible value of the line as a going concern. In addition there was levied upon it an annual franchise tax equal to one-tenth of one per cent. of the par value of its capital stock and surplus employed in business in the state. For the purpose of the tax a corporation was deemed to have employed in the state that proportion of its entire capital stock and surplus that its property and assets in the state bore to all its property and assets wherever located. Holding the latter tax invalid:]

Mr. Justice Sutherland delivered the opinion of the court. * * *

The tax is one upon the privilege or right to do business, State ex rel. v. State Tax Commission, 282 Mo. 213, 234, and if appellant is engaged only in interstate commerce it is conceded, as it must be, that the tax, so far as appellant is concerned, constitutionally cannot be imposed. It long has been settled that a state cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on. Leloup v. Port of Mobile, 127 U. S. 640, 648; Kansas City Ry. v. Kansas, 240 U. S. 227, 231, and cases cited. Plainly, the operation of appellant's pipe line is interstate commerce and beyond the power of state taxation. * * * The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of its interstate business, and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected. Heyman v. Hays, 236 U. S. 178, 186. * * *

Some stress is laid upon the fact that the objects and purposes specified in appellant's articles of incorporation are not confined to the transportation of petroleum but include the doing of other business local in character. As to this, it is enough to say that none of these powers were in fact exercised in the state of Missouri; and so far as this case is concerned the power to tax depends upon what was done and not upon what might have been done. Moreover, the license issued by the state authorized appellant to engage "exclusively in the business of transporting crude petroleum by pipe line."

Nor is it material that appellant applied for and received a Missouri license or that it had the power thereunder to exercise the right of eminent domain. These facts could not have the effect of conferring upon the state an authority, denied by the federal Constitution, to regulate interstate commerce. The state has no such power even in the case of domestic corporations. See Philadelphia S. S. Co. v. Pennsylvania, 122 U. S. 326, 342. The statute as applied to appellant is unconstitutional.

Reversed.

[A dissenting opinion of BRANDEIS, J., is omitted.]

ALPHA PORTLAND CEMENT CO. v. MASSACHUSETTS.

1925. Supreme Court of the United States. 268 U. S. 203.

[Error to judgments of the Supreme Judicial Court of Massachusetts which had sustained a tax levied on the New Jersey corporation, plaintiff in error. The Massachusetts tax law provided: "Every foreign corporation shall pay annually, with respect to the carrying on or doing business by it within the Commonwealth, an excise equal to" the sum of (1) ½ of 1% of that proportion of the cash value of the shares of its capital stock as its assets employed in the state bore to its entire assets and (2) 2½% of the net income derived from business done within the state. An elaborate method was prescribed for calculating item (2). The tax imposed on plaintiff for the year 1922 was, item (1), $379.66 + item (2) $187.91 = $567.57. Other facts appear in the opinion.]

Mr. Alexander Lincoln, Assistant Attorney General of Massachusetts * * * for the defendant in error. * * *

If a tax on tangible and intangible assets, including the corporate franchise of a foreign corporation, employed in a state, although employed exclusively in interstate commerce, is valid, an excise tax measured by such property should also be valid. * * * This court has on several occasions held that such a tax is in effect a tax on property and therefore in no respect repugnant to the federal

Constitution. Western Union Tel. Co. v. Massachusetts, 125 U. S. 530.

The tax, so far as measured by net income derived from business within the commonwealth, is valid as to foreign corporations engaged solely in interstate commerce. The income of a nonresident is subject to taxation within the state where it was earned or accrued. Shaffer v. Carter, 252 U. S. 37; Travis v. Yale & Towne Mfg. Co., 252 U. S. 60. Such a tax does not constitute a direct interference with interstate commerce. Peck v. Lowe, 247 U. S. 165, 174, 175; United States Glue Co. v. Oak Creek, 247 U. S. 321, 326-329; Shaffer v. Carter, supra; Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 119, 120. * * *

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Plaintiff in error claims that the commonwealth illegally exacted of it $800.45 as an excise tax for the year 1921, and $567.57 plus $22.97 interest for 1922. The court below upheld the tax and definitely ruled that it was not repugnant to the Fourteenth Amendment or the Commerce Clause of the federal Constitution. 244 Mass. 530; 248 Mass. 156. * * *

We accept the following statements in the opinion below: "The petitioner is a corporation organized under the laws of New Jersey. Its business is the manufacture and sale of cement. Its principal office is at Easton, Pennsylvania. Its mills are located in several other states outside of Massachusetts, from which shipments are made to various parts of the United States and to foreign countries. It maintains an office in Boston in charge of a district sales manager, with a clerk, where its correspondence and other natural business activities in connection with the receipt of orders and shipments of goods for the New England states are conducted. The office is used as headquarters for travelling salesmen, who solicit orders in Massachusetts and the other New England states. Orders so taken are transmitted at the Boston office by mail to the principal office at Easton, Pennsylvania, where exclusively they are passed upon, and if accepted, the goods are shipped and invoices sent directly to the customer. Remittances usually are made to the petitioner at Easton, though in exceptional instances prepayments or collections are made by the salesmen and immediately transmitted to Easton. No samples or other merchandise are kept in this commonwealth. The only property of the petitioner in Massachusetts is its office furniture, valued at $573. It maintains no bank account here, its salaries and office rent being paid from its principal office. Incidental expenses are paid from an account not exceeding $1,000 kept by the district sales manager in his own name. No corporate books, records, or meetings are in Massachusetts. There is no controversy as to the facts, valuations or computation of the tax. The issues between the parties relate solely to the correct interpretation of our corporate tax law as to foreign corporations and to the constitutionality of that law in its application to the petitioner. * * * It is rightly conceded by the Attorney General that the petitioner was engaged in this commonwealth exclusively in interstate commerce." * * *

Counsel for the commonwealth assert: "The present tax law imposes an excise on foreign corporations for the privilege of doing business in Massachusetts under the protection of its laws and with the financial, commercial and other advantages flowing therefrom, measured solely by the property and net income fairly attributable to the business done within the state. Payment of the tax is not made a condition precedent to the doing of business. Collection of the tax is to be made by ordinary methods. There is no discrimination either against foreign corporations or against interstate commerce." "The taxes complained of were excises and not property taxes." "Being excises these taxes are not taxes *on* property or net income, but taxes *measured by* property and net income, used in or derived from business done in Massachusetts." See Judson Freight Forwarding Co. v. Commonwealth, 242 Mass. 47.

This view of the nature of the exaction was adopted by the court below, and we think it is the correct one. The right to lay taxes on tangible property or on income is not involved; and the inquiry comes to this: May a state impose upon a foreign corporation which transacts only interstate business within her borders an excise tax measured by a combination of two factors—the proportion of the total value of capital shares attributed to transactions therein, and the proportion of net income attributed to such transactions?

Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 153, 154, necessitates a negative reply. Under St. 1909, c. 490, Part III, § 56, the state demanded an excise of a foreign corporation which transacted therein only interstate business. The excise was laid upon the corporation and the basis of it the same as in the present cause. This court said: "We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the commerce clause." Here also the excise was demanded on account of interstate business. A new method for measuring the tax had been prescribed, but that cannot save the exaction. Any such excise burdens interstate commerce and is therefore invalid without regard to measure or amount. Looney v. Crane, 245 U. S. 178, 190; International Paper Co. v. Massachusetts, 246 U. S. 135, 142; Heisler v. Thomas Colliery Co., 260 U. S. 245, 259; Texas Transport & Terminal Co. v. New Orleans, 264 U. S. 150.

International Paper Co. v. Massachusetts considered an excise upon a corporation doing both local and interstate business, measured by its capital stock. St. 1909, c. 490; St. 1914, c. 724. Pertinent cases were cited and discussed and the tax declared "unconstitutional and void as placing a prohibited burden on interstate commerce and laid on property of a foreign corporation located and used beyond the jurisdiction of the state." Payment as a condition precedent to the doing of any business was not a controlling circumstance. The opinion recognizes the state's right to demand excises of foreign corporations in respect of intrastate business unless the exaction is really a tax on interstate business or property beyond the state. Under this principle certain of the complaining corporations in Cheney Brothers Co. v. Massachusetts, supra, were properly taxed. Plaintiff in error did no local business, and there was no proper foundation for the excise.

It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation of property beyond the state's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved.

Union Tank Line Co. v. Wright, 249 U. S. 275, 282, et seq., pointed out the limitations which must be observed when property used in interstate commerce is valued for purposes of taxation by a state. We there declined to follow the rule applied in Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 26, and held that determination of real value with fair accuracy is essential. Many methods adapted to that end have been accepted, but this does not tend to support an excise laid upon a foreign corporation on account of interstate transactions.

The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was intended to modify well established principles. It must be read with the essential facts in mind. Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the state. Of course, the opinion does not support the suggestion that the present statute is free from the fatal objections to the former one because payment of the tax is no longer a condition precedent to carrying on any business. It cites approvingly St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 364; and there this court said—[The passage quoted is the first paragraph ante, p. 1767.]

The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in Cheney Brothers Co. v. Massachusetts, and cannot be enforced against a foreign corporation which does nothing but interstate business within the state.

The introduction of an extremely complicated method for calculating the amount of the exaction does not change its nature or mitigate the burden. * * *

Reversed.

Mr. Justice Brandeis dissents.

HUMP HAIRPIN MANUFACTURING CO. v. EMMERSON.

1922. Supreme Court of the United States. 258 U. S. 290.

Mr. Justice Clarke delivered the opinion of the court.

In 1918 the defendant in error, as Secretary of State, assessed a tax of $6,045 upon the plaintiff in error, a corporation organized under the laws of West Virginia, for the privilege of doing business in the State of Illinois. The tax was paid under protest and this suit was instituted to recover the amount of it, based upon the contention that the statute under which it was imposed offends against the federal Constitution for various reasons, the only one argued in this court, however, being that, if given effect, it will constitute a regulation of, and impose a direct burden upon, interstate commerce.

The case was tried on stipulated facts, from which we derive these as essential to a disposition of it.

In 1918 the authorized capital stock of the company was $6,000,000, of which $5,500,000 was reported by the company to the state as paid in and issued. It was a manufacturing corporation, with all of its tangible property in Illinois. Its method of doing business was to send salesmen into Illinois and the various other states to solicit orders, which, however, were not accepted until approved at the Chicago office, after which they were filled from stocks maintained in that city. The company represented the potential value of its patent rights, licenses, trademarks, secret processes and good will as $5,124,126.72, and the total value of its real and personal property as $416,629.07,—making a total in Illinois of $5,540,755.79. It also represented the total sales made by it in 1917, on which year's business the tax was computed, as $263,334.96, and of these $25,814 were made to residents of Illinois.

The statute under which the tax was assessed reads:

"It shall be the duty of the Secretary of State to propound interrogatories from time to time to officers of such foreign corporations [with negligible exceptions] doing business in this state to ascertain the proportion of capital stock actually being represented by property located and business transacted in the State of Illinois, which proportion shall be determined by averaging the percentage of the total business of the corporation transacted in Illinois with the percentage of the total tangible property located in this state." (Hurd's Statutes, 1917, p. 719, § 67 fb.)

In a recent case, American Can Co. v. Emmerson, 288 Ill. 289, the Supreme Court of Illinois held that it has been the policy of that state since 1872 to accord precisely equal treatment to domestic and foreign corporations of like character (Hurd's Statutes, 1917, p. 703, § 26,) and that the fees for transacting business in the state are computed on the amount of the authorized capital stock of domestic corporations and, at the same rate, on the amount of the capital stock of foreign corporations actually "represented by property located and business transacted" in the state, as determined by the Secretary of State under the statute. The basis for the computation was $50 for the first $5,000, and $1 upon each $1,000 over that amount.

Acting under these statutes, the Secretary of State concluded that, under the facts as we have stated them, all of the business of the company was "transacted" in the State of Illinois, and all of the tangible property of the company being in the state, he computed the tax on the entire authorized capital stock. The state Supreme Court sustained the assessment as valid.

The contention of the plaintiff in error in this court is that, notwithstanding the manner in which it was done, the business which the company did with residents of states other than Illinois was interstate business, and that the treating of the amount of it as a part of the business of the company transacted in that state, in determining the percentage of the total business of the corporation transacted therein, renders the act under which the computation was made unconstitutional and void for the reason that the tax assessed is a burden upon interstate commerce.

Plainly this contention cannot be sustained. The statute and the state Supreme Court both show a candid purpose to differentiate state from interstate business and to use only the former in determining the amount of the disputed tax. If the Secretary of State or the court, in computing the tax, erroneously treated as intrastate that which was really interstate business, such error would be reason in a proper case for correcting the computation, but would not justify declaring the act unconstitutional. The facts, that all of the property of the company was located in Illinois, that all of its manufacturing operations were conducted in that state, and that all contracts of sale must be approved at Chicago, where the only business office of the company was maintained, certainly reduce the interstate element in its business to the lowest terms; but, nevertheless, we are constrained to hold that the business done with residents of states other than Illinois is interstate business, and therefore there remains the question whether the use made of the amount of such interstate business, in determining the amount of the tax, renders it invalid.

While a state may not use its taxing power to regulate or burden interstate commerce (United States Express Co. v. Minnesota, 223 U. S. 335; International Paper Co. v. Massachusetts, 246 U. S. 135), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule. Maine v. Grand Trunk Ry. Co., 142 U. S. 217; Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379; Flint v. Stone Tracy Co., 220 U. S. 107; United States Express Co. v. Minnesota, 223 U. S. 335, 343; Baltic Mining Co. v. Massachusetts, 231 U. S. 68; Kansas City, Memphis & Birmingham R. R. Co. v. Stiles, 242 U. S. 111; United States Glue Co. v. Oak Creek, 247 U. S. 321, 326-327. The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it.

No formula has yet been devised by which it can be determined in all cases whether or not such a tax is valid, and, applying the repeated declaration of this court, in the cases cited and in many others, that the question is inherently a practical one, depending for its decision on the special facts of each case, we are clear that the tax here involved falls within the excepted class described, even though the business done with residents of states other than Illinois be regarded as interstate.

Clearly the statute is not a disguised attempt to tax interstate commerce. On the contrary, its purpose plainly is to differentiate state from interstate business and to impose the tax only on the former. Construed with other statutes the act accords equal treatment to domestic and foreign corporations, and clearly in this case property of the company beyond the jurisdiction of the state is not taxed—all of its property is in Illinois. To require foreign corporations to pay for the privilege of doing business in a state is, of course, a familiar and often approved form of taxation, and in this case the fee imposed is reasonable in amount.

The tax is not imposed directly upon the proceeds of interstate commerce and is not computed upon it. The $235,000 of interstate business of the company is only one of three factors used in estimating or measuring "the amount of the capital stock represented by property and business transacted in Illinois," upon which the privilege tax in dispute was computed. The other two factors were $5,540,000 of property in Illinois and $25,000 of business stipulated as done with residents of that state. If the fee or privilege tax were computed at the statutory rate on the whole of the interstate business, it would be trifling in amount, but if computed on the property admitted to have been in use in the state it would be but slightly less than the tax collected.

If this same amount of tax had been imposed upon such manufacturing corporation as we have here without reference being made to the basis of its computation, very certainly no objection to its validity would have been thought of (142 U. S. supra, p. 229). Or if the state had imposed an income tax, a part of which would have been derived from the net profits on this same interstate business, no valid objection could have been made to it. (United States Glue Co. v. Oak Creek, supra.) At most the assessment, so far as interstate commerce is concerned, is incidental, remote and unimportant and it is therefore constitutional. The judgment of the Supreme Court of Illinois must be

Affirmed.

Mr. Justice Van Devanter dissents.
Mr. Justice McReynolds concurs in the result.

NATIONAL LEATHER COMPANY v. MASSACHUSETTS.

1928. Supreme Court of the United States. 277 U. S. 413.

Mr. Justice Sanford delivered the opinion of the court.

The National Leather Co., a Maine corporation, applied by two petitions to the Supreme Judicial Court of Massachusetts for Suffolk County, for the abatement of portions of the taxes that had been exacted of it by the commissioner of corporations and taxation, under Chapter 63 of the General Laws, for the privilege of carrying on business in Massachusetts in the years 1922 and 1923. The petitions alleged that the statute as applied was an attempt to tax property not within the jurisdiction of Massachusetts and repugnant to the Fourteenth Amendment. The cases were consolidated, and at the hearing, by order of the presiding justice, were reserved for determination by the full court upon the pleadings and an agreed statement of facts. The court in banc sustained the excise, 256 Mass. 419; and in accordance with its rescript the court for Suffolk County dismissed the petitions. The writ of error was properly directed to the latter court. See Davis v. Cohen Co., 268 U. S. 638, 639.

The statute provides that every foreign corporation shall pay annually "with respect to the carrying on or doing of business by it within the commonwealth," an excise consisting in part of an amount "equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth," which is defined as "such proportion of the fair cash value of all the shares constituting the capital stock * * * as the value of the assets, both real and personal, employed in any business within the commonwealth * * * bears to the value of the total assets of the corporation," with certain exceptions not here material. § 30, cl. 4; § 39(1).

The business of the National Leather Co.—hereinafter called the petitioner—was the purchasing of hides and skins, having them tanned by other companies, and selling the leather through the tanners. It operated no tanneries itself. Its business was conducted wholly in Massachusetts; its business offices were located there; and it carried on no active business outside the state. Among other properties it owned the entire capital stock, except a few qualifying shares, of the A. C. Lawrence Leather Co. and the National Calfskin Co., two other Maine corporations. Its upper leather was tanned chiefly by these two subsidiary corporations; and its sole leather by other corporations in which it had no interest.

The business of the Lawrence Company was the tanning of hides, principally for upper leather, which it sold on a commission basis. Most of its tanning was done for the petitioner. Its tanneries were in Massachusetts, where it was engaged in business, but it was qualified to do business and had selling branches in four or five other states. The business of the Calfskin Company was tanning hides of the petitioner. Its tannery was in Massachusetts, where it was engaged in business. It had no property or selling branches outside Massachusetts, and was not qualified to do business in any other state except Maine.

In determining the portions of the excises based upon "corporate excess" the commissioner included all the capital stock of the Lawrence Company and the Calfskin Company owned by the petitioner, as part of the assets employed by it in business within Massachusetts; but did not include any stocks owned by it in other corporations which were not engaged in business within Massachusetts.

The petitions for abatement were directed solely to the portions of the excises assessed by reason of this inclusion of the capital stocks of the Lawrence and Calfskin Companies.

The petitioner contends that the inclusion of these stocks as part of the assets employed by it in business in Massachusetts for the purpose of measuring its taxable corporate excess is in effect the imposition of a tax upon the stocks themselves; that these stocks, as distinguished from the assets of the subsidiary corporations, had no situs in Massachusetts and were not within its jurisdiction; and that the statute, so applied, is therefore beyond the power of the state and violates the due process clause of the Fourteenth Amendment.

The Massachusetts court, in holding that the statute had been properly construed and applied by the commissioner and in sustaining the validity of the taxes, said: "The commissioner * * * in determining under G. L., c. 63, § 44, the 'corporate excess employed within the Commonwealth, by every foreign corporation' doing domestic business here is required to give those words the definition and to follow the legislative mandate in G. L., c. 63, § 30, cl. 4. * * * The petitioner held the stock in its two subsidiary corporations for the lawful prosecution of its business. All the facts recited lead to the conclusion that there was no error of law in including the shares of stock for computation of the excise of the petitioner. The entire business of the petitioner was conducted in this commonwealth, the certificates of stock of the subsidiary corporations actually were kept here, all the business of one and a large part of the business of the other was carried on here, and the petitioner made use of the activities of these subsidiary corporations as essential parts of its business. Without discussing whether any one or more of these factors standing alone would justify the method employed in ascertaining the excise, their collective force is sufficient to that end. The interpretation of the words of the statute requires this result. * * * The language of the statute * * * is explicit and its meaning is not clouded or obscure. It cannot render subject to direct taxation property not within the jurisdiction; but where other essential elements are present the excise is justified. * * * Apart from the domicil of the several corporations and looking for the moment only at tangible property and its physical location, there is jurisdiction to sustain taxation in this commonwealth. All the business of the petitioner and of one of its subsidiaries and a principal part of the business of the other subsidiary is conducted in Massachusetts. * * * [There] is no direct tax on property, but an excise on a foreign corporation, levied solely on the privilege of doing domestic business within this commonwealth, measured in part on the value of stock employed in business in this commonwealth. * * * The question, whether the value of the stock of the Lawrence Company attributable to that part of its business and property in other states ought to have been deducted is not presented on this record. That relates to overvaluation, as to which a different remedy is provided * * * G. L., c. 63, § 71."

For present purposes it may be assumed that the capital stocks of the two subsidiary companies had no situs in Massachusetts which brought them within the jurisdiction of that state for the purpose of imposing a direct property tax. See Rhode Island Trust Co. v. Doughton, 270 U. S. 69, 80. But here the statute does not impose any direct tax upon these stocks and, as construed by the

Massachusetts court, merely treats them as assets employed by the petitioner in its business within the state, and therefore requires that they be included when the total assets so employed by it are computed for the purpose of arriving at the proportionate part of the value of its own capital shares—determined by comparing the assets employed in business within the state with the total assets wheresoever employed or located—on which the excise for the privilege of carrying on its business within the state is imposed.

It is settled law that a state may lawfully impose upon a foreign corporation a tax for the privilege of doing business within its borders which is measured by the proportionate part of its total gross receipts that are received within the state, Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 228; or by the proportionate part of its total capital stock which is represented by the property located and business transacted within the state, Hump Hairpin Co. v. Emmerson, 258 U. S. 290, 293, American Mfg. Co. v. St. Louis (C. C. A.), 8 F. (2d) 447, 450; or by the proportionate part of its total net income which is attributable to the business carried on within the state, Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 120, Bass, etc. Ltd. v. Tax Comm., 266 U. S. 271, 282.

Here both the commissioner, the administrative officer charged with the enforcement of the statute, and the Massachusetts court, have found that the capital stocks of the two subsidiary companies were employed by the petitioner in carrying on its business within Massachusetts. We find no adequate reason for disturbing this conclusion. On the contrary, looking to the substance of the transactions and not merely to form, we think that the petitioner, through its ownership of the capital stock of the two subsidiary corporations and the control which it thereby exercised over them, did, in a very real and practical sense, employ these stocks as an instrumentality in carrying on its business within Massachusetts—to the extent, at least, that the controlled activities and property of the subsidiary corporations were within the state. Cf. Edwards v. Chile Copper Co., 270 U. S. 452, 456. And since the Massachusetts court did not determine whether the value of the stock in the Lawrence Company attributable to that part of its business and property in other states should have been deducted, for the reason that, as to such overvaluation, if any, a different statutory remedy was provided, we have no occasion to consider that question.

It is said that under the Massachusetts statute the subsidiary corporations were subject to similar excises on their own account, and therefore there will be what is akin to double taxation. But we are not here concerned with an excise tax on the subsidiary corporations and need not consider its constitutional propriety either independently or in connection with the excise against the petitioner.

Judgment affirmed.

Mr. Justice McReynolds is of opinion that the effect of the challenged judgment is to tax property beyond the jurisdiction of Massachusetts, and that therefore it should be reversed.

SCHWAB v. RICHARDSON.

1923. Supreme Court of the United States. 263 U. S. 88.

Error to the Supreme Court of California.

Mr. Justice McKenna delivered the opinion of the court.

The case presents the validity of state taxation on the franchise of the Oceanic Steamship Company, a corporation of the State of California.

There is no dispute of facts. The case turns entirely upon the law applicable to them. The company was organized to engage under California laws in the transportation of freight and passengers between San Francisco and the Hawaiian Islands and certain foreign countries, and did no intrastate business except the purchase of its fuel and supplies used in its transportation business.

The company made a written report to the State Board of Equalization as required by the law of the state. The report contained a concise statement and description of every franchise enjoyed by the company, and other matters required of the company by the law.

The Board, in pursuance of the law and the constitution of the state, determined the value of the franchise granted by the state to be $120,000 and assessed and levied a tax thereon of one per cent. which amounted to the sum of $1,200. It is contended that the assessment and levy were and are void under § 1 of Amendment XIV of the Constitution of the United States, because thereby the Board assessed and taxed the company on property the situs of which was, for more than a year prior to the assessment, and is, without the State of California and beyond the jurisdiction of the state for the purpose of taxation, and attempts to regulate and burden interstate and foreign commerce.

The specification of the means is expressed in the complaint, in addition to the situation of the company's property, as follows: The company engaged in business outside of the state. In assessing the franchise of the company the Board of Equalization did so in pursuance of a fixed rule and general system which necessarily was discriminatory and inequitable. The Board ascertained the actual or market value of the capital stock of the company, which was constituted of all the value of its property outside of the state, and from such sum deducted the value of the tangible property of the company in and out of California, and the sum thus ascertained was held by the Board to be the value of the franchise of the company. The Board then ascertained the percentage and proportion of the total business of the company transacted in California during the year 1913, and determined the same percentage and proportion of the total franchise value to be the value of the franchise assessable and taxable in California, and the Board thereupon took 15% of that sum, which amounted to $120,000, and on that sum levied a tax at the rate of 1%, amounting to $1,200. And it is alleged that the market value of the shares of capital stock of the company was at all times materially increased by reason of, and in a great part due to, the ownership and use by the company of the property outside of the state.

The company paid the tax under protest. It subsequently assigned its claim to Edwin Schwab, plaintiff in error, who brought this action in the Superior Court of San Francisco against the state, basing the ground of action upon the illegality of the tax.

The answer of the Treasurer to the complaint admitted the assessment of the franchise but denied that the method pursued by the Board of Equalization in the assessment produced a result which was unnecessarily or at all discriminatory, or necessarily or at all inequitable.

Denied that the assessment was or is void under any law or for any reason whatsoever, or that the Board assessed or taxed the company on any property the situs of which was or is without the state or beyond the jurisdiction of the state for the purpose of assessment.

Alleged that the value of the franchise was the sum fixed by the Board.

Judgment was moved on the pleadings, and plaintiff in error elected to stand on the motion without introducing evidence. The motion was denied and judgment rendered against him. It was affirmed by the Supreme Court. 188 Cal. 27.

Three contentions are made against the assessment and levy. (1) They deprive the company of its property without due process of law. (2) They are an attempt to regulate interstate and foreign commerce. (3) They are burdens upon interstate commerce.

The argument is that they have such effect because they are "based on the value of property outside of California and on interstate and foreign commerce engaged in, so that the amount of" them "grows in proportion to the growth of such property and commerce."

The basis of the contention is not a new one in this court. It is not always easy to answer and has involved difference of opinion. Any property of a corporation engaged in interstate commerce may be said to take on value from such commerce and a tax on the property be increased as the commerce increases. The cases, however, have been careful to distinguish when such effect produces illegality and when it does not.

They have been careful to declare the immunity of interstate commerce from state taxation, but as careful to declare the power of a state to tax values within its borders though they may get enhancement from the exercise of rights outside of those borders. How intimate and direct such rights must be, cannot be pronounced in formula. A state may not burden or interfere with interstate commerce or tax property outside of its borders, yet, on the other hand, it has a definite sphere of government which must not be curtailed. Certainly it is not restricted to property taxation, nor to any particular form of excises.

The exertion of the power of a state in taxation has been considered in many cases. A review of them we do not think is necessary. Their pertinence and value are not insistent. The present case is more single. Its instance—the taxation exercised—is upon intangible property. The power of a state over that has been declared many times and has many illustrations. The case is, therefore, free from the perplexity of a consideration of situs which may beset tangible property. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194. It is strictly a franchise tax laid on the company because it derives its existence—its right to be—from the state.

This is the field within which this case lies and we are not concerned with those which reach beyond that field. To this we confine ourselves. The state has taxed the right which it granted, and which it was competent to tax. Horn Silver Mining Co. v. New York, 143 U. S. 305. Postal Telegraph Cable Co. v. Adams, 155 U. S. 688; Kansas City, etc., Ry. Co. v. Botkin, 240 U. S. 227; Cream of Wheat Co. v. Grand Forks, 253 U. S. 325. And it has been recognized that its—the franchise's—value may be constituted of its employment in interstate commerce, and have measurement in the property which is its instrumentality. Kansas City, etc. Ry. Co. v. Botkin, supra; St. Louis-San Francisco Ry. Co. v. Middlekamp, 256 U. S. 226.

Plaintiff in error resists these cases, yet concedes the power of the state to tax the franchise—a "right of its own creation," and concedes that neither the constitutional provisions nor the statute under which the tax was levied "are on their face obnoxious to the commerce or due process clause of the federal Constitution." That effect is worked, it is the contention, emphasized by repetition, because the tax is based in whole or in substantial part on the value of the property outside of California, or on interstate or foreign commerce engaged in, so that the amount of it grows in proportion to the growth of such property or commerce.

The contention and its basis are in antagonism to the cases cited and their authority. A repetition of their reasoning is unnecessary.

They establish that the method pursued by the Board was not illegally oppressive to interstate commerce or beyond the jurisdictional power of the state. We agree with the Supreme Court that it was admitted by the motion for judgment on the pleadings, without introducing evidence, that the tax was not excessive and that if the state had jurisdiction the imposition of the tax was a proper exercise of it.

Judgment affirmed.

KANSAS CITY, MEMPHIS & BIRMINGHAM R. CO. v. STILES.

1916. Supreme Court of the United States. 242 U. S. 111.

Mr. Justice Day delivered the opinion of the court.

The Kansas City, Memphis & Birmingham Railroad Company, plaintiff in error herein (hereinafter called the Railroad Company), filed its complaint in the City Court of Birmingham, Alabama, against James P. Stiles, Probate Judge of Jefferson County, Alabama, whereby it sought to recover sundry sums of money, aggregating $2,434.40, paid to Stiles by virtue of the provisions of § 12 of an act of the Alabama Legislature, entitled "An Act to further provide for the revenues of the State of Alabama." By this act it is provided that corporations organized under the laws of Alabama shall pay an annual franchise tax as follows: where the paid-up capital stock does not exceed $50,000, one dollar per thousand of such paid-up capital stock; where paid-up capital stock is more than $50,000 and up to $1,000,000, one dollar per thousand on the first $50,000, and fifty cents for each thousand of the remainder; where paid-up capital stock is more than $1,000,000 and up to $5,000,000, one dollar per thousand on the first $50,000, and fifty cents per thousand for the next $950,000, and twenty-five cents per thousand for the remainder; where the paid-up capital stock exceeds $5,000,000, one dollar per thousand on the first $50,000, fifty cents per thousand on the next $950,000 twenty-five cents per thousand on the next $4,000,000, and ten cents per thousand on the remainder; and that corporations organized under the laws of any other state and doing business within the State of Alabama shall pay annually franchise tax as above, based, however, on the actual amount of capital employed in the State of Alabama. The act also contains provisions not relevant to this action and not necessary to be set forth here.

The Railroad Company is a consolidated corporation, existing by virtue of the consolidation, under concurrent acts of the States of Tennessee, Mississippi, and Alabama, of three independent and distinct railroad corporations created by and formerly operating solely within the respective states named. As regards this consolidation, plaintiff avers—"that it is a consolidated corporation, made up and consisting of the consolidation of three distinct and separate corporations, under the following circumstances: A railroad corporation organized and existing solely under the laws of the State of Tennessee, acquired, constructed, owned and operated all of that part of plaintiff's line and railway situated within the State of Tennessee; a separate and distinct railroad corporation, organized and existing solely under the laws of the State of Mississippi, acquired, constructed, owned and operated all that part of plaintiff's line and railway situated within the State of Mississippi; and a separate and distinct railroad corporation, organized and existing solely under the laws of the State of Alabama, acquired, constructed, owned and operated all that part of plaintiff's line and railway situated within the State of Alabama. Plaintiff avers that said separate railroad corporations, being desirous of operating said distinct and separately owned properties as a single system, for the conduct of the business of a common carrier in interstate commerce, as well as the continuation of intrastate commerce within said several states, before the period mentioned or involved herein, and by virtue of concurrent or contemporaneous laws or special acts of said several states, including the States of Tennessee and Mississippi, as well as the State of Alabama, consolidated themselves into a corporation known as Kansas City, Memphis & Birmingham Railroad Company, the plaintiff herein, and, in pursuance of the laws of each of said states, duly filed therein agreements and instruments consolidating said companies, and complying with the laws of each of said states authorizing the same. And plaintiff avers that by said consolidation the shares of stock of said several companies were surrendered by the holders hereof and in lieu thereof there were issued the shares of stock of said consolidated company, the plaintiff herein—being the capital stock of plaintiff issued and outstanding as aforesaid. Plaintiff further avers that the capital stock on which said franchise tax was estimated and exacted as aforesaid was and is the capital stock issued and outstanding under the circumstances aforesaid, although less than one-half thereof was issued in lieu of the stock of or represents the property or assets or business of the Alabama corporation which became a constituent of the plaintiff by consolidation as aforesaid."

The entire capital stock of the consolidated Railroad Company amounted to $5,976,000.00, and it was upon this entire amount that the Company was assessed. By this action the Railroad Company seeks to recover the full amount of the franchise tax exacted upon that basis, and contends that in any event it should have been assessed only upon that part of the capital employed by it in the State of Alabama.

The Railroad Company averred, if it was required to pay the franchise tax in question upon its entire capital, that it would be paying another and different rate of taxation, or another and different amount of franchise tax, from that which is required of like corporations doing business in Alabama, contrary to the provision of the Fourteenth Amendment to the federal Constitution that no state shall deny to any person within its jurisdiction the equal protection of its laws; that the enforcement of the act by subjecting to its operation the Railroad Company's property in other states constituted a taking of its property without due process of law; and that said act imposed a direct burden upon interstate commerce in requiring it to pay, in addition to all other fees and taxes provided by law, a tax upon its capital stock for the right and privilege of transacting and carrying on its interstate business as a common carrier, in violation of clause three of § 8, Article I of the federal Constitution.

A demurrer was filed to this complaint, which demurrer was sustained. Upon appeal to the Supreme Court of Alabama, this judgment was affirmed, 182 Alabama, 138, and a writ of error brings the action to this court.

The consolidated Company was formed, so far as the State of Alabama is concerned, under § 1583 of the Alabama Code of 1887, which provides in substance, as follows: That whenever the lines of any two or more railroads, chartered under the laws of that or any other state, which, when completed, may admit the passage of burden or passenger cars over any two or more of such roads continuously without break or interruption, such companies are authorized before or after completion to consolidate themselves into a single corporation, in the manner following: The directors of such corporations may enter into an agreement, prescribing the terms and conditions thereof, mode of carrying into effect, name, number of directors, etc., and such new corporation shall possess all the powers, rights, and franchises conferred upon the two or more corporations, and shall be subject to all the restrictions, and perform all the duties imposed by such statute. Provision is also made for ratification of such consolidation by the stockholders, after which ratification the agreement is deemed completed, as to each corporation. It is also provided that "every such new corporation so formed shall keep an office in the State of Alabama, and be in all respects subject to the laws of the State of Alabama as a domestic corporation." The corporation is to be deemed consolidated when a copy of the agreement is filed with the Secretary of State, and after the election of the first board of directors the property and franchises of each corporation shall be vested in the new corporation, and it shall be subject to the liabilities of its integral parts, as if such debts had been incurred by it.

It will be noted that this statute, which is a grant of corporate rights from the State of Alabama to the consolidated company, contains the express provision that such company shall in all respects be subject to the laws of the State of Alabama as a domestic corporation. Applying § 12 of the statute, the Alabama Supreme Court has held that the Railroad Company is a corporation organized under the laws of that state, and as such subject to the franchise tax imposed by that section of the statute.

The federal questions (which are alone within the jurisdiction of this court) are to be determined upon this construction of the state statute by its highest court.

When the companies comprised in this consolidation sought to avail themselves of the laws of Alabama, they were asking a privilege and right which, subject to the limitations of the federal Constitution, was within the authority of the state. This principle was succinctly stated in Ashley v. Ryan, 153 U. S. 436, 442:

"Nor is the question at issue affected by the fact that some of the constituent elements which entered into the consolidated company were corporations owning and operating property in another state. The power of corporations of other states to become corporations, or to constitute themselves a consolidated corporation under the Ohio statutes, and thus avail of the rights given thereby, is as completely dependent on the will of that state as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws. Bank of Augusta v. Earle, 13 Pet. 519; Lafayette Insurance Co. v. French, 18 How. 404; Paul v. Virginia, 8 Wall. 168, 181."

This doctrine has been affirmed since. Louisville & Nashville Railroad Co. v. Kentucky, 161 U. S. 677, 703, and previous cases in this court therein cited; Interstate Railway Co. v. Massachusetts, 207 U. S. 79, 84.

The railroads comprising this consolidation entered upon it with the Alabama statute before them and under its conditions, and, subject to constitutional objections as to its enforcement, they cannot be heard to complain of the terms under which they voluntarily invoked and received the grant of corporate existence from the State of Alabama.

The specific objections based upon the federal Constitution remain to be noticed. It is said that the Company is deprived of the equal protection of the laws, this contention being based upon the fact that domestic corporations, operating only within the state, are required to pay the tax upon property within the state, and foreign corporations are taxed only upon the basis of property within the state. To support this contention as to denial of equal protection of the laws, the Company relies principally upon the decision of this court in Southern Railway Company v. Greene, 216 U. S. 400. In that case, a foreign corporation, complying with the laws of Alabama, entered upon business within the state, paid both license and property taxes imposed by the laws of the state, and when it was attempted to impose upon it another tax for the privilege of doing business in the state, a business in all respects like that done by domestic corporations of a similar character who were not subjected to the additional tax complained of, it contended that it was denied equal protection of the law, and this court so held.

That case is readily distinguishable from the one now under consideration. Here the state imposes the franchise tax equally upon all of its corporations, consolidated and otherwise. The fact that a wholly intrastate corporation may own no property outside of the state while the consolidated Company does presents no case of arbitrary classification. In both cases, the franchise tax is based upon a percentage of the capital stock. There is no denial of equal protection of the laws because a state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchise which the state grants in creating them.

It is urged that this tax is void because it undertakes to tax property beyond the jurisdiction of the state, and imposes a direct burden upon interstate commerce. Objections of this character were so recently discussed, and the previous cases in this court considered, in Kansas City &c. Railway Co. v. Kansas, 240 U. S. 227, that it would be superfluous to undertake extended discussion of the subject now. In that case, after a full review of the previous decisions in this court, it was held that each case must depend upon its own circumstances, and that while the state could not tax property beyond its borders, it might measure a tax within its authority by capital stock which in part represented property without the taxing power of the state. As to the objection based upon the due process clause of the Constitution, we think that principle controlling here. There is no attempt in this case to levy a property tax; a franchise tax within the authority of the state is in part measured by the capital stock representing property owned in other states.

The tax is not of the character condemned in Western Union Telegraph Co. v. Kansas, 216 U. S. 1, and kindred cases. In the latter case, a tax of large amount was imposed upon a foreign corporation engaged in interstate commerce for the privilege of doing local business within the state. Under the circumstances therein disclosed and the character of the business involved, this court held that the statute was in substance an attempt to tax the right to do interstate business, and to tax property beyond the confines of the state, and was therefore void. Here, a franchise tax is levied upon a corporation consolidated under the laws of the state by its own acceptance of that law in incorporating under it.

So of the objection that the tax imposes a burden upon interstate commerce, the test of validity recognized in previous cases and repeated in Kansas City &c. Railway Co. v. Kansas, supra, is the nature and character of the tax imposed. The state may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. In the present case, the franchise tax is imposed upon the capital stock of a corporation consolidated under the state law, and engaged in both interstate and intrastate commerce.

We find nothing in the amount or character of the tax which makes it a burden upon interstate commerce, and so beyond the authority of the state to impose. It results that the judgment of the Supreme Court of Alabama must be affirmed.

MAINE v. GRAND TRUNK RAILWAY CO.

1891. Supreme Court of the United States. 142 U. S. 217.

The court stated the case as follows: The defendant is a corporation created under the laws of Canada, and has its principal place of business at Montreal, in that Province. Its railroad in Maine was constructed by the Atlantic and St. Lawrence Railroad Company, under a charter from that state, which authorized it to construct and operate a railroad from the city of Portland to the boundary line of the state; and, with the permission of New Hampshire and Vermont, it constructed a railroad from that city to Island Pond in Vermont, a distance of 149½ miles, of which 82½ miles are within the State of Maine. In March 1853, that company leased its rights and privileges to the defendant, The Grand Trunk Railway Company, which had obtained legislative permission to take the same; and since then it has operated that road and used its franchises.

A statute of Maine,[3] passed in 1881, enacted that every corporation, person or association, operating a railroad in the state, should pay to the state treasurer, for the use of the state, "an annual excise tax for the privilege of exercising its franchises" in the state, and it provided that the amount of such tax should be ascertained as follows: [The average gross receipts per mile of the whole line were to be multiplied by the number of miles of line in the state, and the tax on gross receipts thus allocated to the state was to be "equal to ½ of 1%" of such receipts if the average receipts per mile did not exceed $3,000, with higher rates for greater average receipts,—in no case exceeding 3¼%.]

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[3] Sect. 1. The buildings of every railroad corporation or association whether within or without the located right of way, and its lands and fixtures outside of its located right of way, shall be subject to taxation by the several cities and towns in which such buildings, land and fixtures may be situated, as other property is taxed therein.

Sect. 2. Every corporation, person or association, operating any railroad in this state, shall pay to the state treasurer, for the use of this state, an annual excise tax, for the privilege of exercising its franchises in this state, which, with the tax provided for in section one, shall be in lieu of all taxes upon such railroad, its property and stock.

The defendant, The Grand Trunk Railway Company, made no returns as a corporation, but it furnished the data and caused the Atlantic and St. Lawrence Railroad Company to make a return of the gross transportation receipts over its road, 149½ miles in length, including the 82½ miles in Maine, for the years 1881 and 1882, and upon this return the governor and council, pursuant to the statute, ascertained the proportion of the gross receipts in the state, and assessed the tax in controversy accordingly. The tax thus assessed for 1881 was $9,569.66, and for 1882, $12,095.56, and to recover these amounts as debts to the state, the present action was brought in the Supreme Judicial Court of the State of Maine, and, on application of the defendant, it was transferred to the Circuit Court of the United States. [From a judgment for the defendant this writ of error was taken.]

MR. JUSTICE FIELD delivered the opinion of the court.

The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the state of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of the state to levy, there can be no question. The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises. It is used more frequently, in this country, in the latter sense than in any other. The privilege of exercising the franchises of a corporation within a state is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the state, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the state, in its judgment, may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period, or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the state in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the state and the corporation taxed.

The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and therefore in conflict with the exclusive power of Congress in that respect; and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts, and to a certain percentage of the same, in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the state as to the value of the privilege were limited to receipts of certain past years, instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and if not, we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred. This conclusion is sustained by the decision in Home Insurance Co. v. New York. [After summarizing this case, which is printed ante, p. 1578, the opinion continues:]

The case of Philadelphia and Southern Steamship Co. v. Pennsylvania, 122 U. S. 326, in no way conflicts with this decision. That was the case of a tax, in terms, upon the gross receipts of a steamship company, incorporated under the laws of the state, derived from the transportation of persons and property between different states and to and from foreign countries. Such tax was held, without any dissent, to be a regulation of interstate and foreign commerce, and therefore invalid. We do not question the correctness of that decision, nor do the views we hold in this case in any way qualify or impair it.

Judgment reversed.[4]

[BRADLEY, J., gave a dissenting opinion, in which HARLAN, LAMAR, and BROWN, JJ., concurred.]

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[4] See the comment on this case by Holmes, J., in Galveston, Harrisburg & S. A.

AIR-WAY ELECTRIC APPLIANCE CORPORATION v. DAY.

1924. Supreme Court of the United States. 266 U. S. 71.

MR. JUSTICE BUTLER delivered the opinion of the court.

Plaintiff, Air-Way Electric Appliance Corporation, brought this suit against the above named treasurer and other state officers to restrain the collection of a franchise fee charged against it as a foreign corporation for the privilege of exercising its franchises in Ohio during the year commencing July 1, 1921, on the grounds, among others, that the legislation of Ohio, under which the fee was imposed, is invalid under the commerce clause of the Constitution, and is repugnant to the Fourteenth Amendment.

Plaintiff was incorporated in 1920 under the laws of Delaware. Under its certificate of incorporation and the laws of that state, its authorized capital stock is 400,000 shares without par value, of which 200,000 shares are common stock and 200,000 founders' stock. The only difference between the two classes is that holders of the former are entitled to one vote per share and of the latter to five votes per share. Shortly after its incorporation, it obtained from the Secretary of State in conformity with the laws of Ohio a certificate of admission to do business in that state, and also paid the initial fee for the privilege of there exercising its franchise. §§ 178,

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R. Co. v. Texas, ante, p. 1753, and the citation of it by Sanford, J., in National Leather Co. v. Massachusetts, ante, p. 1780.

American Manufacturing Co. v. St. Louis (1919) 250 U. S. 459, 63 L. ed. 1084: The City of St. Louis levied on all manufacturers a tax of 1/10 of 1% of the gross receipts of all sales of its products, as a condition of the grant of a license to carry on a manufacturing business in that city. A West Virginia corporation complained of so much of a disputed tax as was measured by the price received for goods manufactured by it in the city, removed to storage warehouses outside of the state and later sold from these warehouses to buyers in states other than Missouri. The complaint was rejected, the court, by Pitney, J., saying:

"The tax is computed according to the amount of the sales of such manufactured goods, irrespective of whether they be sold within or without the state, in one kind of commerce or another; and payment of the tax is not made a condition of selling goods in interstate or in other commerce, but only of continuing the manufacture of goods in the City of St. Louis.

"There is no doubt of the power of the state, or of the city acting under its authority, to impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city. * * * The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not, and have required payment as soon as, or even before, the goods left the factory. In order to mitigate the burden, and also, perhaps, to bring merchants and manufacturers upon an equal footing in this regard, it has postponed ascertainment and payment of the tax until the manufacturer can bring the goods into market. * * * In our opinion, the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce." Compare Heisler v. Thomas Colliery Co., ante, p. 1720.

179, 180, 183, 184, General Code of Ohio. It complied with the laws of Ohio regulating the sale of stock in that state and received a certificate from the Commissioner of Securities authorizing sale at $7 per share. §§ 6373 (1)-6373 (24), General Code of Ohio. It acquired two large manufacturing plants at Toledo, including grounds, buildings, tools, machinery, etc. August 1, 1920, it commenced business, — the manufacture of electrical household appliances and their sale in Ohio and elsewhere. In July, 1921, as required by law, it filed with the tax commission a report covering the year ended July 1, 1921. There had been issued and were then outstanding only 50,485 shares of stock, of which 10,010 shares were common and 40,475 were founders' stock. All of its property was located in Ohio; its value was $458,278.56. The amount of business transacted in the preceding year was $250,594.58. The complaint alleged and the answer admitted that the value of the stock was $7 per share.

Section 5503 (enacted May 31, 1911) imposes an annual fee required of foreign corporations having capital stock with par value as follows: "On or before October fifteenth, the auditor of state shall charge for collection, as herein provided, annually, from such company, in addition to the initial fees otherwise provided for by law, for the privilege of exercising its franchises in this state, a fee of three-twentieths of one per cent. upon the proportion of the authorized capital stock of the corporation represented by the property owned and used and business transacted in this state. * * *"

An Act of May 17, 1921 (§ 8728-11, General Code of Ohio) provides: "* * * The amount of fees payable by a foreign corporation having common stock without par value * * * under section 5503 shall be three-twentieths of one per cent. upon the proportion of the authorized preferred stock represented by property owned and used and business transacted in this state and five cents per share upon the proportion of the number of shares of authorized common stock, represented by property owned and used and business transacted in this state * * *"

Under the section last quoted, an annual fee of $20,000 was assessed and payment on or before December 1, 1921, was demanded, and notice was given that, if not made on or before that day, a penalty of 15 per cent. would be added. Under the laws of the state, all fees, taxes and penalties constitute liens on the corporation's property; a fine for each day's delinquency may be imposed; and in case of failure to pay, its authority to do business is liable to cancelation, and injunction and ouster are authorized. §§ 5506, 5507, 5509, 5512, 5513.

Plaintiff's report to the tax commission stated that the amount of business transacted in Ohio in the year ended July 1, 1920, was $250,594.58, whereas that figure represented its total sales, of which only $70,802.30, or about 28 per cent. was intrastate, and the balance $179,792.28, or about 72 per cent. was interstate. The state officers, assuming that all plaintiff's property and business was located and transacted in Ohio, made no apportionment between local and interstate business and fixed the annual franchise fee at five cents per share on its total authorized stock.

Plaintiff invoked equity jurisdiction on the ground that it was threatened with irreparable injury through the enforcement of the coercive provisions of the statutes above referred to. Ohio Tax Cases, 232 U. S. 576, 587. A motion for a temporary injunction was heard by a court of three judges. § 266, Judicial Code. It was held (279 Fed. 878) that the plaintiff's objections to the act and the tax were not valid; but the bill was retained to await the result of an application by the plaintiff to the tax commission for a rehearing and correction of the amount of the tax. Plaintiff made such an application, setting forth the above mentioned amount of intrastate and interstate sales respectively. The commission held that, as more than 60 days had elapsed after the certification of the amount of the tax by the state auditor, it had no jurisdiction to entertain such an application. At a later hearing, the court held that the commission was authorized to grant plaintiff a rehearing and make correction if it found the tax or any part of it to be erroneous; that it was not the intent of the state laws to include interstate commerce as a basis for the levy, and that plaintiff may not be taxed on its interstate business and on the portion of its authorized stock represented by property owned and used and business transacted in other states; that the $20,000 charge included a substantial sum levied directly on the stock representing interstate business and that the tax should have been $14,926 — five cents per share on 298,520 shares. These figures were arrived at by taking such proportion of 400,000, the total number of shares authorized, as the actual value of plaintiff's property in Ohio plus its local business in that state is to such actual value plus all its business, and by applying thereto five cents per share. By the decree defendants are enjoined from collecting any part of the tax in excess of $14,926. The plaintiff appealed, and attacks the act on the grounds above stated. Defendants appealed and contend that the lower court erred in finding that 298,520 shares of the authorized capital stock of plaintiff represented the property owned and used and business transacted by it in Ohio, and in enjoining the collection of a tax in excess of $14,926.

In cases involving the validity of the laws of a state imposing license fees or excise taxes on corporations organized in another state, this court has decided: [Here points numbered 1 to 6 in the opinion in International Paper Co. v. Massachusetts, ante at pp. 1761, 1763-4, are quoted.]

All plaintiff's business, intrastate and interstate and all its property wherever located were represented by the 50,485 shares of stock outstanding. The annual fee demanded by the state officers is five cents per share on 400,000 shares, and that fixed by the lower court is based on 298,520 shares. The inevitable effect of the act is to tax and directly burden interstate commerce of foreign corporations permitted to do business in Ohio, and engaged in interstate commerce, wherever the number of shares authorized, subject to the charge of five cents each, exceeds the number of outstanding shares attributable to or represented by the corporation's property and business in that state. In this case, the fee fixed by the commission was based on nearly eight times the number of outstanding shares and that determined by the court on nearly six times that number. As some of the outstanding shares are represented by plaintiff's interstate business, the application of the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business including the interstate commerce of the plaintiff. International Paper Co. v. Massachusetts, supra, 142. We hold that the act violates the commerce clause.

The fee determined by the lower court, as well as that fixed by the state officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement. Indeed, under the constitution and laws of Ohio, a tax on privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred or its continued annual value thereafter. Southern Gum Co. v. Laylin, 66 Ohio St. 578. That value depends on the "property owned and used and business transacted" in Ohio. § 8728-11. Plaintiff's authority to issue stock or the number of shares it may have outstanding at any time does not depend upon the laws of Ohio. Under the laws of Delaware where the corporation was organized, these matters are left to the discretion of the persons controlling the corporation. Laws of Delaware 1917, c. 113, § 3; Revised Code, c. 65, 1918a, § 4a. The number of non-par value shares of the corporation is not an indication of, and does not purport to be a representation as to the amount of its capital. Each outstanding share represents merely an aliquot part of its assets. The number of shares not subscribed or issued has no relation to the privilege held by plaintiff in Ohio, and it is not a reasonable measure of such a fee. Such shares may never be subscribed or issued, or additional shares may be issued to acquire property or do business in other states or to carry on interstate commerce. Plainly the fee, to the extent that it is based on a number of shares in excess of those outstanding, has no relation to what was paid in for the stock or to its value or to the amount of plaintiff's capital, its property or its business, intrastate in Ohio or interstate. The act in its practical operation does not require like fees for equal privileges held by foreign corporations in Ohio under the same circumstances. Unless, under the laws of the states where organized they chance to be authorized to issue the same number of non-par value shares, the annual franchise fees imposed on foreign corporations having the same amount of property and business, and exercising the same privileges in Ohio will not be the same; and the charge imposed on one may be many times that made against another. If plaintiff's authorized shares were of the par value of $100 each, the amount of capital stock for apportionment between its property and business in Ohio and its interstate business to arrive at the franchise fee would be $40,000,000; and, adopting the basis of apportionment determined by the lower court which attributed about 75 per cent. of the shares to the property and business in Ohio, the amount of the fee would be $44,778; and with par value of $7 each,—the amount for which the Commissioner of Securities authorized plaintiff to sell its shares in Ohio, and their admitted value,—the amount for such apportionment would be $2,800,000, and the fee would be $3,134.46.[5] These figures are to be contrasted with $14,926, fixed by the lower court. Again, compare two corporations organized in a sister state having the same number of authorized non-par value shares, one having property and business of little value, all in Ohio, and the other having much more property and business in that state, and also much property and business in other states. The act would require the former to pay five cents per share on all its shares, but would require the latter to pay a fee based only on the proportion of its shares representing its property owned and used and business transacted in Ohio.

It is clear that the mere number of authorized non-par value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made. Southern Ry. Co. v. Greene, 216 U. S. 400, 417; Royster Guano Co. v. Virginia, 253 U. S. 412, 415. The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application. Martin v. District of Columbia, 205 U. S. 135, 139; Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55, 58; Kansas City Southern Ry. Co. v. Road Improvement District, 256 U. S. 658, 660. The act violates the equal protection clause of the Fourteenth Amendment.

Plaintiff's motion for a temporary injunction should have been granted.

Decree reversed.

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[5] If par value were $100:
298,520x$100=$29,852,000
$29,852,000x3/20 of 1%=$44,778 amount of tax.
If par value were $7:
298,520x$7=$2,089,640
$2,089,640x3/20 of 1%=$3,134.46 amount of tax.

NEW YORK v. LATROBE ET AL., TRUSTEES IN BANKRUPTCY OF THE THERMIODYNE RADIO CORPORATION.

1929. Supreme Court of the United States. 279 U. S. 421.

Mr. Justice Stone delivered the opinion of the court.

This is an appeal under § 240 of the Judicial Code from a judgment of the Court of Appeals for the Third Circuit affirming, on the opinion of the court below, 26 F. (2d) 713, an order of the District Court for Delaware expunging the claim in bankruptcy of appellant, the State of New York, for unpaid taxes assessed by it against the bankrupt corporation.

Section 181, Article 9, of the Tax Law of New York, c. 62, Laws of 1909, as amended, imposes on every foreign corporation doing business in that state a tax computed upon the basis of the capital stock employed by it within the state during the first year it does business there; the amount of its stock so employed being that proportion of its total issued capital stock which its gross assets employed within the state bear to its gross assets wherever employed. In the case of stock having a par value, the tax is fixed at ⅛ of 1% of the par value of its stock so employed; for stock of no par value the fee is 6 cents per share. The tax, denominated a "license fee," is paid but once, purports to be imposed on the corporation "for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state," and the obligation to pay it is made a prerequisite to obtaining a certificate of authority from the state and to the continuance of business there. People ex rel. Griffith v. Loughman, 249 N. Y. 369. But the foreign corporation is permitted to transact business and make valid contracts within the state prior to payment of the tax, which of necessity cannot be computed or paid until after the first year has elapsed. The tax is evidently the complement of the organization fee, computed in like fashion on the authorized capital stock of domestic corporations by Chapter 143 of the Laws of 1886. See People ex rel. Elliott-Fischer Co. v. Sohmer, 148 App. Div. 514, aff'd 206 N. Y. 634.

The bankrupt is a Delaware corporation whose authorized capital stock consists of 250,000 shares without par value, all of which has been issued at an average price of $2.32 per share. It commenced doing business in New York in November, 1924, and its total assets were used in its business in that state during the following year. The value of its tangible assets is alleged to have been but $280,000, or about $1.12 per share, and its intangible property to have been of no value. A tax of $15,000, computed at 6 cents per share, was assessed against it, and is the basis of the present claim.

The rejection of the claim by the referee was upheld by the district court on the sole ground that the tax on the bankrupt's non-par stock at the fixed rate of 6 cents per share, without regard to its true value or the amount paid into the corporation upon its issue, infringed the equal protection clause of the Fourteenth Amendment. The court thought that, as the tax could not be regarded as a true admission fee imposed as a condition of entrance into the state and the corporation was thus in a position to invoke the equal protection clause, see Hanover Ins. Co. v. Harding, 272 U. S. 494, 510, the invalidity of the taxing statute was established by the decision of this court in Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71, 83, since foreign corporations having the same amount of business and property both within and without the state, but with a different number of issued non-par shares, might be required to pay a tax differing from each other and from other foreign corporations with par value stock having like property within and without the state. The Court of Appeals of New York has since reached the opposite conclusion both as to the nature of the tax and its constitutionality. People ex rel. Griffith v. Loughman, supra.

For present purposes we need not determine whether the tax may be sustained because imposed as a condition of entrance into the state, for, assuming that the bankrupt corporation was within the state and thus entitled to equal protection, Hanover Ins. Co. v. Harding, supra; Southern Ry. Co. v. Greene, 216 U. S. 400, 417, we do not deem the decision in the Air-Way case controlling, nor the tax so unreasonable or discriminatory as to deprive the bankrupt of any constitutional immunity.

The question presented in the Air-Way case was whether a state franchise tax imposed on a foreign corporation, based upon its total authorized non-par shares, only a small part of which had been issued, was forbidden. In holding that the tax infringed the equal protection clause, the court was careful to point out that it was a tax computed upon the number of authorized shares of such a corporation, whether or not subscribed for or issued, and so had no relation to the value of the privilege exercised by the foreign corporation within the state and was not a reasonable measure of the tax imposed on such a privilege. And in Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50, in upholding a franchise tax similar to that here involved upon a domestic corporation having non-par shares, whose entire authorized stock had been issued, this court, in speaking of the decision in the Air-Way case, said (p. 54):

"While one factor in the computation of the tax was properly the proportion of the corporation's business done and property owned within the state, the other factor was the amount of its authorized capital stock, only a part of which had actually been issued. The authority to issue its capital stock was a privilege conferred by another state and bore no relation to any franchise granted to it by the State of Ohio or to its business and property within that state. When authorized capital stock is taken as the basis of the tax, variations in the amount of the tax are obtained, according as the corporation has a large or small amount of unissued capital stock. This was held, in the Air-Way Case, to be an unconstitutional discrimination, since it resulted in a tax larger than the tax imposed on other corporations with like privileges and like business and property within the state, but with a smaller capital authorized under the laws of the state of their creation."

But the computation of the present tax is not, as in the Air-Way case, based upon the mere authority of the corporation to issue stock, a privilege conferred by another state and not fully exercised. Instead it is calculated on the number of shares of stock actually issued and used by the corporation in carrying on its business within the state. There is no complaint of discrimination between foreign and domestic corporations and no attempt to tax property outside the state, since the tax is apportioned to the property used within it. See International Shoe Co. v. Shartel, 279 U. S. 429. So we come to different questions from any presented in the Air-Way case: Whether issued capital stock of foreign corporations may be made the basis of a franchise or license tax at a flat rate per share when apportioned to the property and business of the corporation within the state, and whether the taxing act may discriminate by placing in one class corporations having par value stock and in another corporations having stock without par value.

1. It is said that the tax computed on the number of non-par shares at a flat rate may bear little relation to the property and business of the corporation within the state and consequently corporations having like property and business within the state, but with a different non-par capitalization, may be required to pay a different tax. But this is equally true of corporations having par value stock, even though full value be paid in on its issue. Par value and actual value of issued stock are not synonymous and there is often a wide disparity between them. Par value has long been a familiar basis of computing a franchise tax upon foreign corporations, and when otherwise unobjectionable has been repeatedly upheld by this Court. See St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350; Hump Hairpin Co. v. Emmerson, 258 U. S. 290; Cheney Brothers Co. v. Massachusetts, 246 U. S. 147.

We have likewise sustained a state franchise tax on foreign corporations, measured by a fixed percentage of its non-par stock valued, as required by the statute, at $25 per share, and apportioned to the property and business of the corporation within the state. Margay Oil Corporation v. Applegate, 273 U. S. 666; aff'g 167 Ark. 614; Gilliland Oil Co. v. Arkansas, 274 U. S. 717, aff'g 171 Ark. 415.

The kind and number of shares with which a foreign corporation is permitted to carry on its business within the state is a part of the privilege which the state extends to it and is a proper element to be taken into account in fixing a tax on the privilege. It may be assumed that if the doing of business with a greater number of non-par shares is not deemed by the taxpayer to be a valuable privilege, it will reduce the number of shares as the statute permits. A state which has adopted a permissible scheme of franchise tax for domestic corporations, based on capital stock, Roberts & Schaefer Co. v. Emmerson, supra, has a legitimate interest in imposing a like burden on foreign corporations which it permits to carry on business there, and we can perceive no constitutional objection to its protecting that interest by such a tax where, as here, it is limited to shares actually issued, is not assailed as confiscatory, does not reach either directly or indirectly property beyond the state and does not discriminate between foreign and domestic corporations, or between foreign corporations of like organization and property.

There is nothing in the Constitution which requires a state to adopt the best possible system of taxation. Southwestern Oil Company v. Texas, 217 U. S. 114, 126; Delaware Railroad Tax Cases, 18 Wall. 206, 231. Although permissible, a franchise tax need not be based solely on the amount of business done or property owned within the state. It may be rested on the nature of the business. Southwestern Oil Company v. Texas, supra; Quong Wing v. Kirkendall, 223 U. S. 59; American Sugar Refining Co. v. Louisiana, 179 U. S. 89; Williams v. Fears, 179 U. S. 270, 275; see Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 562, or the particular form in which it is carried on, see Home Insurance Co. v. New York, 134 U. S. 594, 606, so long as it bears some real and reasonable relation to the privilege granted or to the protection of the interests of the state. See Roberts & Schaefer Co. v. Emmerson, supra, at p. 57.

We think that the measurement of such a tax upon a foreign corporation at a flat rate upon its corporate stock, either par or non-par, used within the state, is likewise reasonably related to the privilege granted by the state and to the protection of its own interest in the maintenance of its similar policy of taxation with respect to domestic corporations and so does not infringe any constitutional immunity.

2. Nor is such a tax to be deemed a denial of equal protection because a different measure or method of computing the tax is applied to corporations having non-par stock from that applied to corporations having stock of par value. In Roberts & Schaefer Co. v. Emmerson, supra, at p. 56, it was pointed out that there were such differences between par and non-par shares, both in their legal incidents and their actual use, and such practical difficulties in measuring a tax by the latter except by assigning to them an artificial or fixed value or assessing them at a flat rate, as to justify the classification for purposes of a franchise tax on domestic cor-

porations. It was accordingly held that such a tax may be based on the par value of shares of corporations having par value stock, and on a fixed value assigned to non-par shares, regardless of their actual value or the varying amounts paid in upon them.

But these differences between the two classes of stock, and especially the difference in the rights of creditors of the two classes or corporations, equally justify classification and discrimination between them in fixing a franchise tax based on corporate stock of foreign corporations. The inequalities in the tax result from a classification founded upon real differences, hence the resulting discrimination is not arbitrary or prohibited by the Fourteenth Amendment.

Reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER concur in the result.

INTERNATIONAL SHOE COMPANY v. SHARTEL.

1929. Supreme Court of the United States. 279 U. S. 429.

[Appeal from a decree of a District Court of three judges denying an interlocutory injunction to restrain state officials from levying the taxes stated in the opinion.]

MR. JUSTICE STONE delivered the opinion of the court. * * *

Section 9836 of the Missouri Revised Statutes imposes an annual franchise tax upon both foreign and domestic corporations of 1/20th of 1% of the par value of their outstanding capital stock and surplus employed in business within the state. For the purpose of ascertaining the tax every corporation subject to it is "deemed to have employed" within the state "that proportion of its entire [outstanding] capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located."

The Stock Corporation Act of the Missouri Laws of 1921, p. 661, first provided for the formation and regulation of corporations with stock of no par value. By § 12 of that act it was enacted that for the purpose of ascertaining any organization taxes imposed by the laws of the state, computed on the basis of the par value of shares of stock, each share of stock without nominal or par value should be considered the equivalent of a share having a par value of $100. In State of Missouri v. Pierce Petroleum Corporation, 318 Mo. 1020, the Supreme Court of Missouri held that this section supplemented and amended the earlier provisions of the franchise tax law of the state by prescribing the method of computing the tax, imposed by § 9836, in the case of corporations having non-par stock. The tax was thus fixed in effect at the rate of 5 cents on each share of non-par stock employed within the state regardless of its actual value.

Appellant is engaged in the business of manufacturing and selling shoes in both intrastate and interstate commerce. It has gross assets of more than $97,000,000, of which 54% are located in Missouri. It has 100,000 shares of preferred stock of the par value of $100 and 3,760,000 shares of non-par stock, for which latter it received $9.60 per share. The total paid in capital was thus $46,082,631.09. Appellant alleges that prior to the enactment of § 12, its non-par stock was assessed on the basis of the amount paid for it. Cf. State v. Freehold Investment Co., 305 Mo. 88, 103. But, applying the statute as interpreted by the state court in State v. Pierce Petroleum Corp., supra, the taxing authorities have assigned to appellant's outstanding non-par stock a value of $376,000,000, resulting in an increase of appellant's annual franchise tax from approximately $25,000 to a sum in excess of $100,000.

The market value of appellant's stock does not appear and no foundation is laid for assailing the tax as so excessive as to be a denial of due process, but appellant argues, as did respondent in New York v. Latrobe, supra, that the tax is a denial of the equal protection of the laws. For reasons, stated more at length in our opinion in that case, we conclude that the present statute does not infringe that clause of the Fourteenth Amendment. Although it directs that the tax be ascertained by assigning a specific value to the non-par stock, and applying to it the rate applicable to par value stock, the resultant inequalities do not differ from those complained of in that case where the tax was computed at a flat rate on non-par stock, used in the state, without assigning to it any value.

The assignment to the shares of a value in excess of their present worth or of the present value of the assets within the state does not operate to tax property or business without the state. The tax is a privilege and not a property tax. Giving to the shares a specified value by which the tax is measured, only affects the rate of tax on the privilege and does not give the statute an extra-territorial effect. The result is the same as if a flat tax of 5 cents per share upon that part of the capital which is justly apportioned to the state had been imposed. So apportioned the tax cannot be said to reach the property or the franchise of the corporation without the state.

Other objections to the tax require but brief comment. The mere fact that a corporation is engaged in interstate commerce does not relieve it of local tax burdens in respect of its property within the state or its intrastate business. Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 696. Appellant does a substantial amount of local commerce. A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the state, is not invalid under the commerce clause merely because a part of the property or capital included in computing the tax is used by it in interstate commerce. St. Louis-San Francisco Ry. v. Middlekamp, 256 U. S. 226, 231 (ruling on the Missouri franchise tax); Hump Hairpin Co. v. Emmerson, 258 U. S. 290; Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 119; St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350; Kansas City, &c. Railway Co. v. Botkin, 240 U. S. 227; Kansas City, &c., R. R. Co. v. Stiles, 242 U. S. 111; Southern Railway Co. v. Watts, 260 U. S. 519; cf. United States Glue Co. v. Oak Creek, 247 U. S. 321; Shaffer v. Carter, 252 U. S. 37. The tax is distinguishable from those considered in Air-Way Electric Appliance Corporation v. Day, 266 U. S. 71, Looney v. Crane Co., 245 U. S. 178, and Cudahy Packing Co. v. Hinkle, 278 U. S. 460, which either were measured by authorized instead of issued capital stock or were not limited to the part of the capital stock justly apportioned to the taxing state. * * *

Affirmed.

MR. JUSTICE MCREYNOLDS thinks the effect of the statute is to tax property beyond the state.

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